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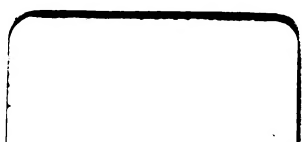
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The Encyclopedic Digest of Virginia and West Vir- ginia Reports

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**Encyclopedia and Digest of all the Virginia and West Vir-
ginia Case Law up to and including Vol. 103
Virginia Reports and Vol. 55 West
Virginia Reports**

UNDER THE EDITORIAL SUPERVISION OF

THOMAS JOHNSON MICHIE

VOLUME V

THE MICHIE COMPANY, LAW PUBLISHERS
CHARLOTTESVILLE, VA.
1906

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See the titles CONSTITUTIONAL LAW, vol. 3, p. 140; CORPORATIONS, vol. 3, p. 510; COUNTIES, vol. 3, p. 636; INTOXICATING LIQUORS; JUDGES; MANDAMUS; MUNICIPAL AID; MUNICIPAL CORPORATIONS; PUBLIC OFFICERS; STATE; STATUTES; TOWNS AND TOWNSHIPS.

As to the election of specific officers, see the appropriate titles. As to the injunction against removal of a county seat, see the title COUNTIES, vol. 3, p. 654. As to offenses against local option laws, see the title INTOXICATING LIQUORS.

I. General Considerations.

Powers and Duties of West Virginia Legislature.—The constitution of West Virginia, in art. 4, § 11, gives wide powers to the legislature to make all reasonable regulations and restrictions as to preparation of ballots and the conduct and returns of elections. *Morris v. Board of Canvassers*, 49 W. Va. 251, 38 S. E. 500.

Under the constitution of West Virginia, § 11, art. 4, it is the duty of the legislature to prescribe the manner of conducting and making returns of elections and determining contested elections, and to pass such laws as may be necessary and proper to carry out their requirements in this regard without disorder or violence at the polls, and to prevent corruption or fraud in counting the votes, ascertaining the result or otherwise. *Halstead v. Rader*, 27 W. Va. 806.

"This provision is mandatory and plenary, and requires the legislature to prescribe all reasonable laws deemed necessary or proper for the prevention of fraud, securing the purity of elections and ascertaining the results. It imposes no restriction whatever upon the power of the legislature. It

is a command and not a grant of power; because the power existed in the legislature and independent of the constitution. The constitution is a limitation and not a grant of legislative powers. The only restrictions, in our constitution on this plenary power of the legislature are those contained in the first, second and twelfth sections of said fourth article. The first declares, that all the male citizens, with certain specified exceptions, shall be entitled to vote at all elections held in the counties in which they reside. The second, that the voting shall be by ballot either open or secret. And the twelfth section declares that, 'No person shall ever be denied or refused the right or privilege of voting at an election, because his name is not, or has not been, registered or listed as a qualified voter.'" *Halstead v. Rader*, 27 W. Va. 806.

"These are all the limitations or restrictions which the people, by the adoption of the constitution, deemed it advisable or proper to impose on the legislative power. But not content to leave the exercise of the powers inherent in the legislature and not denied to it, at the discretion of the legislature, the constitution commands,

that it shall pass all laws necessary and proper to prevent fraud and secure the purity of elections and returns. No law which is unreasonable can be necessary or proper, and therefore no such law can be regarded as authorized by the constitution or the general powers of the legislature. But all laws, which are deemed not only necessary but proper for the purpose of fair and honest elections and ascertaining their results, the constitution commands the legislature to pass. It is necessary and proper that every citizen having a constitutional right to vote should have the power to do so without any improper restrictions. But it is equally important and just as necessary to the purity of elections, that persons not possessing that right should be excluded from the power to vote by reasonable regulations and safeguards to prevent them from doing so, or having their votes counted in ascertaining the result. It is impossible to do this latter without in some degree controlling or burdening the rights of those duly qualified to vote. It is likewise just as important to the qualified voters, that the person elected by their vote should be declared elected as it is that they should have the power to exercise their right to vote. In order, therefore, that the mandate of the constitution may be respected, it was the duty of the legislature to pass laws which would not only give the legal voter the power to vote and have his vote counted, but it was equally its duty to enact laws which would prevent illegal votes and exclude such votes in ascertaining the result of the election." *Halstead v. Rader*, 27 W. Va. 806. See also, in accord, *Morris v. Board of Canvassers*, 49 W. Va. 251, 38 S. E. 500.

Constitutionality.—The act of the assembly approved March 6, 1894, entitled "an act to provide for the method of voting by ballot," is a valid act; and not in conflict with art. 3, §§ 1, 2, constitution of Virginia; nor with art.

1, § 20; nor with art. 1, § 8, Virginia constitution. Nor is it in conflict with art. 14, of the amendments to the constitution of the United States. *Pearson v. Supervisors*, 91 Va. 322, 21 S. E. 483, 1 Va. Law Reg. 176.

Curative Acts.—The legislature may by a subsequent act correct mistakes in a local election, legalize the proceedings, if they are irregular, and so confirm the result. *Redd v. Supervisors*, 31 Gratt. 695. It is said in the opinion of this case that "mistakes and irregularities are of frequent occurrence in municipal elections, and the state legislatures have often had occasion to pass laws to obviate such difficulties. Such laws, when they do not impair any contract, or injuriously affect the rights of third parties, are never regarded as objectionable, and certainly are within the competency of the legislative authority." See also, *Bell v. Farmville, etc., Co.*, 91 Va. 99, 112, 20 S. E. 942; *Supervisors v. Randolph*, 89 Va. 614, 16 S. E. 722. See the title CONSTITUTIONAL LAW, vol 3, p. 176.

Construction of Election Statutes.—

It is said by the court in *Loomis v. Jackson*, 6 W. Va. 613, 691, that "Election statutes are to be tested like other statutes; but with a leaning to liberality, in view of the great public purpose which they accomplish; and except where they specifically provide that a thing shall be done in the manner indicated, and not otherwise, their provisions, designed merely for the information and guidance of the officers, must be regarded as directory only; and the election will not be defeated by a failure to comply with them, provided, the irregularity has not hindered any who were entitled to vote from exercising the right of suffrage, or rendered doubtful the evidence from which the result was to be declared."

II. Election of Certain Officers.

A. ATTORNEY GENERAL.

See the title ATTORNEY GENERAL, vol. 2, p. 172.

B. SPECIAL JUDGES.

As to the election of special judges, see the title JUDGES.

C. BOARD OF EDUCATION.

As to the election of boards of education, see the title SCHOOLS.

D. COUNTY OFFICERS.**1. In General.**

See the title COUNTIES, vol. 3, p. 658.

2. Treasurer.

See the title COUNTIES, vol. 3, p. 676.

3. Sheriff.

See the title SHERIFFS AND CONSTABLES.

Constitutional and Statutory Provisions.—See the Virginia constitution of 1902, art. 7, § 112; Schedule, § 10; Code, 1904, § 92. See also, *Monteith v. Com.*, 15 Gratt. 172, 175. And see the West Virginia constitution, art. 9, §§ 1, 2, 3; Code of 1899, ch. 3, §§ 1 and 2.

E. MUNICIPAL OFFICERS.

See the titles MUNICIPAL CORPORATIONS; PUBLIC OFFICERS.

Election under an Invalid Ordinance.

—The new charter of the city of Petersburg was granted March 11th, 1875. Under it certain officers are elected by the voters—others by the council; which is composed of twenty-four members, elected by the voters, one-half every other year. In May, 1882, of the twelve whose terms expired June 30th, 1882, the voters re-elected one and replaced eleven with new members. At the council's first meeting under this charter, it elected the officers elective by it, and ordained that similar elections be held on July 1st every two years thereafter. This ordinance was observed until June 28th, 1882, when, twenty-two members being present, sixteen, including eleven whose terms expired on the third day thereafter, against the protest of the other six, repealed that ordinance and elected all the officers that were to be elected by the incoming council on July

1st thereafter, and even a president of and standing committees for the incoming council. The new council coming in July 1st, 1882, ignored these proceedings, organized, and then elected the officers elective by the council. On petition by the officers elected June 28th, 1882, for a mandamus to compel the city auditor to pay their salaries, held, the power exercised by the council June 28th, 1882, in enacting the ordinance of that date, was unreasonably exercised, being in derogation of the rights of the voters of the city, and in contravention of the spirit of the charter—and that ordinance is invalid. And the elections held under that ordinance are void, not only for those reasons, but on the additional ground that the council, on July 1st, 1880, at its first meeting, elected all the officers elective by it for the term of two years commencing on that day. Having exercised its power of election, its power in that respect was at an end. *Kirkham v. Russell*, 76 Va. 956.

Election under Chapter 47 of the Code of West Virginia.—It was not necessary for the residents of Harrisville, in order that the town might become a corporation, to obtain a certificate of incorporation under §§ 2, 3, 4, 5, 6, 7, 8, 9, of chapter 47 of the Code of West Virginia, as the town, within the limits aforesaid, was already incorporated by said act. But all other parts of said chapter 47, which are applicable to a town incorporated under its provisions, as far as they apply to a town, apply, substantially, to "The town of Harrisville," and such is the manifest intent of the said act. And, it was competent for the resident voters of said town to elect their corporate officers under the provisions of said forty-seventh chapter. *Douglass v. Harrisville*, 9 W. Va. 162.

Mayor, Recorder and Council.—The act for the incorporation of the town of Elizaville, and most of the acts for the incorporation of towns in this state, declare what shall be the cor-

porate limits and boundaries of the town, and provide that the qualified voters resident therein, shall, at times specified, elect a mayor, recorder and councilmen, who, when they have been elected and qualified, shall be a body politic and corporate; that they shall form a town council; and that all the powers of the corporation shall be exercised by them, or under their authority, except when otherwise provided. When the officers have been elected and qualified, the voters resident in the town become a body politic; but the town is not, in fact, incorporated before. *Chesapeake, etc., R. Co. v. Pack*, 6 W. Va. 397, 400.

III. Questions Submitted to Popular Vote.

A. RELOCATION OF COUNTY SEAT.

See the title COUNTIES, vol. 3, p. 648.

B. LOCAL OPTION.

See the title INTOXICATING LIQUORS.

C. MUNICIPAL AID.

See the title MUNICIPAL AID.

IV. Voters and Their Qualifications.

A. IN GENERAL.

The right of suffrage is derived directly from the constitution of the state and we look to it to ascertain who may or may not vote. *Pearson v. Supervisors*, 91 Va. 322, 21 S. E. 483, 1 Va. Law Reg. 176.

B. EDUCATIONAL QUALIFICATION.

It is not within the power of the legislature to prescribe any qualifications additional to those found in the constitution either directly or indirectly, and, since no educational qualification is prescribed by the constitution none can be required. The sole function of the legislature with respect to suffrage, is to provide the method of

voting, to guard against any improper or fraudulent conduct in connection therewith, and to this end it may adopt and enforce reasonable rules and regulations, but the enforcement of a regulation which virtually establishes a test of qualification of the voter in addition to those prescribed in the constitution is unconstitutional and therefore void. *Pearson v. Supervisors*, 91 Va. 322, 21 S. E. 483, 1 Va. Law Reg. 176.

Act of March 6, 1894.—The act of assembly, approved March 6, 1894, "to provide for the method of voting by ballot," does not contravene any of the propositions stated above. The general scheme of the act is to secure the independence of the voter, by the safeguards provided by the act, which appear to be not only reasonable, but well adapted to secure the end in view to all classes of voters. *Pearson v. Supervisors*, 91 Va. 322, 21 S. E. 483, 1 Va. Law Reg. 176.

C. CITIZENSHIP.

See the title CITIZENSHIP, vol. 2, p. 825.

D. RESIDENCE.

Cession of Land for District of Columbia—Effect on Voters.—A person who, at the time of the cession of the District of Columbia to the United States resided in that part of the county of Fairfax which, by the said cession, was comprehended in that district, and who has continued to reside there ever since, is not entitled to vote for members of the general assembly; notwithstanding he was born in Virginia and possesses a freehold therein. *Custis v. Lane*, 3 Munf. 579.

Extension of City's Boundary—Effect on Voter's Privileges.—The act of the assembly, Sess. 1866-7, p. 635, extending the boundaries of the city of Richmond was held in *Wade v. Richmond*, 18 Gratt. 583, to operate upon the municipal relations of the inhabitants of the territory annexed to the city, but in political elections they were

still to vote as part of the county of Henrico.

E. OATH OF LOYALTY.

The act of the West Virginia legislature passed February 26th, 1865, in relation to challenging voters and requiring them to take the oath therein prescribed, is not unconstitutional. For the legislature has the constitutional power to exclude the enemies of the state from the polls, and to continue them so excluded as long as it might be necessary to the public security. *Randolph v. Good*, 3 W. Va. 554.

"If, after the war had terminated and peace restored, those who were enemies, had become friends and regained their rights, if they had any, or whether they ever had any right to vote or not before the war, if they subsequently obtained such right by the laws of the land, and the legislature should attempt by statute to divest such right, either directly or indirectly, then it would be obnoxious to the charge of invading and divesting vested rights, and on that account repugnant to the fundamental law. But that is not the case here." *Randolph v. Good*, 3 W. Va. 554.

F. TRIAL AND DENIAL OF RIGHT TO VOTE.

1. In General.

The 22d section of the act passed February 25, 1867, entitled "An act providing for the registration of the qualified voters of the state, as amended by the act passed March 4, 1868," provides that "the board of registration of each county shall have the sole jurisdiction to try and determine the right of any person to vote therein under the constitution and laws of this state and their decisions shall be final, except in cases of contested elections before either house of the legislature." The object and purpose of the legislature was to determine the rights of the persons to vote at any particular election and is plainly manifested throughout the whole act, and the act makes the

decision of the board of registration conclusive of that question. *McPherson v. State*, 3 W. Va. 564, 565.

2. Civil Action.

Quære, whether an action upon the case lies against a sheriff for refusing to permit a person, who is lawfully entitled, to vote at an election of members of the general assembly. *Custis v. Lane*, 3 Munf. 579.

V. Registration.

A. IN GENERAL.

Necessity for Registration.—The twelfth section of the fourth article of the present constitution of West Virginia declares that "No person shall ever be denied or refused the right or privilege of voting at an election, because his name is not, or has not been, registered or listed as a qualified voter." *Halstead v. Rader*, 27 W. Va. 806; *Morris v. Board of Canvassers*, 49 W. Va. 251, 264, 38 S. E. 500.

"Registered Voters."—"The word 'registered,' in its popular acceptance, has several definitions, according to the connection in which it is employed. When used in our statutes, relating to elections, it has a well-defined, well-understood signification. When these statutes speak of registered voters, they uniformly refer to the persons whose names are placed upon the registration books provided by law as the sole record or memorial of the duly qualified voters of the state." *Chalmers v. Funk*, 76 Va. 717, 719. See the title INTOXICATING LIQUORS.

B. TRIAL AND DENIAL OF RIGHT TO REGISTER.

1. In General.

Trial of Right to Register.—"It was made the duty of the county board of registration, by chap. 87, § 8, acts, 1866, to examine registrar's books; section also declared: 'And if they are satisfied that any person has been registered who has been guilty of any of the acts enumerated in that affidavit

contained in the third section of this act, or is in any way disqualified to vote, under the provisions thereof, it shall be the duty of the said board, upon proof of any such act or disqualification, to exclude the name of such person from the list of registered voters. But the party whose name is proposed to be excluded, shall have due notice of the time and place of taking the evidence to prove his disqualification, which evidence he shall have the right to rebut, and shall have his name restored to such list if improperly stricken therefrom." *Fausler v. Parsons*, 6 W. Va. 486.

"By § 86 of the Virginia Code of 1887, the right is given to any five qualified voters of any election district to post written or printed notices, fifteen days before any regular day of registration, at not less than three public places in said district, of the names of all persons alleged by said voters to be improperly on the registration books of that district; and by the same section it is made the duty of the registrar, on the regular day of registration, to hear testimony on the subject, and, if he be satisfied that any person mentioned in said notice is not a qualified voter, to strike his name from the books." *Clay v. Ballard*, 87 Va. 787, 793, 13 S. E. 262.

Mandamus.—Where under the Code of 1887, § 83, a voter appealed from refusal of the registrar to allow him to register, the answer of the registrar that the voter did not offer to qualify as to his right to vote, and that he was not entitled to vote, was held to be no defense to an application for mandamus to compel the registrar to transmit to the court the grounds relied on by the appellant, and the reasons for his refusal to register him. *Coleman v. Sands*, 87 Va. 689, 13 S. E. 148. See also, post, "Mandamus," XIII, D, 5.

2. Civil Action.

Acting under the provisions of § 8,

ch. 78, acts of 1866 (W. Va.), the members of the county board of registration passed upon the right of a party to be registered or not, were acting in a judicial capacity, and if they acted within their jurisdiction, limited by the statute, they could not be amended in a civil action. *Fausler v. Parsons*, 6 W. Va. 486.

But if they exceeded their jurisdiction and did not comply with the requisitions of the statute, but erased the name of the plaintiff from the register of voters, without giving him due notice of the time and place of taking the evidence, etc., or refused him the right to rebut the evidence, it would have been a usurpation of authority, and such a violation of law as to have made them trespassers, and amenable in an action, by the plaintiff, for damages; because their authority was prescribed and limited by the act of the legislature, and they had no right to exceed that limit, but acted without jurisdiction. *Fausler v. Parsons*, 6 W. Va. 486, 494.

Requirements of the Declaration— Presumption as to Action of Officers.

—The mere allegations of willfully, unlawfully, knowingly, maliciously and corruptly, and without sufficient cause, excluding and erasing the name of the plaintiff, from the registration book, etc., do not make the declaration good, but the declaration must show by allegations how the defendants acted willfully, unlawfully, corruptly, etc. Did they erase his name without giving him the notice required? Did they erase it without complying with the requirements of the statute? Did they act without jurisdiction? If so, the declaration should so allege, otherwise, the court will presume they acted within their jurisdiction and judicially, and will refuse to take jurisdiction of a case against them for mere error of judgment. *Fausler v. Parsons*, 6 W. Va. 486. See post, "Evidence," XIII, E.

C. RIGHT TO INSPECTION AND COPIES OF REGISTRATION BOOKS.

See also, post, "Record of Proceedings," VII, D.

Liberal Construction of Statute.—The provisions of the Virginia Statute, Code 1887, § 84, which provides that the registration books "shall at all times be open to public inspection" was intended as a safeguard against fraud and must be liberally construed. *Clay v. Ballard*, 87 Va. 787, 13 S. E. 262.

Mandamus.—A mandamus will lie to compel a registrar to allow any citizen to inspect, and take copies of the registration book, although he is allowed no compensation for so doing; the books being of a public nature, in which every citizen has an interest; and more, the statute provides for such inspection in plain language. *Clay v. Ballard*, 87 Va. 787, 13 S. E. 262. See also, *Keller v. Stone*, 96 Va. 667, 32 S. E. 454.

Mandamus does not lie to compel the registrar of an election precinct to make copies of the registration books in his possession, or to permit such copies to be made. *Keller v. Stone*, 96 Va. 667, 32 S. E. 454. See also, post, "Mandamus," XIII, D, 5.

VI. Time of Election.

Where by an act of the general assembly a vote was to be taken "after the present war is over," and it was taken on the fourth Thursday of May, 1866, before the proclamation of the president of the United States, declaring that the insurrection was at an end, and that peace and tranquility reigned throughout the whole of the country (issued on the 20th day of August, 1886), such vote is a nullity, being taken before the act had validity. *Conley v. Supervisors Calhoun County*, 2 W. Va. 416.

The act of March 15th, 1856, changing the time at which the term of office of the sheriff shall commence, made no

alteration as to the time of the election or the period thereafter within which bond was to be given. *Monteith v. Com.*, 15 Gratt. 172, 176.

VII. Officers of Election.

A. ELECTION AND APPOINTMENT.

"The electoral boards of the county are chosen by the direct vote of the legislature upon joint ballot, just as are the judges and many other important officers of the state. They, in turn, select the officers charged with the registration of voters and the conduct of elections. Among the latter, as we have seen, are the special constables. They are bound by their oaths of office to select none but good and discreet men, and those men are, in turn, sworn faithfully to discharge the delicate and responsible duties committed to them. Not only do they come under the sanction of an oath, but severe penalties are denounced against them for a violation of their duties; and, in addition to the liability incurred by the expressed terms of the act, they would doubtless be responsible for damages to any elector with respect to whom they had failed in the performance of their duty." *Pearson v. Supervisors*, 91 Va. 322, 333, 21 S. E. 483, 1 Va. Law Reg. 176.

"Members of electoral boards are not constitutional officers. The office is a legislative creation; and an election to it does not constitute a contract. *Cooley's Const. Lim.* (6th Ed.), p. 331." *Sinclair v. Young*, 100 Va. 284, 290, 40 S. E. 907.

An independent resolution of the general assembly appointing members of an electoral board for a single county, thereby supplying an omission under a previous act, amending a section of the Virginia Code, but leaving the general law intact, is not an amendment of the previous law in the sense that it must be re-enacted and published at length as required by article

5, § 15, of the constitution. *Sinclair v. Young*, 100 Va. 284, 40 S. E. 907.

Commissioners and Judges of Election.—Commissioners of election appointed at the May term of court when the statute directed that they be appointed at the April term, were deemed validly appointed, the court considering the provision directory only. *Redd v. Supervisors*, 31 Gratt. 695.

Judges of election, as they are termed, are substantially the same as the commissioners of election under the former constitution and laws. The latter were also appointed by the county and corporation courts. The former officers constitute judges for all elections to be held during the year; whereas the commissioners were appointed merely for the general election day and the subsequent examination and certification of the results. The court says: "The difference between the two is simply in the duration of the tenure or time of holding and not in the duties to be performed or the right to discharge them." *McDougal v. Guigon*, 27 Gratt. 133, 140.

B. QUALIFICATION.

Freehold Qualification.—Act of February 14th, 1884 (acts, 1883-4, p. 150), prescribing that members of electoral boards shall be freeholders, contravenes Virginia constitution, art. 3, § 2, which declares that "all persons entitled to vote shall be eligible to any office within the gift of the people," and is void. *Black v. Trower*, 79 Va. 123.

Oath of Office.—Judges of election, as they are termed, are substantially the same as the commissioners of election under the former constitution and laws. The latter, before entering upon the discharge of their duties, were required to take the same oath as the judges of election now take. *McDougal v. Guigon*, 27 Gratt. 133, 140.

"A registrar is not only a public officer, but one upon whom, in the ad-

ministration of the government, most important and essential duties are imposed. He is required, moreover, to take the same oath of office as is prescribed for officers of the state generally. Code, § 76." *Coleman v. Sands*, 87 Va. 689, 693, 13 S. E. 148. See also, ante, "Election and Appointment," VII, A.

C. DUTIES.

1. In General.

See post, "Conduct of Elections," XI; "Ascertainment of Result," XII.

2. Nature of.

a. Under the Virginia Law.

Commissioners of Election—Ministerial Officers.—The five commissioners of election, provided for under §§ 40, 41, 42, of the Virginia statute, are merely ministerial officers, whose duty is to take the votes, count them, and certify the results; therefore, since a writ of prohibition can not be issued to a ministerial officer, it could not properly be issued to such commissioners. *Ex parte Ellyson*, 20 Gratt. 10. See post, "Prohibition," XIII, D, 4.

The duties of commissioners of election are entirely ministerial, and if they fail to discharge them, they may be compelled to do so by mandamus. *McKinny v. Peers*, 91 Va. 684, 22 S. E. 506. See also, *Keese v. Melvin*, 3 Va. L. Reg. 285; *Brown v. Randolph County Court*, 45 W. Va. 827, 32 S. E. 165. See also, *Dunlevy v. County Court*, 47 W. Va. 513, 573, 35 S. E. 956. See post, "Mandamus," XIII, D, 5.

b. Under the West Virginia Law.

See post, *Canvass of Ballots*," XII, C; "Canvass of Returns," XII, D; "Mandamus," XIII, D, 5.

(1) Prior to 1891.

While many of the acts of the commissioners, while sitting as a board of canvassers, after an election are merely ministerial, they are not all so. *Brazie v. Fayette County Com'rs*, 25 W. Va. 213; *Fleming v. Commissioners*, 31 W. Va. 608, 8 S. E. 267; *Alderson v. Com'*

missioners, 31 W. Va. 633, 8 S. E. 274. See also, *Dent v. Commissioners*, 45 W. Va. 750, 32 S. E. 250.

Aside from the quasi judicial functions necessarily incident to the duties of county commissioners in determining that the ballots, poll books and certificates of election returns, the legality of which are in question, are genuine, that they are in fact the returns and substantially in the form prescribed by the statute, and to correct them if necessary and have them put in the proper form, the duties of said commissioners are purely ministerial, and their judicial functions are limited to the acts prescribed by the statute. *Brazie v. Fayette County Com'rs*, 25 W. Va. 213; *Chenoweth v. Commissioners*, 26 W. Va. 230; *Fleming v. Commissioners*, 31 W. Va. 608, 8 S. E. 267. See also, *Dent v. Commissioners*, 45 W. Va. 750, 32 S. E. 250.

"In *Brazie v. Fayette County Com'rs*, 25 W. Va. 213, this court, in construing the statute now in question, said: 'The duties and powers of commissioners are mainly ministerial, but are quasi judicial so far as it is their duty to determine whether the papers laid before them by the clerk, and purporting to be returns, were in fact such, were genuine, intelligible and substantially authenticated as required by law. To the extent here indicated, a judgment in the nature of a judicial function is necessarily exercised; for, if it were otherwise, the whole law is inoperative in respect to the powers of the county commissioners to do any act whatever. But aside from these limited judicial functions, the commissioners possess no discretionary powers; their duties are purely ministerial.'" *Chenoweth v. Commissioners*, 26 W. Va. 230, 233.

"The statute provides that the commissioners of the county court, when convened to ascertain the result of an election, 'may require the attendance of any of the commissioners or canvassers or other officers or persons pres-

ent at the election, to answer questions under oath respecting the same, and may make such orders as shall seem proper to procure correct returns and ascertain the true result of the said election in their county. * * * They shall, upon the demand of any candidate voted for at such election, open and examine any one or more of the sealed packages of ballots and recount the same,' etc. 'If the result of the election be not changed by such recount,' etc. section 21, ch. 155, acts, 1882. 'Under this act it is the duty of the county commissioners to determine, ministerially, the result, but necessarily, by the exercise of discretion and judgment. They must first determine, that the ballots, poll books and certificates before them are genuine, and that they are certified in form and manner substantially according to the requirements of the statute to correct and put or have them put in form if they are not so, and if they are, in fact in law, the returns of the election. This involves the exercise of a quasi judicial power.'" *Halstead v. Rader*, 27 W. Va. 806, citing *Brazie v. Fayette County Com'rs*, 25 W. Va. 213, 221. See also, *Golf v. Wilson*, 32 W. Va. 393, 9 S. E. 26.

When the commissioners were assembled, under our statute, in special session, after an election, to canvass the votes cast, and the question was presented to them whether the precinct commissioners, canvassers, and clerks at a certain voting place were sworn, such question was a judicial one, within their jurisdiction, and whether on the evidence before them they decided rightly or wrongly, could not be the basis for an application for a writ of prohibition. *Fleming v. Commissioners*, 31 W. Va. 608, 8 S. E. 267.

Board of Supervisors—A Judicial Tribunal—Power Limited by the Statute.—By the provisions of ch. 3, W. Va. Code, 1868, in conferring upon the board of supervisors the power to call

and examine witnesses, to compel the production of papers, to open, inspect, examine and count the ballots cast at an election, and to make all orders deemed necessary to enable them to discharge their duties; and that their determination upon that subject should be entitled to the force and validity of a judgment until impeached on proper grounds, it was the evident intention of the legislature to establish a judicial tribunal. *Loomis v. Jackson*, 6 W. Va. 613, 616.

Precinct Commissioners.—"The authorities uniformly agree that the precinct commissioners act judicially in passing upon the right of persons to vote." *Brazie v. Fayette County Com'rs*, 25 W. Va. 213, 220.

(2) Since 1891.

"When the legislature re-enacted the election law of this state in 1891, it undoubtedly intended to take away all judicial functions from the election officers, and by careful provision make all their duties purely ministerial, subject to the control of the writ of mandamus. Section 89, ch. 3, Code. This purpose was rendered more apparent by amendment in 1893, when the duties of the election officers were more carefully defined, and it was provided that 'a mandamus shall lie from the supreme court of appeals, or any one of the judges thereof in vacation, returnable before said court, to compel any officer herein to do and perform legally any duty herein required of him.' In short, the court is to construe the law, and compel such officers to discharge their duties in accordance therewith. Such officers are allowed no judicial discretion." *Dunlevy v. County Court*, 47 W. Va. 513, 35 S. E. 956, 958. See also, *Daniel v. Simms*, 49 W. Va. 554, 39 S. E. 690. Compare *Dent v. Commissioners*, 45 W. Va. 750, 32 S. E. 250. And see post, "Canvass of Ballots," XII, C; "Mandamus," XIII, D, 5.

"Whether, at common law, the as-

certainment and declaration of the result from the returns, including the ballots, upon a recount, is judicial or ministerial, it seems to have been the intention of the legislature to render that duty ministerial only, or to change the nature of the writ of mandamus and make it applicable to all the duties of election officers, whether judicial or ministerial, and to enlarge the scope of the writ of mandamus and, as to the latter duties, make it operate as a certiorari, and thus summarily review the action of such officers." *Daniel v. Simms*, 49 W. Va. 554, 577, 39 S. E. 690.

It had been established by decisions of the West Virginia court, prior to the enactment of the present election law—*Brazie v. Fayette County Com'rs*, 25 W. Va. 213; *Chenoweth v. Commissioners*, 26 W. Va. 230; *Alderson v. Commissioners*, 31 W. Va. 633, 8 S. E. 274—that election officers had conferred upon them both ministerial and judicial powers and that certiorari, and not mandamus, was the proper remedy to review other proceedings. See also, *Alderson v. Commissioners*, 32 W. Va. 454, 9 S. E. 863.

3. Mandamus to Compel Performance.

See post, "Mandamus," XIII, D, 5.

D. RECORD OF PROCEEDINGS.

"By an act of the assembly (acts, 1893-94, p. 730), amending § 68 of the Code, the secretary of each board is required to keep in a book, to be provided for the purpose, an accurate account of all the proceedings of the board, including all appointments and removals of judges and registrars." *Gleaves v. Terry*, 93 Va. 491, 493, 25 S. E. 552. See ante, "Election and Appointment", VII, A; post, "Resignation and Removal", VII, E.

How Far Open to Inspection.—So much of the record of the proceedings of the electoral boards as relates to the appointment and removal of judges and commissioners of election and registrars, or the ordering of a new regis-

tration, is a public record, open to inspection by any citizen and voter of the county in which the record is kept, and he may take therefrom at and within a reasonable time, in the presence of the secretary the board, memoranda or notes of the proceedings of the board as to which no secrecy is enjoined. But so much of said records as relates to the preparation and printing of the official ballots prescribed by law, certification of the same and their distribution to the judges of election, is not a public record that is open to the inspection of any one, other than the officers of the county to whom the duties of preparing, printing, certifying, and distributing the ballots are confided by law, and the secretary of the board can not be compelled to allow memoranda or notes thereof to be taken, or that portion of the records to be inspected, by any other voter. *Gleaves v. Terry*, 93 Va. 491, 25 S. E. 552. See also, ante, "Right to Inspection and Copies of Registration Books," V, C.

E. RESIGNATION AND REMOVAL.

See also, ante, "Record of Proceedings," VII, D.

Resignation from Office—Not a Matter of Right.—A registrar is not at liberty to resign at his pleasure; his resignation must be accepted in order to have effect, and until it is accepted, it is inoperative, and he remains in office. *Coleman v. Sands*, 87 Va. 689, 13 S. E. 148. It is held further in this case, that it is not true that an office is held at the will of either party. It is held at the will of both. Generally resignations are accepted, and it may be that it is generally believed that resigning is a matter of right; but it is otherwise. The public has a right to the services of all its citizens, and may demand them in all civil departments as well as in the military.

County and Corporation Courts—Authority to Remove Judges of Election.—The county and corporation

courts have authority to remove a judge of elections for malfeasance in office or gross neglect of duty, though he has not been convicted by the verdict of a jury of any offense. *McDougal v. Guigon*, 27 Gratt. 133, cited in *Lewis v. Whittle*, 77 Va. 415, 423.

VIII. Apportionment.

An unconstitutional act forming a delegate district or apportioning delegates for the house of delegates may be declared void by the courts, although the act is the exercise of political power, since in such case the question is judicial. *Harmison v. Ballot Commissioners*, 45 W. Va. 179, 31 S. E. 394.

When, after a census the legislature has, by law, created delegate districts, and apportioned delegates for the house of delegates among the counties and districts, § 10, art. 6, of the constitution forbids any change until after the next census. An act making earlier change is void. *Harmison v. Ballot Commissioners*, 45 W. Va. 179, 31 S. E. 394. See the title CONSTITUTIONAL LAW, vol. 3, p. 140.

This case turned upon the question of the constitutionality of the act of 1897. If that act were constitutional, Harmison was ineligible to represent the district, and had no right to go upon the ballots, because a resident of Morgan county, which, under that act, is no part of the district; whereas, if that act were unconstitutional, the district stood as under the act of 1891, Morgan a part of it. The act was held void. *Harmison v. Ballot Commissioners*, 45 W. Va. 179, 31 S. E. 394. See also, *Marcum v. Ballot Commissioners*, 42 W. Va. 263, 26 S. E. 281.

IX. Nominating Conventions.

In passing on the right of nominees for public office to appear on election ballots, this court recognizes the right of the convention making them to judge of the election, qualifications, and returns of its own members, and will not go back of its action to inquire as

to the right or title of delegates admitted by it as members. *Marcum v. Ballot Commissioners*, 42 W. Va. 263, 26 S. E. 281.

X. Notice of Elections.

Local Option Elections.—See the title INTOXICATING LIQUORS.

Relocation of County Seat.—As to notice of election to determine location of county seat, see the title COUNTIES, vol. 3, p. 637.

XI. Conduct of Elections.

A. EFFECT OF IRREGULARITIES.

1. Irregularities of Officers.

a. Directory Provisions.

Many of the provisions of the law in regard to the manner of holding and conducting the elections and counting the votes and certifying the result, must be held to be directory only, and intended to point out to inexperienced and ignorant persons, who are sometimes necessarily called upon to act as election officers, a plain, easy and direct way by which they are to attain the great end of their creation, viz.: to ascertain the true result of the election. And when the true result of a legal election has been ascertained, or can be ascertained, by the officers charged with the performance of this duty, no irregularity, mistake or even fraud committed by any of the officers conducting the election, or by any other person, can be permitted to defeat the fair expression of the popular will as expressed in said section. Fraud in such case is never to be presumed, but must be particularly alleged, especially when the act charged as a fraud may be innocent. *Loomis v. Jackson*, 6 W. Va. 613, 690; *Dial v. Hollandsworth*, 39 W. Va. 1, 19 S. E. 557.

Irregularities Have No Effect Unless Result of Election Is Thereby Changed.—It is affirmed in *Loomis v. Jackson*, 6 W. Va. 613, 692, that no irregularity, or even misconduct, on the part of the election officers, or other

persons, will vitiate an otherwise legal election, unless the result thereof has been thereby changed, or rendered so uncertain as to make it impossible to ascertain the true result. A different rule would make the manner of performing a public duty, more important than the duty itself. See also, *Dial v. Hollandsworth*, 39 W. Va. 1, 19 S. E. 557.

Where the polls were closed at a certain township at 4 o'clock and before sunset and the ballot box was at three different times opened and the vote counted, it was held, that these were mere irregularities where it did not appear that the result of the election was thereby changed. *Loomis v. Jackson*, 6 W. Va. 613.

"In the able opinion of Judge Woods in the case of *Loomis v. Jackson*, 6 W. Va. 613, authorities bearing on the question here raised are cited to the following effect, to-wit: "The following irregularities have been held to be immaterial: Where the inspector acted as clerk, and where more than the lawful number of inspectors acted at the election (*People v. Cook*, Brightly, Elect. Cas. 452); where the clerk assumed the place of an absent inspector (*Thompson v. Ewing*, 1 Brewst. 69); where one of the clerks during the election became so much intoxicated as to be unable to continue his labors, and another person was called, who acted in his place, without being sworn, until the regular clerk was able to resume his labors (see *Boileau's Case*, Brightly, Elect. Cas. 268; *People v. Cook*, Id. 452); where the election officers, being illiterate, called in a person who was not an election officer or clerk to take the ballots from the box, and read them to the tellers at the invitation of the election officers (see *Sprague v. Norway*, 31 Cal. 175); the omission of the inspectors while counting the votes to take out the ballots deliberately from the boxes, and read aloud the names printed thereon (*Skerrett's Case*, 2 Pars. Eq. Cas. 515);

and, lastly, the omission of the judges or clerks of an election to sign the poll books, to fill up blanks in the caption, or to state the aggregate number of the votes, all which may be corrected by parol and, when corrected, used as competent evidence of the result of the election (*Powers v. Reed*, 19 O. St. 189.)' " *Dial v. Hollandsworth*, 39 W. Va. 17, 19 S. E. 557, 558.

At an election for county officers, four persons who had not registered, were allowed to deposit ballots, but were subsequently and before the whole vote was counted, declared by the election officers to be improper voters. On being called before the officers they were sworn as to the character of the ballots deposited by them, and four ballots were accordingly destroyed which did not change the result of the election. The election officers certified certain parties as having received the highest number of votes and the board of supervisors set the election aside because of the irregularity mentioned, and ordered another election. Subsequently the parties who had been elected by the first vote, petitioned the circuit court for a writ of certiorari to supervise the proceedings of the board of supervisors. Held, that there was no irregularity in the election, in fact or in law, that would be sufficient to invalidate the election, according to the provisions of § 28, acts, 1863. *Burke v. Monroe Co.*, 4 W. Va. 371.

Unlawful Appointment of Additional Ballot Clerks.—If the commissioners of election, acting innocently in violation of law, appoint two additional ballot clerks to aid in conducting the election, such misconduct though a strong suspicious circumstance, is not sufficient to invalidate the poll unless there is some evidence tending to show that such appointments were corruptly intended to, and did, influence the result of the election. *Dial v. Hollandsworth*, 39 W. Va. 1, 19 S. E. 557.

It is said further in the opinion of this case, that while, ordinarily, such misconduct on the part of the judges, unexplained, raises grave suspicions, and would require but a small amount of additional evidence to destroy the presumption of fairness and sustain the charge of corruption, yet, such conduct may be, as it was in this case, satisfactorily explained so as to excuse their conduct. *Dial v. Hollandsworth*, 39 W. Va. 1, 19 S. E. 557.

In the case of *Dial v. Hollandsworth*, 39 W. Va. 1, 19 S. E. 557, the court went so far, in order to uphold a fair result, that it ignored the act of officers of the election in appointing two poll clerks without a shadow of authority, and the acting of such unlawful poll clerks of the same political party in preparing the ballots of illiterate voters in separate rooms, with every opportunity to falsify the ballots. *Snodgrass v. Wetzel County Court*, 44 W. Va. 56, 29 S. E. 1035.

Politics of Ballot Clerks—Directory Provisions.—While the election law requires the ballot clerks to be of opposite politics, the mere fact that such is not the case is not alone sufficient to justify the exclusion of the poll from the court. *Dial v. Hollandsworth*, 39 W. Va. 1, 19 S. E. 557.

Informalities in Holding Election—Effect.—Mere informalities on the part of election officers in holding, and ascertaining, and declaring the result of an election, unless otherwise provided by statute will not vitiate an election in other respects fair and impartial. *Knight v. Town of West Union*, 45 W. Va. 194, 32 S. E. 163.

Conformity with Statute—Substantial Compliance—Presumption of Fairness.—It is not necessary that all the details required by the statute in conducting an election should appear on the record; but if it appears from the record that the county court, with the poll books, tally sheets, and certificates of election from the various precincts

before it, has canvassed the returns, and declared the result, it will be presumed to have acted rightly, unless the contrary be made to appear. *Miner v. Tucker County Court*, 39 W. Va. 627, 20 S. E. 659.

Election Concerning Issue of Municipal Bonds.—In a municipality having less than 600 voters, an election confined solely to the question of the issue of municipal bonds is not invalid because conducted in the mode prescribed for the election of municipal officers, in the absence of political or party nominations. *Knight v. Town of West Union*, 45 W. Va. 194, 32 S. E. 163. See the title MUNICIPAL AID.

Clerical Error—Does Not Invalidate Election.—A mistake entered in the record of the county court in relation to the date of an order concerning an election will not invalidate the election. *Thomas v. Com.*, 90 Va. 92, 17 S. E. 788.

b. Mandatory Provisions.

The rule that departures from, or violations of, merely directory statutes, regulating elections, by election officers, will not invalidate votes or elections, in the absence of such actual fraud as clearly vitiates the votes or the election, does not apply in the case of violations of statutory provisions requiring specific things to be done, and declaring that noncompliance with the requirements shall make the ballot void. *Kirkpatrick v. Board of Canvassers*, 53 W. Va. 275, 44 S. E. 465. Compare *Snodgrass v. Wetzel County Court*, 44 W. Va. 56, 29 S. E. 1035.

"Much stress is laid upon the fact that the evidence shows that no fraud was either perpetrated or intended at the precincts at which this statutory requirement was omitted. This argument would be sufficient if the omissions could be classed as mere irregularities. Where such irregularities are accompanied by fraud, which established the impurity of the election at the pre-

cinct, it is generally held, that the election is void. But where mere irregularities, not violations of mandatory statutes, are the result of a mistake or ignorance, they do not vitiate the election. The question here is not affected by the presence or absence of actual fraud. The ballots are, by express declaration of the law, void, without reference to the presence or absence of fraud." *Kirkpatrick v. Board of Canvassers*, 53 W. Va. 275, 44 S. E. 465.

"In this connection *Dial v. Hollandsworth*, 39 W. Va. 1, 19 S. E. 557, is relied upon. In that case the requirement that poll clerks be of opposite politics was ignored, and the election commissioners, without authority, appointed two additional clerks. These were irregularities, departures from the statutory provisions, but the statute did not declare that in case of such irregularities the election should be void, or that the ballots cast under such conditions should be void, or should not be counted. There was room there for construction in the effort of the court to uphold an honest vote, where there was on suspicion of actual fraud, on the part of the election officers. The same principal has been applied in many other similar cases." *Kirkpatrick v. Board of Canvassers*, 53 W. Va. 275, 44 S. E. 465, 469.

The clause in § 36, ch. 3, of the West Virginia Code of 1899, requiring each poll clerk to "write his name" on the back of each election ballot sheet, before it is delivered to the voter, and the clause in § 66 of said chapter, declaring that "any ballot which is not indorsed with the names of the poll clerks, as provided in this chapter, shall be void and shall not be counted," are mandatory, and ballots not so indorsed must be rejected in ascertaining the result. *Kirkpatrick v. Board of Canvassers*, 53 W. Va. 275, 44 S. E. 465; *Doll v. Bender*, 55 W. Va. 404, 47 S. E. 293. But see *Snodgrass v. Wetzel County Court*, 44 W. Va. 56, 29 S.

E. 1035, decided by a divided court. In this last case the defeated candidate for clerk of the county court asked to have the vote from a certain precinct thrown out on the ground that the two poll clerks divided the ballots between them and each signed his own name and the name of the other clerk, instead of each signing his own name on each ballot, as directed by the statute; this was done, however, in the presence of the election judges and of each other. It was held to be a ministerial act and capable of being validly done by an agent. The court said, however, that if one person standing by another, authorizes him to sign his name it is not an act of agency, but is regarded as the very signature of the party himself, as if done by himself.

The purpose of said clauses is to secure identification of the ballots voted, so as to distinguish them from all unvoted official ballots, as well as from all spurious ballots, in the interest of the purity of elections and the preservation of the secrecy of the ballot. Hence the words, "shall write his name," mean that the name of each poll clerk shall be placed on the back of each ballot voted, in his own handwriting, and ballots on which the names of both poll clerks are written by one of them, or by some other person, are void, and can not be counted. *Kirkpatrick v. Board of Canvassers*, 53 W. Va. 275, 44 S. E. 465.

Such requirements, when mandatory, are basic and fundamental in their nature, and the declared consequences of violations of them must follow, whether such violations result from mere ignorance or inadvertence, or actual fraud. *Kirkpatrick v. Board of Canvassers*, 53 W. Va. 275, 44 S. E. 465.

The clauses of §§ 36, 66, ch. 3, of the West Virginia Code of 1899, requiring identification of the ballots case, by the signatures of the poll clerks, being reasonable regulations, designed to prevent fraud, are constitutional and

valid, although they necessitate the rejection of a very limited number of ballots honestly voted. *Kirkpatrick v. Board of Canvassers*, 53 W. Va. 275, 44 S. E. 465.

2. Irregularities of Voters.

As to mistakes and irregularities in elections, a distinction exists between those made by the voter and those made by officers of election. In the former case such mistakes and irregularities may often destroy the ballot, while those of officers do not affect the election, if a fair election has been held. *Morris v. Board of Canvassers*, 49 W. Va. 251, 38 S. E. 500, distinguishing *Loomis v. Jackson*, 6 W. Va. 613; *Dial v. Hollandsworth*, 39 W. Va. 1, 19 S. E. 557. See post, "Ballots and Balloting," XI, B.

B. BALLOTS AND BALLOTING.

1. In General.

"**Ballot and Vote.**"—"While the terms 'ballot' and 'vote' are sometimes confused and while they may sometimes be used synonymously, the ballot is, in fact, under our form of voting, the instrument by which the voter expresses his choice between two candidates or two propositions; and his vote is his choice or election between the two, as expressed by his ballot; and when his ballot makes no choice between any two candidates, or on any question, then he casts no vote for either of these candidates or on the question." *Davis v. Brown*, 46 W. Va. 716, 34 S. E. 839, 842.

"**Purity of the Ballot Box.**"—"All such reasonable regulations of the constitutional right which seem to the legislature important to the preservation of order in elections, to guard against fraud, undue influence, and oppression and to preserve the purity of the ballot box, are not only within the constitutional power of the legislature, but are commendable, and at least some of them absolutely essential." *Daniel v. Simms*, 49 W. Va. 554, 574, 39 S. E. 690, quoting *Cooley's Cons. Lim.* 757.

The Virginia Act of 1894.—"We find that the general scheme of the law is to secure the independence of the voter by secluding him within an isolated booth, surrounded by a neutral zone, within which none may enter save those charged with conducting the election. No one is allowed within forty feet of the ballot box, save the officers charged with such duties, and, in case of a challenge of a voter, the challengers and challenged and the witnesses, all of whom may appear before the judges; when the challenge shall have been decided, only the elector is permitted to remain. The object is to relieve the voter from every influence inimical to a free and deliberate exercise of the right of suffrage, to free him from all solicitation and annoyance, and to leave him a perfectly free agent to vote as to him seems best. These provisions seem to be not only reasonable, but well adapted to secure the end in view, so far as the voter is concerned who is able to prepare his own ballot. He goes to the judges, he receives an official ballot printed by authority of the state, upon which is to be found every office to be filled and every candidate for that office, whose name has been filed in accordance with the requirement of the law, and he retires to a booth where he is curtained off and secluded from all the world. No eye can see him and no ear can hear him; no evil agency can approach him; and, with these environments, he prepares his ballot, folds and delivers it to the judge, who, in his presence, places it in the ballot box." *Pearson v. Supervisors*, 91 Va. 322, 331, 21 S. E. 483, 1 Va. Law Reg. 176.

The West Virginia Act of 1891.—"The act of 1891 provides for an official ballot, prescribing the kind of paper on which it shall be printed, its form, method of preparation, the persons by whom it shall be prepared, its custody and distribution, and all the necessary steps to be taken by both

the voter and the officers of the election for its deposit in the ballot box. Among other things, it is provided that such of these ballots as go into the box shall be distinguished from all other ballots, whether official, unvoted ballots or not, by means of the signatures of the two clerks; and upon all officers charged with the execution of these provisions, and all other persons violating them in material respects, the law denounces heavy penalties, making a great many of the forbidden acts felonies, punishable by confinement in the penitentiary. All these elaborate provisions, minutely prescribing the duties of election officers and citizens, have for their object the suppression of corruption, fraud, and intimidation in elections. It is well known that at the time the act was passed these evils were general, not only in this state, but throughout the country, and similar laws were passed in a great many of the states. Of another provision of the statute, relating to the preparation of the ballot, *Brannon, J.*, said, in *Morris v. Board of Canvassers*, 49 W. Va. 251, 255, 38 S. E. 500: 'It was intended as, and it is, a valuable reform made to cure ills revealed by time in the most important matter connected with government.'" *Kirkpatrick v. Board of Canvassers*, 53 W. Va. 275, 44 S. E. 465, 467.

The West Virginia Acts of 1863 and 1882.—"In 1863, under the old constitution, the legislature, in § 18 of chapter 3 of the acts, provided that 'Every person offering to vote at an election shall present to one of the inspectors a single ballot, written or printed upon white paper, which shall be folded or rolled so that its contents can not be seen, and if there be any mark, color, or device visible on the same, intended to distinguish it from other ballots voted at the election, it shall not be received. The ballot shall contain the names of the persons for whom he wishes to vote, and designate the office

he desires each of them to fill.' From that time until the passage of the act of 1891, this portion of the law, prescribing the mode of voting and defining a ballot, underwent some slight changes but remained substantially the same. Under the new constitution, that portion of the act which required the ballot to be folded or rolled so that its contents could not be seen, could not be retained and was stricken out, for the reason that the present constitution guarantees to the citizen the right to vote an open ballot. Immediately before the passage of the act of 1891, providing for the present system of voting, § 13 of chapter 3 of the Code provided that 'Every person offering to vote at an election shall present to one of the commissioners a single ballot, written or printed upon white paper, and if there be any mark, color, or device visible on the same, intended to distinguish it from other ballots voted at the election, it shall not be received. The ballot shall contain the names of the persons for whom he wishes to vote and designate the office he desires each of them to fill.' Acts, 1882, § 13, ch. 155." *Daniel v. Simms*, 49 W. Va. 554, 562, 39 S. E. 690.

Under the Code of 1860.—"Under the law as found in the Code of 1860, the mode of voting in the state of Virginia, of which this state was then a part, was *viva voce*; although it was provided that 'In an election for electors for president and vice-president of the United States, the officer shall receive from each voter a paper or ticket containing the names of as many persons for electors as the state may be entitled to for the time being. The name of the voter shall be written on the back of the paper, and he shall also declare *viva voce* for whom he votes as electors, either by repeating the name of each person voted for, or by any other distinct designation of them collectively; provided, that if he be dumb, he may vote by ballot.'" *Daniel v. Simms*, 49 W. Va. 554, 562, 39 S. E. 690.

Daniel v. Simms, 49 W. Va. 554, 562, 39 S. E. 690.

Printing, Certification and Distribution under the Virginia Statute.—By an act approved March 4th, 1896 (Acts, 1895-6, p. 763) amendatory of the act of March 6, 1894, entitled "An act to provide for a method of voting by ballot," the printing of the ballots, the certification of the same as the official ballots, and their distribution to the judges of election of the several precincts of their county or city, are delegated to the electoral board of each county and city. *Gleaves v. Terry*, 93 Va. 49, 25 S. E. 552.

2. Secrecy of the Ballot.

The West Virginia statute of 1891 as well as the constitution thereof holds the secrecy of the ballot sacred. *Kirkpatrick v. Board of Canvassers*, 53 W. Va. 275, 44 S. E. 465.

"The present constitution of this state was adopted in 1872, nearly twenty years prior to the passage of the act of 1891, and § 2 of article 4 of that instrument reads: 'In all elections by the people, the mode of voting shall be by ballot; but the voter shall be left free to vote either an open, sealed or secret ballot as he may elect.'" *Daniel v. Simms*, 49 W. Va. 554, 563, 39 S. E. 690.

The vote by ballot *ex vi termini* implies a secret ballot. *Pearson v. Supervisors*, 91 Va. 334, 21 S. E. 483, 1 Va. Law Reg. 176; *Gleaves v. Terry*, 93 Va. 491, 493, 25 S. E. 552.

3. Blind and Illiterate Voters.

See ante, "Secrecy of the Ballot," XI, B, 2.

Special Constables—Their Duties.

It was held, in *Pearson v. Supervisors*, 91 Va. 322, 21 S. E. 483, 1 Va. Law Reg. 176, under act of March 6, 1894, that the special constables provided for in said act are sworn officers, charged with the gravest duty to the public in which every citizen is interested, and for failure to perform their duty severe penalties are inflicted. Among

these is the duty to render to those who are blind or unable to read on account of defective education every assistance necessary to aid the elector in preparing his ballot. The word "may," used in the fifteenth section of this act, relating to the duty of special constables, is mandatory and not merely permissive and directory.

"It is obvious that one who, either from physical or intellectual blindness, is unable to read, is wholly incapable of voting by ballot without assistance from some quarter. The law recognizes this and seeks to provide for it. The electoral board of the county is, by the fifteenth section, required to appoint a special constable, 'who shall be an honest and discreet person of said precinct and be able to read and write, and who shall be a conservator of the peace, and shall be especially charged with enforcing the provisions of this act, having all the powers of a constable.' He is required to take an oath faithfully to perform his duties, and for a corrupt violation thereof is punishable by a fine of not less than \$500 and imprisonment for not less than one, nor more than twelve months, in jail. The act provides, in the fifteenth section, that 'at the request of any elector in the voting booth, who may be physically or educationally unable to vote, the said special constable may render him assistance by reading the names and offices on the ballot, and pointing out to him the name or names he may wish to strike out, or otherwise aid him in preparing his ballot. In case said elector be blind, said special constable shall prepare said ballot for said elector in accordance with the instructions of said elector.'" *Pearson v. Supervisors*, 91 Va. 322, 323, 21 S. E. 483, 1 Va. Law Reg. 176.

A vote by ballot *ex vi termini* implies a secret ballot; and the secrecy of the ballot is a right which inheres in the voter; but a blind man or a man unable to read, must, in the nature

of things so far compromise this right of secrecy as to obtain the aid of others in the preparation of his ballot; for which purpose a constable is provided by the statute. It is therefore the duty of the special constable, which he is sworn to faithfully execute, to assist the voters in preparing their ballot, when requested, to observe all his rights and to keep the secrecy of his ballot inviolate. *Pearson v. Supervisors*, 91 Va. 322, 21 S. E. 483, 1 Va. Law Reg. 176.

The oath of office of the constable appointed under the Act of March 6, 1894, binds him to the performance of the duties imposed upon him not only by statute, but by the constitution. He must observe and respect all the rights of the voter, and amongst these not the least important is to have the secrecy of his ballot kept inviolate; and for a breach of this duty upon the part of the constable, he will become amenable to all the pains and penalties provided by law. *Pearson v. Supervisors*, 91 Va. 322, 323, 21 S. E. 483, 1 Va. Law Reg. 176.

4. Marking the Ballot.

See also, ante, "Irregularities of Voters," XI, A, 2.

"A ballot has been defined as 'A piece of paper, or suitable material with the name written or printed upon it, of the person to be voted for.'" *Daniel v. Simms*, 49 W. Va. 554, 560, 39 S. E. 690, quoting *Cush. Leg. Assemb.*, § 103; *Cooley's Cons. Lim.* 760.

A ballot, prepared and perfected under the provisions of § 34 of chapter 3 of the West Virginia Code, is one of the columns on the ballot sheet described in said section, so changed as to suit the wishes of the voter, and is a list in one of such columns of the names of all the persons for whom the voter desires to vote, with the designation of the office he desires each of them to fill; and every other column on the ballot sheet must be defaced in the manner prescribed in said sec-

tion. *Daniel v. Simms*, 49 W. Va. 554, 39 S. E. 690.

Voter Must Only Use One Column.

—The provisions of § 34 of chapter 3 of the Code, requiring the names of all persons for whom the voter desires to vote to be placed in one of such columns, and all other columns on the sheet to be defaced, are mandatory; and, if the voter, in the preparation of his ballot, violates said provisions, his vote can not be counted, although his intention to vote for certain candidates may be clearly expressed upon the ballot sheet. *Daniel v. Simms*, 49 W. Va. 554, 39 S. E. 690.

Such regulations of the constitutional right of the citizen to vote are reasonable and do not abridge or unduly impede the exercise of such right, although by disregarding them the voter disfranchises himself, provided such regulations are plain and may be easily observed. *Daniel v. Simms*, 49 W. Va. 554, 555, 39 S. E. 690.

Section 34 of chapter 3 of the West Virginia Code of 1899, though mandatory, is not unconstitutional because it violates the general provision of the constitution that "The male citizens shall be entitled to vote at all elections" as wide powers are given to the legislature under art. 4, § 11, of the constitution. *Morris v. Board of Canvassers*, 49 W. Va. 251, 34 S. E. 500.

Two of four columns on a ballot sheet are defaced; the republican column is not defaced; the democratic is defaced by broken lines as to all its offices and candidates except two, and their names are skipped by the lines and thus left on that ballot, but their names are written in the republican column for the same offices for which they stand in the democratic column. The republican ballot only has been voted. The voter has not voted two ballots. *Doll v. Bender*, 55 W. Va. 404, 47 S. E. 293.

A voter must use only one of the ballots on the election ballot sheet,

and the names of all candidates for whom he votes must be found on that one ballot. If some names are on one ballot, some on another, the voter does not vote for any candidate. *Morris v. Board of Canvassers*, 49 W. Va. 251, 38 S. E. 500.

"Great emphasis is laid by counsel for *Morris* on the case of *Dunlevy v. County Court*, 47 W. Va. 513, 35 S. E. 956, to sustain the theory that the provisions of the statute under consideration are merely directory, and the voter must get his vote, no matter how many ballots he uses, and no matter how he indicates his choice, so only that choice is clear. That case did not pass on the question involved in this case. This question was not raised in argument or discussed in the opinion, except inferentially. It passed on the question how the voter's will must be manifested on one ballot, not whether he could use several ballots. By no means do we intend to deny that the Australian law has some provisions that are merely directory." *Morris v. Board of Canvassers*, 49 W. Va. 251, 38 S. E. 500, 505.

Intention of Voter.—The courts are strongly inclined to hold up the legality of ballots, not entirely conforming to the requirements of law, if the intention of the voter can be ascertained, but statutes prescribing the form of ballots and kind of paper on which they are to be printed, and prohibiting marks, figures or devices thereon, by which one can be distinguished from another, are designed to preserve the secrecy of the ballot and to prevent fraud, intimidation or bribery, and they are generally held to be mandatory, and are always so held when such statutes provide that a ballot varying from such requirements shall not be counted. *Daniel v. Simms*, 49 W. Va. 554, 39 S. E. 690. See also, *Morris v. Board of Canvassers*, 49 W. Va. 251, 38 S. E. 500.

"It was the law, before the enactment of the Australian ballot, that the

voter's intent must be sought and observed from his ballot. His ballot might be awkward and irregular, but where his intent is plain, that intent must stand. We can not think the new system has wholly abrogated this rule. The paper is a ballot still to express intent. We can not think that we can not look at intention. Some cases do hold that under this new system, looking at its object to suppress fraud, bribery and other election evils, the voter must strictly follow the statute; that the legislature has told him just how he shall vote, and departure from it loses him his vote; but the better opinion seems to be that generally, where the statute does not expressly, or by plain implication, reject the ballot, it is not to be cast out." *Doll v. Bender*, 55 W. Va. 404, 408, 47 S. E. 293.

"A ballot is a paper to express intent, and where its language is plain, we must take it, and not go to guessing that the voter meant something else." *Stanton v. Wolmesdorff*, 55 W. Va. 601, 603, 47 S. E. 245.

Where Name Is Substituted.—The provision in W. Va. Code, 1899, ch. 3, § 34, that where a name is substituted for one on a ballot it must be written in the space below the printed name, is directory. Though the name is not there written, the vote will be counted for the written name for the office for which it is plainly intended. *Doll v. Bender*, 55 W. Va. 404, 47 S. E. 293.

Though a candidate's name is written in the space above the office on a ballot, it will be held a vote for him for the office below his name where the printed name for that office is erased and that above the written name is not erased. *Doll v. Bender*, 55 W. Va. 404, 47 S. E. 293, citing *Dunlevy v. County Court*, 47 W. Va. 513, 35 S. E. 956.

Where a name is written in the space between two offices, and the printed names of the candidates are

not erased, the ballot counts for the office above the written name and for that name, not for the candidate for the office below, though it would be otherwise if the printed name of the candidate for the office below were erased. *Doll v. Bender*, 55 W. Va. 404, 405, 47 S. E. 293.

"It is urged that in *Morris v. Board of Canvassers*, 49 W. Va. 251, 38 S. E. 500, the opinion holds the statute, in general sense, mandatory, and particularly that the law requiring a voter who does not wish to vote for the printed candidate to write another name in the space below the printed name, is mandatory, so that the substituted name must be put in that space, and if it is not, it is no vote. It will be seen that the reference in that case to the space below the printed name was as an argument under the statute to show that one column must be selected and made the sole expression of the voter's will. The question whether, after one column has been selected and the others erased, the voter must write the substituted name in that space and nowhere else, was not up in that case. This case does present, in the ballot now in hand, that question. In that case it is definitely stated that there are provisions in this statute that are merely directory. We did not intend to hold that the provision as to putting the name in this space is mandatory. It was not in the mind." *Doll v. Bender*, 55 W. Va. 404, 408, 47 S. E. 293.

Defacement of Ballots.—Though defacing lines do not pass entirely through a ballot or its heading, yet if it is manifest that the voter did not intend to vote that ballot, the defacement is sufficient. *Doll v. Bender*, 55 W. Va. 404, 47 S. E. 293.

Though lines through the heading of a ballot or through the ballot are not used, still if other marks of cancellation are used, and they plainly indicate that the ballot has not been voted, the ballot is effectually defaced, and

can not be counted. *Doll v. Bender*, 55 W. Va. 404, 47 S. E. 293.

Defacing marks to cancel a ballot must be within the ballot column or its heading. Words only above the heading or elsewhere outside the ballot, such as "I vote this ticket," do not select that ballot and cancel the others. *Doll v. Bender*, 55 W. Va. 404, 405, 47 S. E. 293.

A ballot from which some of the offices and names of candidates for them have been cut entirely out with a knife, instead of being erased with a pen or pencil, is a good ballot for the offices and candidates left in it. The provision of the statute requiring erasure with pen or pencil is directory. *Doll v. Bender*, 55 W. Va. 404, 405, 47 S. E. 293.

Distinguishing Marks.—Distinguishing marks on a ballot will not cause its exclusion from the count. The court says: "We hold that such mark does not destroy the ballot, on the principal that a citizen can be disfranchised only by clear expression of legislative intent to do so. The legislature has not said that this mark shall reject the ballot. It had the particular matter under consideration. It selected its penalty. It made the act a crime, but did not add that the ballot should not be counted." *Doll v. Bender*, 55 W. Va. 404, 410, 47 S. E. 293. See post, "Voting Illegal Ballot or Illegal Use of Legal Ballot," XIV, B.

Time for Preparing Ballot.—Under the statute, March 6, 1894, providing for voting in booths, a limit to the time for the preparation of ballots was an obvious necessity, for which the legislature had a right to provide, and the court can not as a proposition of law, decide that the time allowed by the statute is inadequate. The act places no limit on the number of booths that may be supplied, and the county courts have full power to multiply the voting precincts to meet the

necessities of the people. *Pearson v. Supervisors*, 91 Va. 322, 21 S. E. 483, 1 Va. Law Reg. 176.

5. Custody of the Ballots.

See post, "Ballots as Evidence," XI, B, 6.

When all the ballots cast at all the precincts in an election held in the county have been kept in proper custody, and the packages of ballots voted at one of the precincts nevertheless bear evidence of having been tampered with, that fact does not vitiate the ballots cast at the other precincts. *Stafford v. Board of Canvassers* (W. Va.), 49 S. E. 364.

When the clerk of a county court has laid before the board of canvassers of the county, for the purposes of a recount, the ballots, poll books, and other returns of the election, and, without just cause, has refused to receive back into his custody the ballots and care for them during the recesses of the board, while engaged in the recount, such board may lawfully commit the care and custody of the ballots to the sheriff of the county. *Stafford v. Board of Canvassers* (W. Va.), 49 S. E. 364.

Retention of one or both of the keys to the ballot boxes, although the ballots are in the boxes, by the board of canvassers or a member thereof, does not justify the refusal of the clerk to preserve and be responsible for the ballots. *Stafford v. Board of Canvassers* (W. Va.), 49 S. E. 364.

6. Ballots as Evidence.

See post, "Evidence," XIII, E.

Certificates of the result of an election made by the commissioner at the precincts are prima facie evidence of such result. The ballots, if identified as the same cast, are primary and higher evidence; but, in order to continue the ballots controlling as evidence, it must appear that they have been preserved in the manner and by the officers prescribed in the statute, and that while in such custody they

have not been so exposed to the reach of unauthorized persons, as to afford a reasonable probability of their having been changed or tampered with. If there has been an opportunity for tampering with ballots, they lose their character as primary evidence. *McCrary, Elect.*, § 443. (By two judges.) *Dent v. Commissioners*, 45 W. Va. 750, 32 S. E. 250.

If there is evidence tending to show that ballots are not sealed up after being counted by the precinct election officers, the ballots, on recount, are not the best evidence, but the result will be governed by the precinct certificates, where the certificates and the recount differ in result. (By two judges.) The court says: "Judge English, in an opinion concurred in by Judge Dent, in a case where there was no whisper that the ballots were not the true ones cast, held that when they were not sealed up they could not be counted. *Snodgrass v. Wetzel County Court*, 44 W. Va. 56, 29 S. E. 1035. He said that the law did not intend that even the clerk should have access to ballots required by law to be returned in a sealed package, properly indorsed, until such package was opened by the canvassers. But there was the precinct certificates, showing the same result as the ballots, while here they differ." *Dent v. Commissioners*, 45 W. Va. 750, 32 S. E. 250, 253.

XII. Ascertainment of Result.

A. IN GENERAL.

Return of Poll by Commissioners—Presumption of True Result.—The return of a poll by the commissioner of the election is *prima facie* the true result of the election and will not be reversed by the court because of misconduct of the election officers or other persons, unless it plainly appears that such misconduct changed the result of the election. *Dial v. Hollandsworth*, 39 W. Va. 1, 19 S. E. 557; *Minear v.*

Tucker County Court, 39 W. Va. 627, 20 S. E. 659.

Use of Registration Books.—The commissioners of election are the body to compute and ascertain the number of registered voters in the county, the number of votes cast at the election, to separate them and ascertain for whom, or for what purpose the majority of votes were cast. In ascertaining and reporting the number of registered voters in the county they are to be guided and controlled by the registration books. But where the register had recorded therein the death or removal of a person registered, it was proper to omit his name from the count. *Redd v. Supervisors*, 31 Gratt. 695; *Brown v. Randolph County Court*, 45 W. Va. 827, 32 S. E. 165.

Speedy Ascertainment of Result.—

"The speedy ascertainment and declaration of the result of elections has been declared by the legislature to be a part of our state policy. Section 89 of chapter 3 of the Code says: 'A mandamus shall lie from the supreme court of appeals or any one of the judges thereof in vacation, returnable before said court to compel any officer herein to do and perform legally any duty herein required of him.' This statute is clearly intended to hasten the ascertainment and declaration of the results of elections, as well as the performance of other duties by election officers. It has been so constructed and applied. *Morris v. Board of Canvassers*, 49 W. Va. 251, 38 S. E. 500; *Daniel v. Simms*, 49 W. Va. 534, 39 S. E. 690. See also, *Dunlevy v. County Court*, 47 W. Va. 513, 35 S. E. 956, and *Marcum v. Ballot Commissioners*, 42 W. Va. 263, 26 S. E. 281, 36 L. R. A. 296." *Kirkpatrick v. Board of Canvassers*, 53 W. Va. 275, 44 S. E. 465. See post, "Mandamus," XIII, D, 5. See also, post, "In General," XIII, A.

B. VOTES NECESSARY TO CARRY AN ELECTION.

"When the law requires, for the elec-

tion of an office or the carrying of a measure, a vote of a majority, or a specified proportion of the legal or qualified voters, it is generally considered sufficient if the required proportion of the votes actually cast is in favor of the candidate or measure, and there is no necessity for any inquiry as to the actual number of voters in the district; for it is presumed that all legal electors voted, or, if they did not, that they acquiesced in the action of those who did. It would seem that an application of the same principle would lead to the conclusion that, where a measure is submitted to the voters at a general election, or at the same time as other measures, it should be considered carried if a majority, or the required proportion, of the votes actually cast for or against such measure are in the affirmative; and there are cases supporting this view. But the great weight of authority is otherwise, and supports the view that, in order to pass such a measure, it must have the actual affirmative vote of a majority, or the required proportion, of those who participate in the election." 10 Amer. & Eng. Ency. of Law, 754 (2d Ed.), quoted in *Davis v. Brown*, 46 W. Va. 716, 34 S. E. 839.

"Where voters do not come to the polls at all, they need not be inquired after; they do not exist, no matter how many there may be. This is so though the law require the assent of a majority of the voters of a county or district to elect an officer or approve a measure. 'All qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience, and ought not to be adopted, unless the legislative will to that effect be clearly expressed.' So says the opinion in *Cass Co. v. Johnson*, 95 U. S. 369, 24 L.

Ed. 416." *Davis v. Brown*, 46 W. Va. 716, 34 S. E. 839, 840.

When the legislature requires that a majority of the registered votes shall be given in order to the accomplishment of a particular end, it does not mean simply a majority of the votes entered on the poll books, but a majority of those whose names are registered as voters in the proper registration books kept for that purpose. *Chalmers v. Funk*, 76 Va. 717, 720. See the title INTOXICATING LIQUORS.

As to the majority necessary to carry an election for removal of a county seat, see the title COUNTIES, vol. 3, p. 652.

C. CANVASS OF BALLOTS.

See ante, "Nature of," VII, C, 2; post, "Canvass of Returns," XII, D; "Mandamus," XIII, D, 5.

Ministerial Duty.—Under the present election law of this state, the duties of the board of canvassers in recounting the ballots are purely ministerial, and not judicial, and it is its legal duty to count all ballots or parts of ballots where the intention of the voter appears from the face of the ballots, though not marked or erased in the plain manner directed in the statute, and to reject all ballots or parts of ballots where such intention does not appear from the face of the ballots. If, from the face of his ballot, the intention of the voter is apparent as to his choice of candidates for any office, his vote should be counted as to such office, although his intention as to other candidates for other offices be nonascertainable, and the ballot invalid as to them. *Dunlevy v. County Court*, 47 W. Va. 513, 35 S. E. 956. Compare *Dent v. Commissioners*, 45 W. Va. 750, 32 S. E. 250.

"Under the statute, the counting of ballots is purely a ministerial act. The face of the ballot must show the recorded intention of the voter as to any office. If this appears, it must be

counted as to such office. If it does not, it must be rejected. The facts being set at rest by the ballot, the law allows the board of canvassers no discretion. They must obey the behests of the law, and mandamus, both at common law and now by virtue of the statute, is the only adequate remedy to compel the board to discharge its legal duties in this respect. Section 89, ch. 25, acts, 1893." *Dunlevy v. County Court*, 47 W. Va. 513, 35 S. E. 956, 958, citing *Hebb v. Cayton*, 45 W. Va. 578, 32 S. E. 187; *Marcum v. Ballot Commissioners*, 42 W. Va. 263, 26 S. E. 281, 36 L. R. A. 296.

"The action of canvassers in counting or recounting ballots is purely a ministerial act, one which the law commands them to do. *Brazie v. Fayette County Comm'rs*, 25 W. Va. 213; *Marcum v. Ballot Commissioners*, 42 W. Va. 263, 26 S. E. 281. They have no choice to do or not do it, under proper circumstances." *Hebb v. Cayton*, 45 W. Va. 578, 32 S. E. 187, 188.

"The board of canvassers is merely a body to canvass the returns of elections for public officers, acting simply on the certificates sent from voting precincts by certain officers holding the election, and recounting ballots when demand is made. They may send for those precinct officers to ascertain the true result; but they hear no contests judicially, no evidence of fraud in the election. They act ministerially only. If any candidate claims that the election is fraudulent or in any wise illegal, or that ballots are unlawfully counted against him, or not counted for him, he must get relief by contest as provided in the statute." *Brown v. Randolph County Court*, 45 W. Va. 827, 32 S. E. 165, citing *Brazie v. Fayette County Comm'rs*, 25 W. Va. 213.

"So, in *Brazie v. Fayette County Comm'rs*, 25 W. Va. 213, this court held, that where the commissioners of the county court met, under § 21, ch.

155, acts, 1882 (Warth's Amended Code, ch. 3, § 21), five days after an election, and under certain detailed and prescribed regulations, to ascertain the result of the election in this county, and made out and signed certificates stating the vote cast in the county for each officer voted for at the election, they met not as a county court, but as a board of canvassers, and as such they had only such powers as were specified in that act; that is to say, the power to examine the poll books and certificates from the different precincts presented to them by the precinct officers of the election. They could compel the attendance of any of these precinct officers, or any one else present at the election, to answer questions under oath respecting the election, and make such orders as were necessary to procure correct returns from all the precincts; and, on the demand of a candidate, they might open any of the sealed packages of ballots from any of the precincts, and recount the same. But they had, as a board of canvassers, only these few specified powers, and none others. And that while some of these limited powers required judgment and discretion in the proper exercise of them, yet the duties of these commissioners, when thus assembled simply to make out certificates of the votes cast in the county for each officer, were, like those of other canvassing boards, ministerial in their character, and not judicial. And in showing that their duties were of this character, and that they ought not to be regarded as acting as a court, we pointed out the fact that they kept no record of their proceedings, and only signed the certificate stating the whole number of votes cast for each candidate in the county, and this was simply, under the act, based on the returns after they had been verified and made right so far as they could be by the limited powers conferred on these canvassers. They had, while so acting as a board of canvassers, no au-

thority to go beyond or behind these returns. They had no authority to strike from or add to the list of voters certified to them from the several precincts. They are not by this act authorized, as a court would be, to summon witnesses generally, and to examine them, in order to ascertain the real legal vote cast at the several precincts. They must take the returns to be correct as returned and certified to them by the precinct officers, when these returns and certificates have been examined and tested by the exercise of the limited powers conferred on them. Of course, certificates given by these commissioners, as by other canvassing boards, can not ultimately determine the right of any person to hold an office—they are only *prima facie* correct, throwing on any one who contests an office by a regular judicial proceeding the burden of proving that he had received a majority of the legal vote cast; and ample provision is made by our statute law for thus judicially contesting the right to hold any office conferred by the popular suffrage. See chapter 103, acts, 1882, p. 304 (Warth's Amended Code, ch. 6, p. 60)." *Poteet v. Commissioners*, 30 W. Va. 58, 3 S. E. 97, 107.

It is the ministerial duty of the board of canvassers to make a careful record of every ballot rejected by it, with the reasons therefor, and the identification of such ballot as a part of such record. *Dunlevy v. County Court*, 47 W. Va. 513, 35 S. E. 956.

In West Virginia Prior to 1891.

Power of Commissioners in Canvassing Returns.—If no ballots are returned, or if those returned are shown to be forged or fraudulent, and not the true ballots cast at the election, the commissioners have the power to reject and refuse to count them, notwithstanding the returns are "duly and legally certified;" as the county court commissioners are officers duly elected by the people, and in passing upon the

result of an election act in a quasi judicial capacity. *Fleming v. Commissioners*, 31 W. Va. 608, 8 S. E. 267; *Brazie v. Fayette County Comm'rs*, 25 W. Va. 213, 221; *Chenoweth v. Commissioners*, 26 W. Va. 230. See ante, "Under the West Virginia Law," VII, C, 2, b.

Right to Recount.—A candidate asking a recount of ballots need not assign errors in the first count, or give any reason for a recount. *Hebb v. Cayton*, 45 W. Va. 578, 32 S. E. 187.

Where ballots once recounted as between candidates for one office are again sealed up, that will not debar a candidate for another office from demanding a recount as to the office for which he was a candidate. *Hebb v. Cayton*, 45 W. Va. 578, 32 S. E. 187.

The county commissioners, in reviewing the returns of an election after they have opened the sealed packages returned by the district commissioners, recounted them upon demand of an opposing candidate and again sealed up the ballots, can not under the provisions of § 21, ch. 153, acts, 1882, W. Va., upon a subsequent demand of either of the said opposing candidates reopen the packages and recount the ballots the second time. *Chenoweth v. Commissioners*, 26 W. Va. 230.

"Though a candidate has no right to a second recount, surely a member of the board has, in order to finally make up his mind." *Dent v. Commissioners*, 45 W. Va. 750, 32 S. E. 250.

D. CANVASS OF RETURNS.

See ante, "Nature of," VII, C, 2; "Canvass of Ballots," XII, C; post, "Mandamus," XIII, D, 5.

Powers and Duties of Commissioners—Election Returns—Mandamus.—The powers and duties of commissioners of election, as prescribed by §§ 133, 134, 135, 136, 137 of the Virginia Code are to ascertain the results of elections from the face of the returns, if regular, and if not regular, to summon any clerks, judges, etc., deemed necessary

to investigate any returns which require it and cause the irregularity to be corrected as required by the statute, and then to ascertain the result from the correct returns. When the result has thus been ascertained and signed by the required number of commissioners, and attested by the clerk, and had an abstract of the votes cast annexed thereto, the duties of the commissioners are completed. And when returns have been made and the result ascertained in the manner thus prescribed by law the commissioners can not go behind the returns and throw out a precinct. If they do this, without authority, the clerk may be compelled by mandamus, to issue the certificate of election to the person elected by the regular vote. *McKinney v. Peers*, 91 Va. 684, 22 S. E. 506. See post, "Mandamus," XIII, D, 5.

Power of Canvassers to Go Behind Returns.—The case of *Brazie v. Fayette County Comm'rs*, 25 W. Va. 213, holds that canvassers have no power to go behind the returns to inquire as to fraud or illegality in the election; but that their duty is to pass upon the return as certified to them from the several voting precincts of the county which they are required to review. It was further held in this case that the 26th section of ch. 155, acts, 1882, has no application to the duties of commissioners as canvassers of an election, the powers therein conferred apply only to the final judges of election in case of contested elections.

The acts of said county commissioners must be based on the returns as certified to them from the several voting places of the county. *Brazie v. Fayette County Comm'rs*, 25 W. Va. 213, 214.

As to the power of the county court to go behind the returns in an election for removal of a county seat, see the title COUNTIES, vol. 3, p. 654.

Relocation of County Seat.—As to canvass of returns in an election for

removal of a county seat, see the title COUNTIES, vol. 3, p. 652.

E. INSPECTION OF POLL BOOKS.

Poll books of a special election under a special act of the legislature deposited in the office of the clerk of a county court are public papers or documents under §§ 3, 5, ch. 117, W. Va. Code, and the clerk is under duty to allow inspection of them under proper circumstances to a person interested in them, though such special act be unconstitutional. *Payne v. Staunton*, 55 W. Va. 202, 46 S. E. 927.

Mandamus does lie to compel a clerk, who is the custodian of the poll books after an election, to permit a party interested to inspect them, and to take therefrom, at and within a reasonable time, in the presence of the clerk, memoranda and notes such as are proper to be made, as declared in *Gleaves v. Terry*, 93 Va. 491, 25 S. E. 552, and this court has jurisdiction to award such mandamus. *Keller v. Stone*, 96 Va. 667, 32 S. E. 454. See also, ante, "Right to Inspection and Copies of Registration Books," V, G; "Record of Proceedings," VII, D.

F. DECLARATION OF RESULT.

See the title COUNTIES, vol. 3, pp. 652, 654.

Notice of Meeting to Declare Result.—See the title COUNTIES, vol. 3, p. 653.

Election Gives the Title.—The election gives the right to the office, and the decision of the tribunal fixed by law to try the contest simply declares the title upon the evidence, but does not create or confer it. *Goff v. Wilson*, 32 W. Va. 393, 9 S. E. 26, 28, citing *Bier v. Gorrell*, 30 W. Va. 3, 3 S. E. 30.

Election for Governor.—"The declaration of the result of the election for governor, under the provisions of our constitution, is essential to the right to exercise the duties of that office; and, as the constitution has conferred the power to make this decla-

ration upon the legislative department, that power is exclusive, and beyond the control or interference of the courts in any manner. To dispense with this declaration would be to nullify an express requirement of the constitution. This we are not at liberty to do." *Goff v. Wilson*, 32 W. Va. 393, 9 S. E. 26, 31. See also, *Carr v. Wilson*, 32 W. Va. 419, 9 S. E. 31.

When neither the speaker of the house of delegates, nor the joint assembly of both houses of the legislature, convened under § 3 of article 7 of the constitution of this state for the purpose of opening and publishing the returns of the election for the office of governor, does in fact open and publish the returns in respect to said office, or declare any person elected to that office, this court can not by mandamus adjudge the person who appears from the returns certified to the speaker of the house to have received the highest number of votes for that office to be the governor, and compel the person who was the governor during the preceding term to deliver the office and its insignia to him. In the opinion the court said: "It seems to me * * * that the joint assembly, sitting for the purpose of opening and publishing, or hearing opened and published, the returns of the election for governor and other executive officers, acted in a quasi judicial capacity, at least in respect to determining the genuineness of the certificates, and that it was not bound to publish the returns or declare the result until it had before it all the genuine returns, or exhausted all the means in its power to obtain them without being able to do so; and it having a quasi judicial or discretionary authority in respect to these matters, and not having finally refused to exercise that authority, this court can not by mandamus, if it could do so in any proceeding, take jurisdiction, either for the purpose of determining those matters for itself, or determining the result

of the election." *Goff v. Wilson*, 32 W. Va. 393, 9 S. E. 26, 30, citing *Brazie v. Commissioners*, 25 W. Va. 213.

"It is conceded, and it is unquestionably true that, if the petitioner is entitled to the office of governor, he may obtain it by mandamus." *Goff v. Wilson*, 32 W. Va. 393, 9 S. E. 26, 28, citing *Dew v. Judges*, 3 Hen. & M. 1; *Bridges v. Shallcross*, 6 W. Va. 562.

Where persons are voted for for governor at a regular election for the office of governor, but there has been no declaration of the result of the election by either the speaker of the house of delegates or the joint assembly of the two branches of the legislature, and a contest for that office is pending before such joint assembly, and the declaration of the result has been by such assembly postponed until the decision of such contest, that does not create such a condition of things, within the meaning of § 16, art. 7, of the constitution, as will entitle the president of the senate to act as governor. *Carr v. Wilson*, 32 W. Va. 419, 9 S. E. 31.

In such case the governor elected for the next preceding term has the right and is under duty, by virtue of § 6, art. 4, of the constitution, to continue to discharge the duties of his office until a successor shall be declared elected. *Carr v. Wilson*, 32 W. Va. 419, 9 S. E. 31.

The act of taking the official oath prescribed for governor by a candidate voted for for governor at such election, before a declaration of his election, under § 3, art. 7, of the constitution, would not entitle him to take office; and his inability to take office for want of such declaration of election, whether he attempts to qualify or not, would not entitle the president of the senate to act as governor. *Carr v. Wilson*, 32 W. Va. 419, 9 S. E. 31.

A declaration of election to the office of governor, as provided for by § 3, art. 7, of the constitution, is in-

dispensable to perfect and consummate the title to that office. *Carr v. Wilson*, 32 W. Va. 419, 9 S. E. 31, 32.

The provisions of the constitution limiting the term of office of governor to four years, and making him ineligible to re-election, do not prevent him from continuing to discharge the duties of his office after his term, under § 6, art. 4, of the constitution, in cases where the president of the senate can not act as governor, under § 16, art. 7, of the constitution. *Carr v. Wilson*, 32 W. Va. 419, 9 S. E. 31, 32.

G. CERTIFICATES.

See also, post, "In General," XIII, A.

Although the whole matter of an election may be reopened by the tribunal which may try a contest for an office, yet the person really elected has the right to have the certificate of election given to him by the canvassers, or proper evidence of the correct number of votes he received, to be presented to the officer having the right and by law required to give the certificate. *Alderson v. Comm'rs*, 31 W. Va. 633, 8 S. E. 274.

Mandamus to Compel Issue.—In the case of *Burke v. Monroe County*, 4 W. Va. 371, where the board of supervisors set aside an election for county officers, it is said in the opinion: "The circuit court held the election valid, and the petitioners duly elected as appeared by the said returns, they having the highest number of votes respectively, and that they were in law entitled to certificates of election accordingly, and also to a mandamus to compel the said board to issue such certificates to the parties respectively entitled. And in this ruling the circuit court was unquestionably right, because it was a proper case for the supervision and control of an inferior tribunal by the said circuit court, and necessary in the case to secure the rights of the parties no less than of the people."

As to the certificates of result of the

vote in an election for removal of a county seat, see the title COUNTIES, vol. 3, p. 653.

H. EFFECT OF INELIGIBILITY OF CANDIDATE.

Though there is a diversity of opinion, as to whether, when the candidate receiving the highest number of votes is ineligible for a cause known to the voters, or which they were bound to know, such as his having held or actually holding a public office, which rendered him ineligible to the office, which he seeks, the votes cast for him are to be regarded as if not cast at all, and the candidate, who is eligible, who gets the highest number of votes should or should not be declared elected; yet in this country there is no question, but that when the candidate receiving the largest number of votes is ineligible for a cause unknown to the voters and which they were not bound to know, such as infancy, want of naturalization and the like, the election must be pronounced a failure and there must be another election. *Dryden v. Swinburne*, 20 W. Va. 89, 137.

Election of Alien.—If an alien and a citizen, eligible to office are rival candidates for the same office, and the alien receives a majority of the votes cast, though such alien be declared incompetent by the court in the contest between them, the citizen having received only a minority of the votes can not be declared elected to the office; but it must be held to be vacant. *Dryden v. Swinburne*, 20 W. Va. 89. See *State v. Matthews*, 44 W. Va. 372, 29 S. E. 994.

Disqualification of Elected Officer—Effect as to His Defeated Opponent.

Where two parties are opposing candidates for the office of sheriff, and the one receiving the highest number of votes disqualifies himself from holding the same by contracting to farm or sell the office or a portion thereof, such fact does not confer any interest in the office on the party re-

ceiving the minority of the votes cast at the election. *State v. Matthews*, 44 W. Va. 372, 29 S. E. 994.

XIII. Contest of Election.

A. IN GENERAL.

Party Elected—Entitled to Hold Office during a Contest.—The party who has been elected to a county office and received a certificate of his election from the proper officer and has legally qualified is entitled to hold the office pending a contest for the same by another party. *Swinburn v. Smith*, 15 W. Va. 483. See ante, "Certificates," XII, G.

Speedy Ascertainment of Result.—It is the evident intention of § 11, ch. 6, W. Va. Code, 1868, that every contested election provided for therein should be tried within a comparatively short space of time; and that it was not intended to permit an incumbent to hold his office beyond the limit of its constitutional term and thus enable him to carry on a protracted and dilatory contest with the person certified to have been elected to that office. *Loomis v. Jackson*, 6 W. Va. 613. See also, ante, "In General," XII, A.

County Court—Statute Directory.—The directions of ch. 144, acts, 1874, p. 159, providing that county elections shall be subject to inquiry by county courts on petition of fifteen qualified voters, to which two shall take and subscribe an oath, are, as to form, merely directory, as it is not intimated that they must be complied with, else all will be vitiated, or no further proceedings can be had. *Nelms v. Vaughan*, 84 Va. 696, 5 S. E. 704.

When Legal Election Should Not Be Set Aside.—The legislature did not intend that a legal election should be set aside upon the ground of illegal votes received, or legal votes rejected, or any ambiguity in the ballots as to the designation of the person voted for or of the office intended. *Loomis v. Jackson*, 6 W. Va. 613. 615.

B. WHO MAY CONTEST.

See also, post, "Quo Warranto," XIII, D, 2; "Certiorari," XIII, D, 6, c.

Qualified Voters.—"In the case of *West v. Ferguson*, 16 Gratt. 270, it was held, by this court, that the jurisdiction of the county court, under the act of 1852, §§ 9-10, was not confined to cases of contest between competitors. Judge Robertson, delivering the opinion of the whole court, said: 'These proceedings are novel and peculiar in their character, and seem designed rather for the purpose of ascertaining, on behalf of the public, who has been duly elected, than to enable the candidates to litigate, on their own behalf, the question of right to an office. No contest can be commenced unless complaint of an undue election or false return is made by fifteen or more of the qualified voters, two of whom must make oath or affirmation to the truth of the facts stated in the complaint. This must be filed in the clerk's office within ten days after the election, and the party whose election is contested must, within ten days after the complaint, be served with a copy of it. The defeated candidate, who is the only other party that can be supposed to have any personal interest in the matter, can not, at his own pleasure, enter upon the contest, and it may be commenced and prosecuted without his knowledge or against his will. He is not a necessary party, in any stage of the proceedings. Indeed, the complaint may be made and the election set aside where there has been no candidate, except the one whose election is contested.' These remarks were not obiter, as maintained by the counsel for the petitioners here. They contained the very gist of the ground on which the court put its decision, that costs could not be given to either party in such a proceeding." *Ex parte Ellyson*, 20 Gratt. 10, 27.

"The statute (§ 160, Code of Virginia, 1887) is mandatory and peremptory that 'the returns of elections of

county, corporation and district officers shall be subject to the inquiry, determination and judgment of the court of the county or corporation wherein the election was held, upon the complaint of fifteen or more qualified voters of such county, corporation or district of an undue election or false returns. The court shall proceed to determine the contest without a jury, on the testimony, etc. In judging of such election or return, the court shall proceed on the merits thereof, and decide the same according to the constitution and laws.' A statute, *pro bono publico*, ought to be construed so that it may, as far as possible, attain the end proposed." *Richardson v. Farrar*, 88 Va. 760, 769, 15 S. E. 117.

This statute commands that returns of county elections be, upon complaint by fifteen or more voters of undue election and false return, and counter complaint, if any be filed, subject to the inquiry, determination and judgment of the county court, which shall proceed without a jury and on the testimony to decide the same upon the merits according to the constitution and the laws. In such a contest, the quashing and dismissal of a joint complaint of undue election and false return against three at the same election, on the ground of misjoinder of defendants; held, error because the statute does not limit the contest to one, and mandamus lies to compel the court to proceed to hear and determine the contest. *Richardson v. Farrar*, 88 Va. 760, 15 S. E. 117.

As to who may contest an election for removal of a county seat, see the title COUNTIES, vol. 3, p. 654.

C. JURISDICTION.

A constitutional convention, lawfully convened, does not derive its powers from the legislature, but from the people. The powers of such a convention are in the nature of sovereign powers. The legislature can neither limit nor restrict the exercise of their pow-

ers. The legality of the election for officers held on the 22d day of August, 1872, after the ratifications of the new constitution and schedule, is not to be called in question by any court created or continued by the provisions of that constitution. Courts sit to expound the laws made by their government, and not to declare that government itself an usurpation. *Loomis v. Jackson*, 6 W. Va. 613, 615. See the title CONSTITUTIONAL LAW, vol. 3, p. 147.

Election Contests Decided by Special Courts—Manner of Providing.—Under ch. 6, § 13, W. Va. Code, it is provided that when the election of the secretary of state, treasurer, auditor, attorney general, or a judge of the supreme court of appeals, or a circuit court, is contested, the case shall be heard and decided by a special court consisting of three persons, one of whom shall be appointed by the person declared elected, another by the contestant, and the third by the governor, which court shall proceed to hear and determine the case and certify their decision to the governor; it was held that, in order to authorize the governor to act in such a case, it is necessary that the contestant should file with him a petition, with copies of his grounds of contest, notice, and specifications, and such petition must remain in the governor's office as an evidence upon which to justify his official action. *Loomis v. Jackson*, 6 W. Va. 613.

Authority of Special Court—What May Be Required of It.—Under § 13, ch. 6, W. Va. Code, providing that cases of contested elections of a circuit court judge and other officers, shall be tried by a special court, the manner of forming which is therein prescribed, each court has the right to determine all questions touching the regularity and legality of the acts of the officers conducting the election and making and certifying the returns thereof, and it may be, in a proper case made, to re-examine all, or any part of the election returns which re-

quire it, and if error be found therein, to correct them according to the law and the truth. *Loomis v. Jackson*, 6 W. Va. 613.

Jurisdiction of County and Corporation Courts.—Under Session Acts, 1870, p. 97, § 69, relating to general elections, the county or corporation courts have jurisdiction to vacate an illegal election, though but one person was voted for at such election. *Ex parte Ellyson*, 20 Gratt. 10. It was held, in this case, that, although a person voted for at an election, having been declared elected by the commissioners, and their report certified by the clerk, had entered upon the discharge of the duties of his office, the court might vacate the election, and direct another election to be held. See *West v. Ferguson*, 16 Gratt. 270; *Mayo v. James*, 12 Gratt. 17.

Effect of Failure of Contestants to Subscribe an Oath.—Under the acts of 1874, ch. 144, p. 159, which provided that the returns of county elections should be subject to the inquiry of the county court upon the complaint of fifteen qualified voters, to which two must take and subscribe an oath, the omission to subscribe, as required, does not deprive the court of jurisdiction; such provision not being declared essential to the proceedings by the statute. *Nelms v. Vaughan*, 84 Va. 696, 5 S. E. 704.

Jurisdiction of Supreme Court—Requirements of Constitution.—The record showing that the office of clerk of the circuit court of Kanawha county is of greater value than one hundred dollars, the supreme court of appeals has appellate jurisdiction under § 3, art. 8, of the constitution of West Virginia, to review by writ of error the decision of the circuit courts in the case of contested election to that office. *Dryden v. Swinburn*, 15 W. Va. 234. See post, "Error," XIII, D, 6, b.

Circuit and County Courts.—The notice in the case of *Dryden v. Swinburn*, 15 W. Va. 234, was sworn to and served

on October 19, 1878. It was docketed on November 1, 1878, the October term of the county court having continued to that time. The court dismissed the notice, holding it had no jurisdiction to try it. A writ of certiorari was issued on November 5, 1878, by order of the circuit court made on a petition therefor by J. D., sworn to and accompanied by a copy of the record, without any previous notice of the application for the writ being given to T. S., and without any rule to show cause against its being granted. But T. S. was by order of the court summoned to answer it, when the county court had responded to the certiorari. On the hearing, the circuit court reversed, set aside and annulled the judgment of the county court and retained the cause for trial in the circuit court. Held, the court had jurisdiction of the case, though the notice was returnable to a day of the court during its October term, the 32d section of said act, chapter 118 of acts of 1872-3, not requiring the notice to be returnable to a day during the November term of the court or the next term held after November; this section only directing when the case was to be tried, and not when it should be docketed. The circuit court did not err in reversing, setting aside and annulling the order of the county court dismissing the notice as one over which they had no jurisdiction. The circuit court did err in retaining the cause for trial, as it has no right to try *de novo* any case brought before it by certiorari to the judgment of a county court, the 22d section of chapter 17 of acts of 1872-3, directing the retention of cases in the circuit court applying only to cases brought before it by appeal, writ of error or supersedeas. The circuit court ought to have annulled the order of the county court and remanded the cause to the county court to be proceeded with and tried. When the cause is remanded to the county court for further proceeding, as it should be,

they have a right to try and decide the same, though such trial be necessarily had after the time limited for the qualifying of the clerk; the direction contained in the 32d section of said act not to continue the case beyond that time not preventing the plaintiff from having such trial. Until the first day of January, 1881, the county courts could rightfully exercise the limited jurisdiction prescribed by the 24th section of the amendment of article 8 of the constitution of West Virginia, at the regular terms of said courts, in accordance with the laws in force. The limited jurisdiction remaining vested in said courts, after the adoption of said amendment, on the 12th day of October, 1880, included "all matters of probate, the appointment and qualification of personal representatives, guardians, curators and committees, and the settlement of their accounts, and all matters relating to apprentices; also, the superintendence and administration of the internal police and fiscal affairs of their counties, including the establishment and regulation of roads, ways, bridges, public landings, ferries and mills, with authority to lay and disburse the county levies; to grant licenses, for the sale of intoxicating liquors, in certain cases, and in all cases of contest, to judge of the election, qualification and returns of their own members, and of all county and district officers." *Fowler v. Thompson*, 22 W. Va. 106, 107.

In the case of *Fowler v. Thompson*, 22 W. Va. 106, which was a contest for the office of prosecuting attorney, the contestant having within the manner prescribed by law given notice to the contestee of his intention to contest the election of defendant to the office in question, counter notice also having been legally served, both parties appeared before the county court at the November term, 1880, and on their several motions the said notices were docketed in the court; no other term of the court being held for more than

a year when the county commissioners held their first term, at which no proceedings in this contest were had. At the March term the court refused to proceed with the trial of the case on the ground that, at the said November term the county court had ceased to exist, and for that cause no contest was pending which could be tried. The circuit court having upon writ of certiorari reversed the judgment of the county court and remanded the cause to be further proceeded in according to law, its decision was sustained by the supreme court.

City Council — Contest — Hastings Court—Sections 160 and 1030 of the Virginia Code—Officers.—The council of the city of Richmond, under the authority of § 1030 of the Virginia Code, is the judge of the election, qualification and return of its members, and also has the power to order elections to fill all vacancies in that body. The hustings court of said city has no jurisdiction to decide a contest over an election of a member of that body, even though the contestant alleges that he can not obtain justice before it. Members of the city council are, in a certain sense, officers, but the city officers referred to in § 160 of the Code are such as correspond to the officers of the respective counties and districts of the state, such as sheriffs, treasurers, clerks and attorneys for the commonwealth. *Mitchell v. Witt*, 98 Va. 459, 36 S. E. 528.

Board of Supervisors.—The 4th section of the 7th article of the constitution of West Virginia provides, that boards of supervisors "shall be the judges of the election, qualifications and returns of their own members, and of all county and township officers." *Board of Supervisors v. Minturn*, 4 W. Va. 300.

By the provisions of chapter 3, Code of West Virginia, it was the intention of the legislature to create a judicial tribunal in conferring upon the boards of supervisors the power to call and

examine witnesses, to compel the production of papers, to open, inspect, examine and count the ballots, and to make all orders deemed necessary to enable them to discharge these duties; and that their determinations upon that subject should be entitled to the force and validity of a judgment, until impeached on the grounds of mistake, corruption or fraud, precisely averred and clearly proved. The intention was to avoid the necessity of resorting to contested elections of judges and state officers except in cases of mistake, corruption or fraud, by providing the people with a tribunal essentially and peculiarly their own, always accessible to them. *Loomis v. Jackson*, 6 W. Va. 613, 615. See ante, "Under the West Virginia Law," VII, C, 2, b.

Jurisdiction of West Virginia Legislature.—"The constitution divides the government into three great departments, legislative, executive, and judicial, and forbids either to exercise the functions of another. It provides that the returns as to the action for governor shall go before the two houses of the legislature, in order that their result may be declared. It provides that a contest as to the governorship shall be tried by a joint assembly of those two houses. Their jurisdiction is exclusive in the exercise of this political function." *Carr v. Wilson*, 32 W. Va. 419, 9 S. E. 31, 34. See also, *Goff v. Wilson*, 32 W. Va. 393, 9 S. E. 26.

D. PROCEDURE.

1. Statutory Contest.

a. In General.

In the Nature of a Quo Warranto.—Referring to § 1, ch. 6, amended Code, the court says: "This statute must be treated, as it is in fact, as a substitute for an information in the nature of quo warranto. *Halstead v. Rader*, 27 W. Va. 806. See also, *State v. Matthews*, 44 W. Va. 372, 29 S. E. 994.

Fraud in Election—Manner of Obtaining Relief.—If any candidate claims

that an election was fraudulent or in any wise illegal, or that ballots were incorrectly counted against him, he must get relief by contest as provided for in the statute. *Brazie v. Fayette County Commissioners*, 25 W. Va. 213. See also, *Brown v. Randolph County Court*, 45 W. Va. 827, 32 S. E. 165.

Election Contest—Statute—Not Repugnant to Constitutional Amendment.—Sections 30, 31, 32, 33, of the acts of Legislature, 1872-3, prescribed the time and manner in which the election of county and district officers might be contested were held not repugnant to the provisions of the amendment, article 8 of the constitution of West Virginia and continued in force and effect after its adoption. *Fowler v. Thompson*, 22 W. Va. 106.

b. Notice and Specifications.

(1) In General.

Meaning of Notice as Used in the Statute.—It is said in *Halstead v. Rader*, 27 W. Va. 806, 811, that the complaint called in the statute, § 9, ch. 109, W. Va. Code, 1868, a notice does not mean simply an informal paper such as is usually understood by the term notice; but it is in the nature of a complaint or information setting forth a cause of action as well as the commencement and foundation of an important legal proceeding. See *Dryden v. Swinburn*, 15 W. Va. 234, 235.

Giving of Notice—Requirements of Statute—Right of Amendment.—It is the manifest intent of the statute that a party proposing to contest the election of one who has been declared elected, shall, within a period of time precisely limited, give to him whose election he proposes to contest full information of the case upon which he will proceed to trial. This the contestant does by a notice and specification of the particular facts which constitute his case. And he is expressly authorized to amend his case from time to time, subject to the limitation prescribed, by giving additional notices

and specifications. The respondent may, within thirty days from the date of service of contestant's notice, serve a return notice, with specifications upon the contestant; and thus issues of fact are made up, and all the testimony is taken upon these issues, and afterwards a court is organized to try them, and as in other judicial controversies, the making up of the issues must precede the taking of testimony. *Harrison v. Lewis*, 6 W. Va. 713; *Loomis v. Jackson*, 6 W. Va. 613.

(2) Contents.

Mere General Allegations Are Insufficient.—Mere general allegations that the contestee was not elected, and that the return declaring him so is untrue, false and fraudulent, afford no information to the contestee of the defense he may be required to make. *Halstead v. Rader*, 27 W. Va. 806, 810.

A notice, which states as the sole ground of complaint, that the county court commissioners failed and refused to count the votes cast at a certain precinct, which were duly and legally certified by the commissioners who held the election at said precinct, and that if said votes had been counted, the contestant would have been elected to the disputed office is held insufficient and should have been quashed by the county court. *Halstead v. Rader*, 27 W. Va. 806.

"It is clear to my mind that a specification, within the meaning of the law, must precisely point out some particular act, fact, or matter, in which some error, mistake, fraud or unfairness of some kind is alleged to exist; and that a specification which merely alleges error in a general composite result, as, for example, that there is error in the result certified by the supervisors of a county, is too general and indefinite to answer the requirement of the statute. The result certified by the supervisors is, in its nature, composite. Its correctness depends, of necessity, upon the correctness of all and each of the

antecedent acts and transactions from which the result itself is deduced; and to establish its correctness, or demonstrate its falsity, would obviously require an examination into all such antecedent facts and transactions. Now the very purpose and object of a specification is to point out the particular fact or transaction to which error attaches, and to show what the error is." *Harrison v. Lewis*, 6 W. Va. 713, 726.

Must State Cause of Contest.—A notice which does not state the cause of contest at least in substance, is a nullity. *Loomis v. Jackson*, 6 W. Va. 613, 617; *Halstead v. Rader*, 27 W. Va. 806, 818.

Facts upon Which the Contest Is Founded.—A notice in a contested election case must set forth with reasonable certainty the facts on which the contest is founded; and they must be such that, if sustained by proof, they will make it the duty of the court, either to vacate the election or declare that another person than the contestee was duly elected. *Halstead v. Rader*, 27 W. Va. 806.

"It is in regard to the regulations concerning contested elections and ascertaining the results of elections, that the present inquiry immediately relates. In reference to the first of these, the statute provides: "A person intending to contest the election of another to any county or district office shall, within ten days after the result of the election is declared, give him notice in writing of such intention, and a list of the votes he will dispute, with the objections to each, and of the votes rejected for which he will contend. If the contestant objects to the legality of the election, or the qualification of the person returned as elected, the notice shall set forth the facts on which such objection is founded. * * * Each party shall append to his notice his affidavit that he verily believes the matters and things therein set forth to be true." Section 1, ch. 6, amended

Code. It is evident from the language employed in this statute, that the notice must set forth the facts on which the contest is founded, and that the facts so set forth must be sufficient, is sustained by proof, to make it the duty of the court either to declare the contestant elected to the office or to vacate the election. The object of the notice is not only to give the contestee notice of the grounds of the contest, but it must contain some direct and precise allegation of fact, so as to inform the contestee of the state of facts or matter he is required to meet. The mere general allegations that the contestee was not elected, and that the return declaring him so is untrue, false and fraudulent, afford no information to the contestee of the defense he may be required to make. The statute expressly requires, in the particular cases mentioned in it, that "the objections to each" vote disputed, and "the facts on which the objection is founded" shall be set forth. That such is the requirement of the statute, it seems to me there can be no question." *Halstead v. Rader*, 27 W. Va. 806.

"Section 30 of ch. 118, acts, 1872-3, declares: 'In all contested cases the county court shall be the judge of the election, qualification and returns of its own members, and of all county and district officers. Any person intending to contest the election of any officer enumerated above, shall within ten days after the result of such election is declared, give him notice in writing and a list of the votes he will dispute, with his objection to each, and of the votes rejected for which he will contend. If the contestant object to the legality of the election, or the qualification of the persons returned, the notice shall set forth the facts on which such objection is founded, etc.'" *Gorrell v. Bier*, 15 W. Va. 311, 319.

Unless the notice and specifications taken together disclose a state of facts which, if proven to be true, would enable a court to determine that the con-

testant is entitled to the office, or that it is impossible to ascertain the true result of the election, it is insufficient and should, on motion, be quashed. *Harrison v. Lewis*, 6 W. Va. 713.

"The rule which requires the contestant to present such facts as that the court may see that the result of the election will be changed if the facts be proven, is a rule which is not only consistent with the principle of pleading, but one which is sustained by the authority of particular cases, well considered and solemnly adjudicated." *Harrison v. Lewis*, 6 W. Va. 713. It was therefore held, in this case, that the notice and specification taken together did not disclose such state of facts as required, hence it was insufficient and should on motion be quashed. See *Halstead v. Rader*, 27 W. Va. 806; *Loomis v. Jackson*, 6 W. Va. 613.

Irregularities, etc., in Elections Presumed to Have Been Corrected by Supervisors—Effect.—All errors, irregularities and illegalities committed at the election, or existing at the time of the examination of the returns by the board of supervisors as provided for by statute, must in absence of averments and proof to the contrary, be taken and held to have been corrected by such board. From this it follows that any specification which alleges errors, irregularities and illegalities or misconduct on the part of the officers, or other persons conducting the elections, committed before the action of the board of supervisors was had thereon must be held insufficient, unless such errors are further alleged to have been carried into and formed a part of the election as certified by the board of supervisors. *Loomis v. Jackson*, 6 W. Va. 613, 616.

Number of Illegal Votes and Names of Parties Who Cast Them.—By act of 1872-3 (W. Va.), ch. 118, it is necessary to set forth in the notice, not only the number of votes alleged to be illegal, but also the names of the parties who cast them. See *Dryden v.*

Swinburn, 15 W. Va. 234. See also, supporting the first statement. Loomis v. Jackson, 6 W. Va. 613, 676.

Objections to Illegal Votes.—It is also necessary under the West Virginia statute, to state the objections to votes alleged to have been illegally received or rejected. *Dryden v. Swinburn*, 15 W. Va. 234, 263; *Halstead v. Rader*, 27 W. Va. 806.

"The statute requires the contestant, if he objects to the rejection of a single vote, to state his objection; that is, as I understand it, the grounds or facts on which he objects to the action of the commissioners in rejecting said vote." *Halstead v. Rader*, 27 W. Va. 806.

Where Total Vote of Precinct Is Rejected.—Where the entire vote of a precinct is wrongfully rejected, it is not necessary to the notice to give a list of the votes and the objections to each, but it is essential that it should name the precinct, the votes of which were rejected, and objections to such rejection. *Halstead v. Rader*, 27 W. Va. 806, 809.

Facts Showing the Disqualification.—If the ground of contest is the disqualification of the contestee to hold office, the notice must state facts showing the disqualification. *Halstead v. Rader*, 27 W. Va. 806.

Want of Qualification in the Incumbent—Facts Required in Notice.—When the ground for contesting an election was only the want of qualification to hold the office by the party returned as elected, it was held unnecessary to furnish with the notice a list of votes to be disputed, or to state facts showing that the person with the notice was held entitled to the office; but it was held, sufficient that the notice should show that the contestant was a candidate for the office at the election, and set forth the facts on which he based his objections to his opponent holding the office. *Dryden v. Swinburn*, 15 W. Va. 234, 20 W. Va. 89.

"In the case of *Dryden v. Swinburn*, this court substantially held, that, where the ground of the contest was only the want of qualification to hold the office by the party returned as elected, it is sufficient that the notice should show that the person giving the notice was a candidate for the office at the election, and set forth the facts on which he based his objections to his opponent holding the office. Of course, to make the notice good, the facts set forth must be sufficient, if sustained by proof, to render it the duty of the court either to vacate the election, or to declare that another person than the one returned was duly elected." *Gorrell v. Bier*, 15 W. Va. 311, 319.

"In *Dryden v. Swinburn*, 15 W. Va. 234, this court decided that, in a case in which the contest was the want of qualification in the person declared elected to hold office, it was only necessary to set forth the facts in the notice which showed such disqualification, and that the statute in such case did not require the notice to show that the contestant was entitled to the office. In this case, it is also held, that if the contestant had based his contest on the ground that illegal votes had been received or rejected, then it would have been essential to make the notice good that it should give a list of such votes with the objections to each vote. *Dryden v. Swinburn*, 15 W. Va. 263. It seems to me this is a very reasonable interpretation of the statute and not at all in conflict with the principles hereinbefore announced. It is also clear that, if the notice in such case must state the objection to each vote so improperly received or rejected, it is equally essential, where the contest is founded upon the rejection of all the votes given at a particular precinct, that the notice should set forth the facts which show that the votes given at such precinct were improperly rejected. If it is required to state the objection for the rejection of each single vote in the one case, it is equally,

if not more necessary, that the notice should state the objections to the rejection of all the votes at the precinct in the other. In the latter case, however, I do not think it essential that the notice should give a list of the votes and the objections to each, but it is essential that it should name the precinct the votes of which were rejected and the objections which the contestant alleges to such rejection. And as in such case the contest, being based on the rejection of votes claimed to be legal, and not as in *Dryden v. Swinburn* on the disqualification of the contestee, I think the notice should also show that the contestant, if the facts stated are proved, would be entitled to the office. Otherwise the contest would be useless; for the contestee being qualified to hold the office, the contestant could have no complaint unless he was entitled to it. Any contest which would not give the office to another would leave the contestee in the office; and therefore a contest, which did not allege the illegality of the election, the disqualification of the contestee or the right of another to the office would be a mere farce." *Halstead v. Rader*, 27 W. Va. 806.

Qualifications of Contestant.—A notice of contest as to a municipal office which shows that the contestant was the opposing candidate for such office is not fatally defective in not showing that the contestant had the requisite statutory qualifications. The statute, which is § 1, ch. 6, Code of 1891, relating to contests for county and district offices, makes this a matter of defense on the part of the contestee. *Cushwa v. Lamar*, 45 W. Va. 326, 32 S. E. 10.

"Judge Green, in the case of *Dryden v. Swinburn*, 15 W. Va. 234, and Judge Snyder, in the case of *Halstead v. Rader*, 27 W. Va. 806, both intimate that in a contest of this character the notice should show that the contestant, if successful, is entitled to the office.

In what manner, or to what extent, neither of the judges show, but leave it to be inferred that the statutory qualifications necessary to entitle the contestant to hold the office should be explicitly set forth. Turning to *McCrary on Elections* (§ 431), we find the law stated to be, as a general rule, 'that statutes provided for contesting elections are to be liberally construed, to the end that the will of the people in the choice of public officers may not be defeated by any merely formal or technical objections;' and in § 434, 'where the statute provides that the election of a public officer may be contested by "any candidate or elector," the person instituting such contest must aver that he is an elector, or he was a candidate for the office in question.' In *Paine on Elections* (§ 829) the law is stated to be: 'It is not necessary to aver in a complaint or notice of contest that the relator or contestant possessed the requisite qualifications for the office. That is to be presumed until the contrary is averred and proved by the defendant.' *People v. Ryder*, 16 Barb. 370. In 6 Am. & Eng. Ency. Law, 405, the law is said to be, 'The statement of contestant's right to make the contest should appear, but it is not necessary to state that he was eligible where the notice shows he was a candidate, although this might be required in an information,' referring to *Ledbetter v. Hall*, 62 Mo. 422, and *Rounds v. Smart*, 71 Me. 380. These decisions are to the effect that, unless the statute so requires, it is not necessary for the notice to contain averments of the contestant's eligibility to the office." *Cushwa v. Lamar*, 45 W. Va. 326, 32 S. E. 10.

(3) Time of Giving.

See also, post, "Amendment and New Notices," XIII, D, 1, b, (4).

"Our statute authorizes an additional notice giving specifications of new facts within ten days after the discovery of such facts. Section 2, ch.

6, Amd. Code. *Halstead v. Rader*, 27 W. Va. 806.

By § 4, ch. 6, W. Va. Code, it is expressly declared that: "In contests respecting seats in the legislature if new facts be discovered by either party after he has given notice as aforesaid, he may give additional notice or notices to his adversary with specifications as above prescribed." *Loomis v. Jackson*, 6 W. Va. 613.

A party who desires to contest the election of a judge of a circuit court, is required, by the 11th section of chapter 6 of the West Virginia Code, to give notice, with specifications, to the party whose right is contested within sixty days next after the election. The return notice of respondent must be given to the contestant within thirty days after the service of his notice upon respondent; and all the depositions taken must be concluded within forty days after the service of the return notice. *Loomis v. Jackson*, 6 W. Va. 613.

In a judicial contest, the contestant in order to ascertain and collect the facts of the case, may postpone the service of his notice of contest until the sixtieth day after the election, and in like manner and for a similar reason, the respondent may delay the service of the return notice until the thirtieth day thereafter. *Loomis v. Jackson*, 6 W. Va. 613, 614.

As new facts or the clue to discovery of them may be for the first time disclosed by the return notice, new notices with additional specification of new facts discovered after the service of the original notice and specification, and after the expiration of the sixty days allowed, may be given by the contestant within the forty days allowed for the taking of depositions, subject always to the limitation that reasonable notice of the taking of depositions shall be given to the adverse party as required under §§ 5, 8, ch. 6, W. Va. Code, 1868; *Loomis v. Jackson*, 6 W. Va. 613.

(4) Amendment and New Notices.

See also, ante, "Time of Giving," XIII, D, 1, b, (3).

A notice which does not state the cause of action, being a nullity can not be the subject of amendment. *Loomis v. Jackson*, 6 W. Va. 613, 617; *Halstead v. Rader*, 27 W. Va. 806, 818.

Additional Notice—New Facts—Requirements.—In the case of a contested election if the contestant gives an additional notice specifying new facts, it is essential that it appear in the notice that such facts are new and that they were discovered after service of the original notice, and that they could not have been discovered by the use of such diligence before service of the original notice, otherwise the additional notice is defective. *Harrison v. Lewis*, 6 W. Va. 713; *Loomis v. Jackson*, 6 W. Va. 613.

Amendment of Notice—Two Methods.—In the trial of contested elections, two methods of amendment to the notices required by our statute are permissible: First, the statutory method, which is always based upon new facts discovered after the original notice has been given; second, the method incident to common-law procedure. *Ralston v. Meyer*, 34 W. Va. 737, 12 S. E. 783.

It is further stated by the court in this case that fairness, purity, and freedom of elections are essential to free government, and the object of the judicial tribunal engaged in deciding upon a contested election is not so much to determine the private rights of the parties, as to decide whom the people have elected in that particular election, according to the very right of the case and the principles of justice; hence, at common law, amendments to the notice or petition are permitted only to further the ends of justice, and to promote a true and impartial decision, according to the evidence. *Ralston v. Meyer*, 34 W. Va. 737, 12 S. E. 783.

Permission to Amend Counter Notice Refused—Votes Rejected.—The

counter notice filed by a contestee in an election contest stated that A. and B. were not qualified voters, but had voted for the contestant; which latter had not challenged their qualification in his notice. At the trial the contestee asked leave to strike from his counter notice the names of A. and B., and the allegations concerning them. This was refused, and the court found from the evidence that A. and B. were not qualified voters, but that they had voted for the contestee. It was held, that leave to amend was properly refused, and that the court was justified in rejecting the votes of A. and B. *Ralston v. Meyer*, 34 W. Va. 737, 12 S. E. 783.

Amendment after Ten Days.—A notice, which states, as the sole ground of complaint, that the county court commissioners failed and refused to count the votes at a specified precinct, which were duly and legally certified by the commissioners holding the election at said precinct, and that if said votes had been counted, the contestant would have been duly elected to the disputed office, is insufficient, and it should have been quashed by the county board. Such a notice could not be amended after the expiration of ten days from the time the result of the election had been declared, if it could be amended at all. *Halstead v. Rader*, 27 W. Va. 806.

Amendment by Special Court.—The special court, authorized by ch. 6, § 13 of the Code of West Virginia, having no common-law jurisdiction, can not permit amendments of notices and specifications after the time has passed within which the parties themselves may correct omissions, and supply defects. *Loomis v. Jackson*, 6 W. Va. 613, 615.

c. Petition or Complaint.

See also, ante, "Notice and Specifications," XIII, D, 1, b.

To Whom Addressed—Requirements.—A petition, in a contest for the office

of judge should be addressed to the special court provided by statute to try such cases, and not to the governor of the state. It ought not to contain any prayer for relief beyond what is found in the authority of the court to afford. *Loomis v. Jackson*, 6 W. Va. 613, 615.

To invoke the authority vested in the governor by § 13, ch. 6, of the West Virginia Code, it is necessary that the contestant should file with the governor a petition, with copies of his grounds of contest, notice and specifications. Such petition must remain in the governor's office; without it he could have no evidence upon which to justify his official action. *Loomis v. Jackson*, 6 W. Va. 613, 615.

Allegations and Proofs.—The allegations and the proofs must agree. Therefore a contestant, either in his petition or notice of the ground of contest and specifications, must show directly what was the result of the election as declared by the returning officers and in what manner and to what extent the result will be affected by the correction of errors complained of in the specifications. *Loomis v. Jackson*, 6 W. Va. 613.

And unless it further appears upon the face of the petition, notice and specifications that the result of said election will be so changed by proof of said allegations, as to overcome the majority of the persons who have been declared duly elected, or to show that it is impossible to ascertain the true result, it will be the duty of the court, on motion, to quash the same. The petition in this case not containing such averments, the question did not arise upon the petition. *Loomis v. Jackson*, 6 W. Va. 613, 615.

Petition of Contestant Filed at the Trial—For What Purposes Allowed.

In an election contest the contestant may of right file a petition at the trial, but not for the purpose or to have the effect of curing defects in the notices

and specifications; and so far as the petition contains new allegations material to the case, they must be disregarded or such allegations should be stricken out. *Harrison v. Lewis*, 6 W. Va. 713.

Amendment of Petition.—"Mr. Paine, in his work on Elections (§ 840), thus defines this common-law right of amendment: 'Where a petition is defective in form or substance, it may be amended if the application be made at the earliest possible opportunity. Such an amendment is allowed at common law by virtue of the power which a court of record possesses to allow amendments in furtherance of public justice. When there is a charge of fraud, but no averment showing how the fraud would affect the result, the defect may be remedied by amendment. The inquiry involved in a contested election case is one which deeply concerns the public. The question is broader than the mere claim of an individual to the office in controversy. It is whether the popular will has been or is about to be defeated or thwarted by mistake or fraud. If, therefore, the statement of the grounds of contest lacks a clearness and distinctness of allegation, always desirable in judicial proceedings, it is not on that account peremptorily dismissed; an opportunity to amend should be afforded, to the end that the points in controversy may be developed, and the merits of the case determined. It may become the duty of the court, in the progress of the investigation, to protect the parties from surprise, and should material proof be offered, which reasonable diligence should not have anticipated, an opportunity should be afforded to meet it. The public interests imperatively require that the ultimate determination of the contest should in every instance, if possible, reach the very right of the case.'" *Ralston v. Meyer*, 34 W. Va. 737, 12 S. E. 783.

"To the same effect, see the recent work of Mr. McCrary on Elections, §

419. See also, same author, § 308. These principles have received the sanction of this court in the case of *Halstead v. Rader*, 27 W. Va. pp. 806, 809. This case (*Halstead v. Rader*) cites with approbation *Kneass' Case*, Brightly, Elect. Cas. 337. Upon turning to that case, reported 2 Pars. Eq. Cas. 553, we find a very clear recognition of the principle 'that amendments are reducible to no certain rules, but that each case must be left to the sound discretion of the court; and that the best principles seem to be that an amendment should or should not be permitted to be made, as would best tend to the furtherance of justice.' In the exercise of this sound discretion, the court should always have in view the vindication of the ballot and the elucidation of truth." *Ralston v. Meyer*, 34 W. Va. 737, 12 S. E. 783. See ante, "Amendment and New Notices," XIII, D, 1, b, (4).

Allegation of New Facts—To Cure Defects—When Allowed.—It was decided in the contested election case of *Harrison v. Lewis*, 6 W. Va. 713, 721, under W. Va. Code, 1868, ch. 6, § 13, where it is provided that such case shall be decided "according to law and the truth upon the petition, returns, and evidence to be submitted," that facts, new and material to the contestant's case could not be alleged upon the record and regarded by the court for the purpose of curing any defects which may be inherent in the case made by the contestant in his notice, or notices and specifications, which were served upon the respondent within the time prescribed by law.

It was however held, in this same case that the contestant might file his petition before the hearing is proceeded with, as of right; but not after the trial of the case had begun.

Waiver by Filing Counter Complaint.—The contestees, by filing a joint counter complaint, and allowing the contestants to incur expense in procuring depositions, waive their

right to move for a dismissal on the ground of misjoinder of the parties. *Richardson v. Farrar*, 88 Va. 760, 15 S. E. 117.

Where the complaint complies with the statutory requirements, and countercomplaint has been filed, dilatory defenses are held to have been waived. *Richardson v. Farrar*, 88 Va. 760, 15 S. E. 117.

Election for Removal of County Seat.—As to petition in an election for removal of a county seat, see the title COUNTIES, vol. 3, p. 650.

d. Costs.

County Court—Authority to Give Judgment for Costs—Statute.—In cases of contested elections before the county court, under acts of Virginia 1852, ch. 71, pp. 64, 65, the county court has no authority to give judgment for costs to either party. *West v. Ferguson*, 16 Gratt. 270. It was held, that this case could not be considered as a "motion," or an "action," or an "interlocutory order or proceeding," under the statute of 1852, where costs might be recovered. See also, *Roberts v. Paul*, 50 W. Va. 528, 40 S. E. 470.

2. Quo Warranto.

By common law, contests in regard to offices were always determinable by quo warranto, which was in the nature of a criminal writ. This writ was afterwards superseded by proceedings upon an information in the nature of quo warranto, and this was applied to the mere purpose of trying the civil right to a franchise or office. *Halstead v. Rader*, 27 W. Va. 806. See ante, "In General," XIII, D, 1, a.

Usurpation of Office—Interested Party.—In the proceeding by way of an information in the nature of a writ of quo warranto instituted by the defeated candidate in election of sheriff, against the successful candidate, who had forfeited his right to hold office by contracting to sell or farm the office, and who continued to claim right thereto; the latter being claimed in

the information to have intruded into and usurped the office of sheriff of the county. Held, that such proceeding must be at the relation of some person interested, otherwise than as a citizen and taxpayer (which was not the case here), unless such proceeding is instituted at the instance of the attorney general or the prosecuting attorney of the county. *State v. Matthews*, 44 W. Va. 372, 29 S. E. 994.

3. Injunction.

"A court of equity will not interfere by an injunction to prevent the election officers or canvassing officers from doing their duty as required by the law, nor prevent them from canvassing votes in a certain way." 6 Amer. and Eng. Cyclop. Law, tit. Elections, p. 392, quoted in *Alderson v. Commissioners*, 32 W. Va. 640, 9 S. E. 868, 869.

"Equity disavows jurisdiction by the stringent process of injunction where other adequate remedy exists. High, Inj., § 28. Equity especially disavows a jurisdiction in matters pertaining to elections." *Alderson v. Commissioners*, 32 W. Va. 640, 9 S. E. 868, 871.

"Acts of public officers pertaining to the calling, conducting and certifying the results of elections, being the exercise of political functions of great importance, are rarely and reluctantly interfered with by court of equity, owing to the imperative necessity of protecting expressions of the popular will in the selection of officers and in other matters, and of having the result of such expressions accurately ascertained, numerous safeguards against fraud and abuse, and remedies for the correction of error and violations of duties, are usually provided by statute, so that the existence of means of redress by statutory proceeding usually afford ample ground for refusing equitable remedies." 1 Spell. Inj. & Extra. Rem. § 630, quoted in *Morgan v. County Court*, 53 W. Va. 375, 44 S. E. 182.

"In fact, equity disclaims jurisdiction in cases of contested elections. It does

not overthrow elections, or try title to office, as will be seen in that late excellent work, *American & English Decisions in Equity* (vol. 3, pp. 413, 437). *Alderson v. Commissioners*, 32 W. Va. 640, 643, 9 S. E. 868. Though a vote upon removal of a county seat is not an 'election' in strict sense, yet this rule of equity might apply by analogy. However, as this is not an election for office, but only on a public question, it may be that equity would take jurisdiction by injunction to prevent a county court from removing a county seat under a vote tainted with fraud." *Brown v. Randolph County Court*, 45 W. Va. 827, 32 S. E. 165, 167.

Delivery of Returns.—A court of equity has no jurisdiction to enjoin the secretary of state from delivering to the speaker of the house of delegates the sealed returns of an election for governor, properly transmitted to him, and such injunction, if granted, will be treated as a nullity. *Fleming v. Guthrie*, 32 W. Va. 1, 9 S. E. 23.

This court will not award a writ of prohibition against a circuit court to prohibit it from proceeding by mandamus to compel the secretary of state to deliver such returns, on the petition of a party who alleges no other ground or interest in the matter than that he is the plaintiff in said injunction suit, and that the circuit court has ignored his injunction, although it appears that said court had no jurisdiction to award said mandamus. *Fleming v. Guthrie*, 32 W. Va. 1, 9 S. E. 23.

Certifying Result of Canvass.—Equity has no jurisdiction to enjoin commissioners of a county court from certifying to the governor the result of their canvass of the vote in their county for a representative in the congress of the United States. *Alderson v. Commissioners*, 32 W. Va. 640, 9 S. E. 868, citing *Fleming v. Guthrie*, 32 W. Va. 1, 9 S. E. 23.

Injunction to Restrain Holding of Election.—An injunction does not lie to restrain the holding of a public elec-

tion authorized by law. *Morgan v. County Court*, 53 W. Va. 372, 44 S. E. 182. See also, the title **COUNTIES**, vol. 3, p. 650. See generally, the title **INJUNCTIONS**.

"It has been held, that the power of holding an election being a political power, equity has no jurisdiction to restrain officers intrusted by law with the duty of holding elections from the exercise of such power.' 2 High Inj., § 1316. 'If the court has no jurisdiction over the matter involved, or has exceeded its powers by granting an injunction in a matter beyond its jurisdiction, its injunction will be treated as absolutely void; the defendants can not be punished for contempt for its violation. For example, when an injunction is issued against a board of township officers to restrain them from holding an election which they are authorized by law to hold, equity having no jurisdiction to interfere in such case, there can be no disobedience of the injunction and no attachment for contempt, since the mandate is absolutely void.' High on Inj., § 1425. 'The power to hold election is a political one, and a court of equity has no jurisdiction to enjoin the proper officer from holding an election. An injunction issued in such case is void, and gives no ground for attachment for contempt.' 10 Am. & Eng. Ency. Law 817. *Paine on Elections*, § 940; *McCrary on Elections*, § 386. Kindred principles are stated in *Fleming v. Guthrie*, 32 W. Va. 1, 9 S. E. 23, and *Alderson v. Commissioners*, 32 W. Va. 640, 9 S. E. 868." *Morgan v. County Court*, 53 W. Va. 372, 376, 44 S. E. 182.

Injunction by Circuit Court.—The circuit court judge having in addition to the issuance of a void writ of error and supersedeas to the judgment of the county court, issued an injunction prohibiting the person, who had been declared elected to the office and who had duly qualified, from exercising the duties of the office or interfering with

the person, who had formerly held this office, in the performance of its duties; held, this order of injunction was issued without jurisdiction or authority, and is null and void; and this court will prohibit all proceedings on it or in the case in which it was granted. *Swinburn v. Smith*, 15 W. Va. 483, 484.

4. Prohibition.

See the title PROHIBITION.

When the board of election canvassers assume to exercise legal discretion which it does not possess, its action may be controlled by prohibition. In the opinion, the court says: "We think that the board, though a mere ministerial body, is yet one organized and performing public functions under law, and such a tribunal as may be kept within the legal bounds of its jurisdiction by prohibition. This seems to be conceded. *Fleming v. Commissioners*, 31 W. Va. 608, 8 S. E. 267; *Alderson v. Commissioners*, 31 W. Va. 633, 8 S. E. 274; *Brazie v. Commissioners*, 25 W. Va. 213." *Brown v. Board of Election*, 45 W. Va. 826, 32 S. E. 168.

When a board of election canvassers assumes jurisdiction, which it has not, to canvass and declare the result of a vote upon the relocation of a county seat, prohibition will lie to restrain it, though, in its proper action, its functions are ministerial, and not subject to prohibition. *Brown v. Board of Election*, 45 W. Va. 826, 32 S. E. 168.

While many of the acts of the commissioners, while sitting as a board of canvassers, after an election, are merely ministerial, they are not all so; and where such tribunal, clothed by the statute with both ministerial and judicial powers, is merely exercising its ministerial functions, to its action in such matters prohibition will not lie; but when it is exercising its judicial functions, and is proceeding in excess of its judicial powers, or is usurping judicial powers which do not belong to it, to such action a writ of prohibition

will lie. *Brazie v. Fayette Co. Com'rs*, 25 W. Va. 213; *Fleming v. Commissioners*, 31 W. Va. 608, 8 S. E. 267. See also, *Alderson v. Commissioners*, 31 W. Va. 633, 8 S. E. 274. See ante, "Under the West Virginia Law," VII, C, 2, b.

A writ of prohibition lies from a circuit court to the county commissioners assembled to ascertain the result of an election, under acts, 1882, ch. 155, to prevent them from exceeding their legislative powers, by examining witnesses and hearing evidence to determine whether the precinct commissioners have certified and returned the votes of persons not entitled to vote with a view to rejecting such votes. *Brazie v. Fayette Co. Com'rs*, 25 W. Va. 213; *Alderson v. Commissioners*, 31 W. Va. 633, 8 S. E. 274.

Errors of Canvassers.—Mere errors and irregularities of such commissioners, while proceeding within their jurisdiction, are not subject to prohibition. *Fleming v. Com'rs*, 31 W. Va. 608, 8 S. E. 267; *State v. County Court*, 33 W. Va. 589, 11 S. E. 72.

Circuit Court—Jurisdiction.—Circuit courts have no original jurisdiction of election contests or recounts, nor authority to prevent, by writ of prohibition, a person who claims to have been elected to an office from taking the same and assuming and exercising its powers and duties, on the ground of invalidity of the election or ineligibility of the party claiming the office, and, by awarding such writ in such case, a judge of such court subjects himself to a writ of prohibition from the supreme court of appeals. *Moore v. Holt*, 55 W. Va. 507, 47 S. E. 251.

Prohibition to Correct Error.—In an election contest a writ of prohibition will be issued to restrain an inferior court from exceeding its jurisdiction, but will never be allowed to usurp place of writ of error, especially where the law provides that no writ of error shall lie. *Nelms v. Vaughan*, 84 Va.

696, 5 S. E. 704, citing *West v. Ferguson*, 16 Gratt. 270; *Ex parte Ellyson*, 20 Gratt. 10; *McDougal v. Guigon*, 27 Gratt. 133.

In *Moss v. Barham*, 94 Va. 12, 26 S. E. 388, a contested election case pending before the corporation court of Newport News, of which that court had jurisdiction, a writ of prohibition from the circuit court to prevent proceedings in the case was held improper; the court saying that the writ of prohibition does not lie to correct error but to restrain an inferior court from acting in a matter of which it has no jurisdiction, or in which it is transcending its jurisdiction. *Nelms v. Vaughan*, 84 Va. 696, 5 S. E. 704; *Ellyson, Ex parte*, 20 Gratt. 10.

In *Ex parte Ellyson*, 20 Gratt. 10, Judge Jones says: "If a county or corporation court has such jurisdiction in any case in a contested election the petitioners have no right to a writ of prohibition."

Costs.—Should the county court exceed its jurisdiction by giving judgment for costs to either party in a contested election case under acts, 1852, ch. 71, p. 65, a writ of prohibition from the circuit court is a proper proceeding to arrest the judgment. *West v. Ferguson*, 16 Gratt. 270.

5. Mandamus.

See ante, "Nature of," VII, C, 2.

Scope of Mandamus Extended—Statutes.—Section 89, ch. 3, W. Va. Code, 1891, as re-enacted in ch. 25, acts, 1893, in cases involving duties of ballot commissioners under said chapter gives the writ of mandamus more scope than at common law, rendering a process to control them as to all matters, ministerial or judicial. *Marcum v. Ballot Commissioners*, 42 W. Va. 263, 26 S. E. 281; *Harmison v. Ballot Commissioners*, 45 W. Va. 179, 31 S. E. 394; *Dent v. Commissioners*, 45 W. Va. 750, 32 S. E. 250.

"Indeed, we held in *Marcum v. Ballot Commissioners*, 42 W. Va. 263, 26

S. E. 281, that it gives mandamus, in matters under the election law, more scope than at common law, making it applicable to such matters, whether ministerial or judicial; in other words, giving it the appellate function of certiorari." *Hebb v. Cayton*, 45 W. Va. 578, 32 S. E. 187, 188.

Mandamus will not lie to control the exercise of the discretion of any court, board or officer, when the act is either judicial or quasi judicial in its nature. The propriety of its action, in such case, however erroneous and improper, can not be questioned or controlled by mandamus. This does not apply to election cases. *Roberts v. Paul*, 50 W. Va. 528, 40 S. E. 470.

Assumption of Judicial Duty.—

While mandamus is the proper legal and efficacious remedy provided by statute for the purpose of compelling the election officers to discharge their duties in conformity with the law, when such officers, in violation of their ministerial duties, assume the exercise of judicial functions, certiorari may be resorted to for the purpose of reviewing their erroneous rulings, although mandamus would furnish more speedy, less expensive and more adequate relief. *Dunlevy v. County Court*, 47 W. Va. 513, 35 S. E. 956. See the title CERTIORARI, vol. 2, p. 748.

Certification of Result.—A mandamus will not issue to compel an election canvasser to assent to and certify the result of a recount of ballots as found by another canvasser, though both were present at it, if they disagree as to such result, and the unwilling one says it is not an adequate, correct, true recount. *Dent v. Commissioners*, 45 W. Va. 750, 32 S. E. 250. (By two judges). In the opinion, it is said: "And so I say now, in matters of election, when mandamus is used to review the action of election officers, and to reverse them for error, it is efficacious even in matters where those officers are vested with discretion; but

that is because of that statute, and is not at common law. But note that this mandamus does not seek to review the work of these canvassers, does not bring before us the ballots, that we may see whether the action of one or the other canvasser is right. On the contrary, it assumes the recount is made, and asks us to compel Means to approve it when he disapproves it, and his action and judgment were contrary to it; thus asking us to compel his discretion in a certain direction. The case thus falls, not under that statute, but under the common law as laid down by Judge English." *Dent v. Commissioners*, 45 W. Va. 750, 32 S. E. 250, 252. See also, ante, "Certificates," XII, G.

Mandamus to Compel Recount.

Mandamus lies to compel a board of canvassers canvassing returns of an election to recount the ballots between competing candidates for office on the demand of either, when they refuse such recount. *Hebb v. Cayton*, 45 W. Va. 578, 32 S. E. 187.

Correction of Errors.—If a board of canvassers adjourn, without having legally performed its duties under § 68 of chapter 3 of the Code, such board may be reconvened by writ of mandamus under § 89 of said chapter and compelled thereby to correct any errors it may have committed in attempting to perform such duties. *Daniel v. Simms*, 49 W. Va. 554, 555, 39 S. E. 690.

To Compel Count in a Particular Way.—Under a mandamus awarded under § 89, ch. 3, Code, 1899, a canvassing board may be directed and compelled to count a particular ballot in a particular way or for a particular candidate. The court says: "King resists the application for mandamus on the ground that as asked it would require the council to count the contested ballot for a particular candidate, contrary to the rule stated in *Marcum v. Ballot Commissioners*, 42 W. Va.

263, 26 S. E. 281, that mandamus will not compel an act judicial in nature, but only ministerial; it will compel action, but not any particular action that savors of the judicial function; that in this case whether that ballot is, in law, a good ballot, and how it should be counted, is such a question, and mandamus will not lie. True, such is the general rule, as stated in that case; but it was also stated that the writ, as allowed in the election statute, is an exception, and has wider function. *Hebb v. Cayton*, 45 W. Va. 578, 32 S. E. 187, is cited as antagonistic to the *Marcum Case* and as holding that the writ can go no further than to compel action, not to direct particular action; but that case pointedly makes the writ, when used under the election law, applicable to election matters, 'whether ministerial or judicial; in other words, giving it the appellate function of certiorari.' In order not to be misunderstood, the general rule of the function of mandamus was stated; but the peculiar function in election cases was also stated. This distinction is stated in point 2 in *Roberts v. Paul*, 50 W. Va. 528, 40 S. E. 470." *Stanton v. Wolmesdorff*, 55 W. Va. 601, 603, 47 S. E. 245.

In West Virginia Prior to 1891.

Jurisdiction by Mandamus—Board of Supervisors.—In *Board of Supervisors v. Minturn*, 4 W. Va. 300, M. filed his petition and exhibits in the circuit court of Mason county, praying that a writ of mandamus be awarded him, against the board of supervisors, as commissioners of election, to compel them to allow him to qualify and give bond as treasurer of the county. It was held on appeal to the supreme court that the circuit court had no jurisdiction by mandamus to compel the board of supervisors in such case, as the board had discretionary power. See also, *Doolittle v. County Court*, 28 W. Va. 158; *State v. County Court*, 33 W. Va. 589, 11 S. E. 72; *Miller v.*

County Court, 34 W. Va. 285, 12 S. E. 702; *State v. Herrald*, 36 W. Va. 721, 15 S. E. 974.

If, however, the act is merely ministerial mandamus will lie. *Board of Supervisors v. Minturn*, 4 W. Va. 300; *Doolittle v. County Court*, 28 W. Va. 158. See also, *Marcum v. Ballot Commissioners*, 42 W. Va. 263, 26 S. E. 281.

In an Election for Removal of a County Seat.—As to mandamus in an election for removal of a county seat, see the title COUNTIES, vol. 3, p. 653.

Bills of Exceptions.—Under the provisions of § 3, ch. 153 of the acts of 1882 (W. Va.), which states that, in any case before a county court, etc., or other inferior tribunal in which certiorari would lie, the majority of the commissioners or the justice or officer shall, on request of either party, certify the evidence and sign bills of exceptions, the commissioners of a county sitting as a board of canvassers, after an election, must, on request of one of the candidates for election, sign a bill of exceptions to their ruling, and if they refuse they will be required to do so by mandamus. *Alderson v. Commissioners*, 31 W. Va. 633, 8 S. E. 274.

If the commissioners of the county sitting as a board of canvassers, after an election, refuse to sign bills of exceptions to their ruling, when requested to do so by a candidate voted for at the election, they will be required by mandamus to settle and sign such bills of exceptions. *Alderson v. Commissioners*, 31 W. Va. 633, 8 S. E. 274; *Dryden v. Swinburne*, 20 W. Va. 89; *Poteet v. Commissioners*, 30 W. Va. 58, 3 S. E. 97; *Douglass v. Loomis*, 5 W. Va. 542.

As to mandamus to compel the county court to sign and settle a bill of exception and perfect the record so that the action of the county court may be reviewed on certiorari, see the title COUNTIES, vol. 3, p. 654.

Alternative Mandamus — Inhibiting Adjournment.—When, in such case, a

petition praying a mandamus to issue inhibiting the commissioners, until the further order of the court, from finally adjourning, or certifying the result of the election, so that the peremptory mandamus, if issued, will be effective; and, when the court is informed that the mandamus has been obeyed, the inhibition should be wholly removed. *Alderson v. Commissioners*, 31 W. Va. 633, 8 S. E. 274.

To Compel Performance of Legal Duties.—The members of an electoral board may be compelled by mandamus to perform the duties imposed upon them by law, and for failure to obey a peremptory mandamus may be punished for their contempt. *Cromwell v. Com.*, 95 Va. 254, 28 S. E. 1023.

Appointment of Election Officer.

Electoral Boards — Mandamus.—In *Cromwell v. Com.*, 95 Va. 254, 28 S. E. 1023, a case in which the members of the electoral board were unable to agree and failed to appoint any person to fill a vacancy in that body, or to appoint judges of election as required by the statute, it was held that mandamus would lie to compel the board to perform the duty imposed upon it by law, and for failure to obey a peremptory mandamus, that they might be punished for their contempt.

Election Valid Though Held and Certified by Only Two Judges.—An election held in Halifax county by only two judges of election and certified by them is valid, and the commissioners of election may be compelled by mandamus to count the vote so certified. *Keese v. Melvin*, 3 Va. Law Reg. 285, decided Nov. 21, 1895. In note appended to this case it is said, that "the judgment in the principal case settled a question of general interest which is constantly arising. As no opinion was delivered it escaped the attention of the editors, but its importance to the general public is sufficient reason for reporting it at this late day."

Contested Election—Statute Construed—Mandamus.—It was held, in

Richardson v. Farrar, 88 Va. 760, 15 S. E. 117, that § 160, Virginia Code, 1887, commands that returns of county elections be, upon complaint of undue election and false returns by fifteen or more voters, and counter-complaint, if any be filed, subject to the inquiry, determination and judgment of the county court, which shall proceed in such case, without a jury, and on the testimony to decide the same upon the merits according to the constitution and existing laws; that in such a contest the quashing and dismissal of a joint complaint of undue election, and false return against three at the same election, on the ground of misjoinder of the defendants was erroneous, because the statute does not limit the contest to one; and that mandamus would lie to compel the court to proceed to hear and determine the contest.

6. Review.

a. In General

Commissioners of Elections.—The county commissioners acting in special session to ascertain the result of a contested election, are an inferior tribunal proceeding in a summary manner and not according to the course of the common law. This tribunal is a creature of, and its proceedings are governed entirely by the statute; and no provision is made for a review of its action or proceedings upon motion, appeal, writ of error, or supersedeas. *Chenoweth v. Commissioners*, 26 W. Va. 230, 234.

Action of Ballot Commissioners—Subject of Review.—The action of ballot commissioners is, under the acts of 1893, ch. 25, a subject of review by the courts. *Marcum v. Ballot Commissioners*, 42 W. Va. 263, 26 S. E. 281.

Decision of Court in Ascertaining Result of Vote—Judicial Act—Subject to Review.—The final judgment of the county court, in ascertaining and declaring the result of the vote at an election on the question of a reloca-

tion of the county seat, is a judicial act like the judgment of the court on a contested election case before it, and therefore subject to be reviewed by the circuit court. *Poteet v. Commissioners*, 30 W. Va. 58, 3 S. E. 97, 109; *Welch v. County Court*, 29 W. Va. 63, 1 S. E. 337.

b. Error.

See also, post, "Certiorari," XIII, D, 6, c.

Refusal to Award Certiorari—Reviewed by Writ of Error.—On refusal of a circuit court to award a writ of certiorari on the proper petition, to review the proceedings of the county court, in ascertaining and declaring the result of the vote on a relocation of a county seat, the proceedings may be reviewed by writ of error issued by the supreme court of appeals. *Welch v. County Court*, 29 W. Va. 63, 1 S. E. 337.

Writ of Error to Judgment of Circuit Court.—If, pending a writ of error to a judgment of a circuit court awarding a peremptory writ of mandamus commanding the clerk of a municipal corporation to place the name of the plaintiff, as a candidate for office, on the official ballot to be voted for in an election to be held in such corporation, the election has been held and the alleged right involved has ceased to exist, the writ of error will be dismissed. *State v. Lambert*, 52 W. Va. 248, 43 S. E. 176.

Writ of Error to Judgment of County Court.—A writ of error and supersedeas does not lie to the judgment of a county court in an election contest, but only a certiorari. *Swinburn v. Smith*, 15 W. Va. 483.

This court having so decided and remanded such a case to the county court for trial, and the county court having decided the case, and a circuit judge having issued a writ of error and supersedeas to this judgment; held, this writ was issued by direction of the circuit court judge without jurisdic-

tion or authority and is null and void; and this court will prohibit all proceedings thereon. *Swinburn v. Smith*, 15 W. Va. 483.

This court has appellate jurisdiction in all cases of certiorari awarded by the circuit court in review of matters and proceedings pending before or determined by a municipal council. *Cushwa v. Lamar*, 45 W. Va. 326, 32 S. E. 10.

"There are two distinct classes of cases in which, according to the statutes of this state, certiorari is the proper remedy: (1) All that class of cases in which the writ was proper at common law; (2) civil cases wherein the writ is made a substitute for the writ of error. In the latter class this court has no jurisdiction unless the amount in controversy exceed \$100, while in the former class jurisdiction is general, without regard to the amount in controversy, by express provision of the constitution, as amended in 1879, after the decision of the case of *Dryden v. Swinburn*, 15 W. Va. 234, was rendered. The law has been so settled by the holdings of this court in the cases of *Cunningham v. Squires*, 2 W. Va. 422; *Dryden v. Swinburn*, 15 W. Va. 234; *Board v. Hopkins*, 19 W. Va. 84; *Farnsworth v. Baltimore*, etc., R. Co., 28 W. Va. 815; *Wilson v. West Virginia*, etc. R. Co., 38 W. Va. 212, 18 S. E. 577; *Davis v. Davis*, 40 W. Va. 464, 21 S. E. 906. At common law certiorari was the proper remedy for reviewing contested election cases and other proceedings before municipal councils. 4 Ency. Pl. & Prac. 17. The statute is merely declarative of the common law, enlarging the writ, and substituting it generally for the writ of quo warranto in similar cases. 1 Dill. Mun. Corp., § 202. Such being the nature of the writ, this court has jurisdiction by writ of error to review the judgment of the circuit court." *Cushwa v. Lamar*, 45 W. Va. 326, 32 S. E. 10. See ante, "Jurisdiction," XIII, C.

c. Certiorari.

See also, ante, "Mandamus," XIII, D, 5. See the title CERTIORARI, vol. 2, pp. 744, 747, 748, 756, 762, 763.

Certiorari Lies to Election Commissioner—General Rule.—The writ of certiorari lies in the state of W. Va. from a circuit court or a judge thereof in vacation to the county court commissioners convened in special session to ascertain the result of an election. *Chenoweth v. Commissioners*, 26 W. Va. 230, 232; *Fowler v. Thompson*, 22 W. Va. 106, 107; *Swinburn v. Smith*, 15 W. Va. 483.

Right of Review in Election Cases—Certiorari—Writ of Error.—In an election contest before a county court or other inferior tribunal, the decision may be reviewed by the circuit court by the writ of certiorari; and the decision of the circuit court in such case may be reviewed in the supreme court of appeals by writ of error. *Dryden v. Swinburn*, 20 W. Va. 89, 90. See S. C., 15 W. Va. 234; also, *Swinburn v. Smith*, 15 W. Va. 483; *Fowler v. Thompson*, 22 W. Va. 106, 108.

Notice to Show Cause.—It was held in *Dryden v. Swinburn*, 15 W. Va. 234, that the circuit court properly granted certiorari on the petition accompanied by a copy of the record though no previous notice had been given to the opposing candidate in the election contest to show cause why the writ should not be awarded, this being a matter within the discretion of the court, which discretion was properly exercised in this case.

Certiorari—Not in Due Form—Time of Making Objection.—Where a rule is asked in the circuit court against the board of supervisors, in the nature of a certiorari, and also to show cause why a mandamus should not be awarded, the former to revise the proceedings and reverse the order of the board, setting aside an election at which the petitioners claim to have been duly elected to certain county offices, and

the latter to compel it to declare the election of said officers as shown by the returns certified by the officers conducting the election, and grant them certificates of election, no objection being made to the process in the circuit court, it was held too late to claim in the appellate court that it is not a proceeding by certiorari in due form, and the rule awarded for the mandamus must be regarded as only ancillary to the writ prayed for (which was the writ of certiorari?). *Burke v. Monroe Co.*, 4 W. Va. 371.

Rights of Candidates—Bills of Exception—Review.—Any candidate voted for at the election in question has the right to be present in person or by attorney at the recount of the votes and request the commissioners to give him a bill of exceptions to their rulings against him; he thus becomes a party to the proceedings and has the right to have the rulings of such commissioners reviewed by certiorari. *Alderson v. Commissioners*, 31 W. Va. 633, 8 S. E. 274. See ante, Under the West Virginia Law, VII, C, 2, b.

Certiorari Proper—To Review Action of Supervisors in Contested Case.—In *Cunningham v. Squires*, 2 W. Va. 422, upon application, by one of the contestants, to the supreme court of appeals for a writ of prohibition to the circuit court of Braxton county to prohibit that court from supervising by means of certiorari the action of the board of supervisors in the matter of a contested election for clerk of the circuit court of said county, the right was denied. But the action of a circuit court on the right of certiorari to the proceedings of a board of supervisors, to determine the rights of parties in an election controversy on its merits is subject to review by the supreme court of appeals, for it errs in the matter.

At an election for county officers, four persons were permitted to deposit ballots who were not registered, and who were subsequently and before the whole vote was counted, declared

by the election officers to be improper voters. On being called before the officers they were sworn as to the character of the ballots deposited by them, and four ballots were destroyed in accordance with their statements, which does not change the general result of the election. The election officers certify certain parties as having received the highest number of votes. The board of supervisors set the election aside on the ground of the irregularity mentioned, no objection being made by the parties who are returned as having received the highest number of votes, some of them being present when the order it passed, and order another election. Subsequently the parties so returned petition the circuit court for a writ of certiorari to supervise the proceedings of the board of supervisors. Held: I. That there was no irregularity in the election, in fact or law, that would be sufficient to invalidate the election, according to the provisions of § 28 of the act of November 13th, 1863. II. It was a proper case for the supervision and control of an inferior tribunal by the circuit court, and necessary to secure the rights of the parties and the people. III. Notwithstanding that the order of the board of supervisors setting aside the election was made without objection, it was competent for the court to supervise the proceedings by writ of certiorari. *Burke v. Monroe Co.*, 4 W. Va. 371, 372.

In an Action for Removal of a County Seat.—As to certiorari in an election for removal of a county seat, see the title COUNTIES, vol. 3, pp. 653, 654.

Correction of Certificate.—In the case of *Goff v. Wilson*, 32 W. Va. 393, 9 S. E. 26, it is said: "In respect to the returns for the office of governor, the said journal shows that the certificate for the county of Kanawha had been superseded by an order of the circuit court of that county upon a writ of certiorari to set aside said cer-

tificate and return, and that said order was still in force. It can not be denied that said court had jurisdiction to make said order, and in a proper case to set aside or correct said certificate; for this court has expressly decided that it had such jurisdiction. *Chenowith v. Commissioners*, 26 W. Va. 230; *Alderson v. Commissioners*, 31 W. Va. 633, 8 S. E. 274."

E. EVIDENCE.

Presumption of Legality of Acts of Officers.—As the county court commissioners are officers duly elected by the people and in passing upon the result of an election are acting in a quasi judicial capacity, it must be presumed that they acted rightly and within their legal authority, until the contrary is made to appear. *Halstead v. Rader*, 27 W. Va. 806, citing *Loomis v. Jackson*, 6 W. Va. 613, 712.

Under the provisions of the Code of West Virginia, ch. 6, § 13, the special court here authorized, has a limited jurisdiction. But such jurisdiction necessarily draws to it the right to hear and determine all questions touching the regularity and legality of the acts of the officers or persons conducting the election, and making and certifying the returns thereof. It may re-examine all or such parts of the election returns in said circuit as it may deem necessary, and correct errors found therein according to law and the truth. In the exercise of such jurisdiction, such court recognizes the presumption that all officers and other persons engaged in conducting elections, or in making return and certifying the results thereof acted in accordance with the law, until the contrary shall be specifically alleged and fully proved. *Loomis v. Jackson*, 6 W. Va. 613.

Certified List of Voters.—It is error to admit as evidence a certified list of voters ordered by the board of registration to be stricken from the registry; only the record of the proceedings of the board, or a copy

thereof, properly certified to be a copy, is admissible as evidence. *Phares v. State*, 3 W. Va. 567.

Returns Duly and Legally Certified.

—Referring to § 21, ch. 155, acts 1882, the court in *Halstead v. Rader*, 27 W. Va. 806, said: "Now it is positively certain both from the very language of the statute and the absolute necessity of the case, that the county court commissioners are not concluded by the mere legal and formal certification of the poll books or returns. It will be conceded that, if the returns are duly and legally certified and in regular form, they must be treated by the county commissioners as prima facie correct. But as between such certified returns and the actual ballots cast at said precinct, the ballots and not the certified returns constitute the primary evidence of the votes cast at said precinct. *Hudson v. Solomon*, 19 Kan. 177; *State v. Buckland*, 23 Kan. 259. And such is the necessary result of the principles decided by this court in *Chenowith v. Commissioners*, 26 W. Va. 230." See ante, "Ballots as Evidence," XI, B, 6.

Custody of Ballots.—"Before courts or legislative bodies should receive the result of recounts, there must be absolute proof that the ballots have been safely kept, and that they are the identical ones used at the election," and that not until this is proved beyond all reasonable doubt can force be given to the recount. *Payne, Elect.*, § 776, quoted in *Dent v. Commissioners*, 45 W. Va. 750, 32 S. E. 250, 253. See ante, "Custody of the Ballots," XI, B, 5.

XIV. Offenses against Election Laws.

A. UNLAWFULLY CONDUCTING AN ELECTION.

An election official was indicted under Va. Code, 1873, ch. 8, § 43, for acting unlawfully in conducting an election. On motion to quash, it was held that though he may have acted unlaw-

fully as charged in the indictment, it does not follow that he was guilty of corrupt conduct, for the punishment of which the statute was intended, and the indictment was insufficient. *Boyd v. Com.*, 77 Va. 52.

B. VOTING ILLEGAL BALLOT OR ILLEGAL USE OF LEGAL BALLOT.

Arrest of Offenders.—In the case of *Pearson v. Supervisors*, 91 Va. 322, 335, 21 S. E. 483, 1 Va. Law Reg. 176, it is said: "The offenses for which the judges of election are authorized by the clause in question [§ 12 of the act of March 6, 1894] to arrest by verbal warrant, are the 'taking of an official ballot beyond the voting booth, or away from said booth, except to the judges of election, or to vote any ballot except such as shall be secured by the elector from the judges of election.' These are made misdemeanors, punishable by a fine of one hundred dollars, and, of course, render the person guilty thereof liable to arrest upon proper warrant, which would be equally as efficacious as the more summary remedy given by the statute, should that mode be held void on account of repugnancy to the constitution."

If the provision of the act of March 6, 1894, which authorizes special constables to make arrests on the verbal order or warrant of the judges of election be unconstitutional (a question not decided), the unconstitutionality of that provision would not invalidate the other provisions of the act not in conflict with the constitution. *Pearson v. Supervisors*, 91 Va. 322, 323, 21 S. E. 483, 1 Va. Law Reg. 176.

Distinguishing Marks.—Section 79 of chapter 3 of the West Virginia Code of 1899 provides: "No voter shall place any mark upon his ballot, nor suffer or permit any other person to do so, by which it may be afterward identified as the ballot voted by him. Whoever shall violate any provision of this section shall be deemed guilty of a felony"

and be confined in the penitentiary. Section 76 condemns others for inducing voters to place names or other distinguishing marks on ballots. These provisions against such marks or earmarks are among the most important enactments in this statute it is true, being intended to defeat bribery, intimidation and all sorts of corruption in elections by covering the ballot with the veil of entire secrecy. *Doll v. Bender*, 55 W. Va. 404, 409, 47 S. E. 293. See ante, "Marking the Ballot," XI, B, 4.

C. BETTING ON ELECTIONS.

Bet Made after the Voting Has Ceased.—Under § 9, ch. 5, W. Va. Code, 1887, a bet made after the voting has closed, but before any legal declaration of the result of the election, is an offense. *State v. Griggs*, 34 W. Va. 78, 11 S. E. 740; *State v. Snider*, 34 W. Va. 83, 11 S. E. 742.

Remedial Statute.—The 20th section of chapter 198 of the Virginia Code (in force when this case was decided) which provides "that all laws suppressing gambling, lotteries, unchartered banks, and the circulation of bank notes for less than \$5.00 shall be construed as remedial" applies to all preceding sections of that chapter, hence the 10th section of chapter 198 of the Code in relation to betting on elections is to be construed as a remedial statute. *Shumate v. Com.*, 15 Gratt. 653. See also, *State v. Griggs*, 34 W. Va. 78, 11 S. E. 740.

Imposition of Fine under the Statute.—A short time before the election of certain county officers for Augusta county to be made in May, 1858, M. sold to S. a wagon at the price of one hundred and fifty dollars, which was about the value of the wagon, to be paid by S. when K., one of the candidates for the office of county court clerk at said election, should be elected to that office, and not at all, if he was not elected; and S. at the time of said sale put up his check agreeably to that

understanding; and upon these terms took possession of the wagon. Held, this is a wager on the part of both M. and S., within the meaning of ch. 198, § 10, p. 744, of the Va. Code then in force; and both M. and S. are liable to a fine not exceeding the amount that either might lose. *Shumate v. Com.*, 15 Gratt. 653.

Statute Construed—Limits of Fine.—Under § 10, ch. 198, of the Virginia Code then in force, providing that if any one bet on elections, he should be fined, not exceeding the amount he bet; it was held, in *Re Shumate*, 15 Gratt. 653, that the amount risked or bet was the value of the property bet, because one might lose that; and, as a bet was a joint transaction, both parties were held equally guilty, and each was liable to a fine up to the largest amount bet by either party.

Amount of Fine.—On conviction of two parties jointly indicted under § 9, ch. 5, W. Va. Code, 1887, for betting on elections, there must be a separate fine against each, and that fine must be the value of the money or other thing which the party wagered plus \$50. The court says: "The parties to this bet each wagered \$50. The attorney general insists that the fine should have been not \$100 but \$150 — that is, for the joint amount of the sums each wagered plus \$50 — and asks us to correct the judgment. The statute provides that a person convicted shall forfeit the value of such money or other thing, and \$50 in addition thereto, for every such offense. I think the statute intends to impose on each party to the bet what he wagered, and \$50 in addition, and not the sum of what both wagered, and \$50 in addition. We think the fine was assessed properly." *State v. Griggs*, 34 W. Va. 78, 11 S. E. 740, 741. See also, *State v. Snider*, 34 W. Va. 83, 11 S. E. 742.

Indictment.—An indictment under § 9, ch. 5, W. Va. Code, 1887, which al-

leges that G. and E. bet on election, though it does not expressly allege that they bet with each other, will be construed to mean that they bet with each other, and is therefore good. *State v. Griggs*, 34 W. Va. 78, 11 S. E. 740.

D. BRIBERY.

In an information against a justice of the peace for bribery in an election of a clerk, it ought to be stated with certainty, that an election was holden, and that the vote was given at that election. *Newell v. Com.*, 2 Wash. 88.

Gift of Intoxicating Drinks.—The latter clause of section 10, ch. 5, W. Va. Code, reads: "And if any person, whether a candidate or not, offer, give, or distribute any intoxicating drink to any voter on the day of an election, he shall forfeit not less than ten, nor more than fifty, dollars." Held, that, in an indictment based on this section of the statute, it being charged that the person to whom the intoxicating drink was given was a legally qualified voter, it is not necessary to state the facts constituting such person a qualified voter; nor is it necessary to allege any special criminal intent, but the scienter, or general criminal intent that is, the accused knowingly and willfully did the unlawful act, is sufficient. *State v. Pearis*, 35 W. Va. 320, 13 S. E. 1006.

Right to Challenge Jurors.—The offense of offering, giving or distributing any intoxicating liquor to any voter on the day of an election, provided for in the latter clause of § 10, ch. 5, of the West Virginia Code (2d Ed.) 1891, being a misdemeanor, is not within the meaning of the term "civil case," as used in § 21, ch. 116, Code, and therefore the accused was not entitled to a special jury. But under § 17, ch. 116, the accused was entitled to challenge four jurors peremptorily, and, this having been refused, the judgment and verdict are set aside, and a new trial is awarded. *State v. Pearis*, 35 W. Va. 320, 13 S. E. 1006.

Electric Light Companies.

See the title ELECTRICITY.

ELECTRICITY.

CROSS REFERENCES.

See the titles CORPORATIONS, vol. 3, p. 510; DAMAGES, vol. 4, p. 162; DEATH BY WRONGFUL ACT, vol. 4, p. 226; MASTER AND SERVANT; NEGLIGENCE; STREETS AND HIGHWAYS; STREET RAILROADS; TELEGRAPHS AND TELEPHONES.

Establishment of Municipal Light Plant.—A city can not increase its indebtedness beyond the constitutional limit by contracting for an electric apparatus and plant; and, such indebtedness being forbidden, the contract out of which it arises, although executory, is also forbidden. The end aimed at is prohibited, which carries with it the prohibition of the means directly and appropriately designed and adapted for its accomplishment. *Spilman v. Parkersburg*, 35 W. Va. 605, 14 S. E. 279. See also, the title MUNICIPAL CORPORATIONS.

Restraint of Unconstitutional Indebtedness by Injunction.—Any tax-paying resident and voter of such city, suing on behalf of himself and of all other taxpayers of such city, has a right to enjoin the creation of any such unconstitutional indebtedness. *Spilman v. Parkersburg*, 35 W. Va. 605, 14 S. E. 279. See also, the title INJUNCTIONS.

Contracts for Lighting Streets.—The grant by a city to a gas company of the exclusive privilege of lighting the city with gas does not deprive the city of the power to contract with an electric light company for lighting the city with electric lights. *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435, 4 S. E. 650. See also, the title GAS.

Power of City to Grant Company Exclusive Use of Streets.—The council of the town of Clarksburg in 1887 had no power, either under its charter or under the general statute law governing towns and cities, to grant an exclusive franchise for twenty years to a

private corporation to use its streets for the conveyance of electricity for public use in the city. Such exclusive grant does not prevent the town from granting to another corporation, within said term, the privilege to occupy its streets for the same purpose. Such exclusive grant, being void, is not a valid contract protected by the provisions in the federal or state constitutions forbidding the passage of any law impairing the obligation of contracts. *Clarksburg Electric Light Co. v. Clarksburg*, 47 W. Va. 739, 35 S. E. 994.

Under the general statute law of West Virginia governing cities and towns, a grant by a municipal corporation of the privilege, not exclusive, of occupying its streets for the conveyance of electricity for public use therein, confers a valid franchise, and is a contract protected by the provisions in state and federal constitutions prohibiting the passage of any law impairing the obligations of contracts. *Clarksburg Electric Light Co. v. Clarksburg*, 47 W. Va. 739, 35 S. E. 994.

Grant to Unchartered Corporation.—The grant by a city or town to an intended corporation of a franchise to use its streets for the conveyance of electricity for public use in the town or city is valid, though at its date the corporation is not chartered, but is later chartered, and accepts the grant. *Clarksburg Electric Light Co. v. Clarksburg*, 47 W. Va. 739, 35 S. E. 994.

Care Required in Using Electricity.—The exercise of reasonable care requires persons using dangerous agen-

cies, such as electricity, to avail themselves of the best mechanical contrivances and inventions in practical use which are effectual in preventing injury to persons and property. What constitutes usual and ordinary care is graduated and determined by the danger involved, and must be commensurate therewith. The frequency of accidents resulting from the contact, by breaking or sagging, of high tension wires with those of low tension, and the danger to persons and property caused thereby is very great, and where a company using electricity negligently fails to maintain guard wires, insulation and other devices usually employed to prevent such danger, it becomes liable for any injury resulting from such negligence. It is the province of the jury to determine whether or not due care was exercised. *Richmond, etc., R. Co. v. Rubin*, 102 Va. 309, 47 S. E. 834.

Not Insurers against Accident.—While electric companies are not insurers against accidents, they should be held to a high degree of care in the construction and maintenance of the dangerous appliances employed by them, to the end that travellers along the highway may not be injured. The danger is great, and care and watchfulness must be commensurate with it. The mere fact that a dangerous wire has broken and fallen into the street raises a presumption of negligence. *Norfolk R., etc., Co. v. Spratley*, 103 Va. 379, 49 S. E. 502.

Employee Knowingly Using Defective Tools.—Where the defects in the shunt cord used by intestate caused his death, were visible to him, and yet he chose it for himself, without necessity or direction, he was guilty of contributory negligence, and there can be no recovery. *Piedmont Electric Illuminating Co. v. Patteson*, 84 Va. 747, 6 S. E. 4.

In action against an electric light company for negligently killing an employee, it was proved that he was sent

to look for a break in the circuit whilst the current was on, and took with him a defective shunt cord. He found the break, and trying to turn on the current, grasped the cord at its defective end, and, at the same time, put his other hand on the naked end of the line wire, whereby the current passed through and killed him. Had he grasped the line wire above the exposed end he would not have been injured, notwithstanding the fact that the shunt cord was defective in not being insulated throughout its entire length; it was held, the evidence failing to show negligence on the defendant's part unmixed with the intestate's contributory negligence, was insufficient to sustain the verdict for the plaintiff. *Piedmont Electric Illuminating Co. v. Patteson*, 84 Va. 747, 6 S. E. 4.

Inference as to Contributory Negligence.—Declaration alleges that by defendant's negligence the electric current passed through and killed plaintiff's intestate whilst engaged about his special duties in defendant's service. But plaintiff failed to prove that defendant in any way, by commission or omission, caused the current to pass through and kill the intestate. It was held, the inference is inevitable that the intestate's contributory negligence was the proximate cause of his death. *Piedmont Electric Illuminating Co. v. Patteson*, 84 Va. 747, 6 S. E. 4.

Injury to Inspector from Defective Insulation.—Defective insulation of wires, which it is the duty of a line inspector of an electric company to inspect, is a risk incident to the employment, which such inspector assumes, and can not be made the ground of an action for damages by him against the company. *Bowers v. Bristol Gas, etc., Co.*, 100 Va. 533, 42 S. E. 296.

There can be no recovery by a servant against his master for an injury caused by the failure of the servant, while using defective appliances, to take a precaution for his own safety, which

is both obvious and well known to him. In such case the negligence of the servant is the proximate cause of the injury. In the case at bar, the intestate, an experienced lineman of an electric light company, came to his death by the passage of a current of electricity through his body occasioned by his taking hold of a wire insufficiently insulated, and, at the same time, gasping the carbon in an arc lamp, instead of separating the carbons with a dry stick, or other nonconductor, as he well knew he should have done, and hence there can be no recovery for the injury. *Powers v. Bristol Gas, etc., Co.*, 100 Va. 533, 42 S. E. 296.

Burden of Proof.—When the plaintiff has established the fact of ownership and control of the wire, and its dangerous condition in a public street or highway, coupled with the accident, he has made out a prima facie case of negligence, and cast the burden upon the defendant to show that the wire was broken and remained in such condition until the accident, without its fault. *Norfolk R., etc., Co. v. Spratley*, 103 Va. 379, 49 S. E. 502.

Proximate Cause of Injury.—Where an injury is inflicted by coming into contact with an electric wire which has broken and fallen into the street, and which is not properly insulated, the falling of the wire is the proximate cause of the injury, and not the want of insulation. *Norfolk R., etc., Co. v. Spratley*, 103 Va. 379, 49 S. E. 502.

Presumption of Negligence.—The fact that a child walking along a city street is injured by coming in contact with a live electric wire which had fallen into the street two hours previously, raises a presumption of negligence on the part of the company owning the wire. *Res ipsa loquitur*. This presumption is not overcome by the testimony of a lineman of the company that he had looked over the wire on the morning of the day of the accident and found it all right, but upon

the whole evidence the question of negligence is one for the jury. *Norfolk R., etc., Co. v. Spratley*, 103 Va. 379, 49 S. E. 502.

Injury to Child from Live Wire.—

A child eight years of age, who, passing along a city street, unlawfully thrusts his hand through or over the railing enclosing an adjacent lot, and takes hold of a live electric wire, believing it to be a string, and is injured, is not such a trespasser as will bar him from recovering damages of the owner of the wire who has negligently permitted it to become charged and to hang down in close proximity to a public street. *Lynchburg Telephone Co. v. Booker*, 103 Va. 594, 50 S. E. 148.

Variance.—Where a declaration avers that the plaintiff was in a certain street of a city when injured by an electric wire of the defendant, but makes no averment of the precise position of the wire which inflicted the injury, and the evidence shows that he was injured by a wire hanging down through a tree into a yard adjacent to, but not in, that street, and it plainly appears that, if not in the street, the wire was in such close proximity to it as to have inflicted the injury on the plaintiff who was in the street, there is no variance between the allegation and proof. *Lynchburg Telephone Co. v. Booker*, 103 Va. 594, 50 S. E. 148.

Duty to Insulate Wires.—It is the duty of electric companies to use very great care to keep the insulation of its dangerous wires perfect at places where people have a right to go for work, for business or for pleasure. *Thomas v. Wheeling Electrical Co.*, 54 W. Va. 396, 46 S. E. 217.

One coming in contact with a live electric wire in discharge of duty will not, on account of so coming in contact, be guilty of contributory negligence, if it was the duty of the corporation to properly insulate the wire at the place of injury, and it has neglected to do so, and the person knows

not the defect of insulation. *Thomas v. Wheeling Electrical Co.*, 54 W. Va. 395, 46 S. E. 217.

Injury from Bad Insulation.—When injury to a person comes from contact with a live electric wire from bad insulation at a place where there ought to be good, safe insulation for safety to persons, it is a case of negligence on the part of the electrical corporation, rendering it prima facie liable. *Thomas v. Wheeling Electrical Co.*, 54 W. Va. 395, 46 S. E. 217.

A corporation or person operating a plant for electric lighting must anticipate injury as likely to happen to persons from contact with its wires by reason of defective insulation at places where the law requires such insulation. *Thomas v. Wheeling Electrical Co.*, 54 W. Va. 395, 46 S. E. 217.

If one take hold of an electric wire at a place where it ought to be safely insulated for safety to persons, and is injured by reason of defective insulation, he not knowing its defect, he is not from so doing guilty of contributory negligence forbidding recovery of damages. *Thomas v. Wheeling Electrical Co.*, 54 W. Va. 395, 46 S. E. 217.

Presumption of Insulation.—In places where electric wires should be

insulated for safety to the persons, one may assume that they are so insulated, if he know not to the contrary. *Thomas v. Wheeling Electrical Co.*, 54 W. Va. 395, 46 S. E. 217.

Question for Jury.—In *Snyder v. Wheeling Electrical Co.*, 43 W. Va. 661, 28 S. E. 733, it was held, that the court in its instruction should not take for granted that the wire was exposed and not properly insulated, but should have submitted the question to the jury whether the defendant was bound to anticipate injury to any one from the position of the wire, or that persons would come in contact with it in performing any work. "As we said in the *Snyder* case, an electrical company, using a dangerous power, is required to use very great care and diligence to avoid danger. It is bound to anticipate danger and properly insulate its wires, and inspect and keep them so, at certain places, but not everywhere. It is bound to expect certain accidents in certain ways or from certain causes, but not all accidents from every cause. Whether a place is such, under the evidence, as to require insulation, is generally a question for the jury." *Thomas v. Wheeling Electrical Co.*, 54 W. Va. 395, 46 S. E. 217.

Electric Railways.

See the titles RAILROADS; STREET RAILROADS.

ELEGIT.

CROSS REFERENCES.

See the titles EXECUTIONS; EXECUTIONS AGAINST THE BODY; JUDGMENTS AND DECREES.

Definition and Nature.—In *Hutcherson v. Grubbs*, 30 Va. 351, the court gave the definition and nature of elegit as follows: "At common law, except for debts due the king, the lands of the debtor were not liable to the satisfaction of a judgment against him, and consequently no lien thereon was acquired by a judgment. * * * The goods and chattels of the debtor, there-

fore, and the annual profits of his lands, as they arose, were the only funds allotted for the payment of his debts. This continued to be the law until the passage of the statute, Westm. 2, 13 Edward I, by which, in the interest of trade and commerce, the writ of elegit was for the first time provided for. By that statute the judgment creditor was given his election to sue out a writ of

fi. fa. against the goods and chattels of the defendant, or else a writ commanding the sheriff to deliver to him all the chattels of the defendant (except oxen and beasts of the plough), and a moiety of his lands until the debt should be levied by a reasonable price or extent. When the creditor chose the latter alternative, his election was entered on the roll, and hence the writ was denominated an elegit, and the interest which the creditor acquired in the lands by virtue of the judgment and writ was known as an estate by elegit." See also, *Borst v. Nalle*, 28 Gratt. 423; *Price v. Thrash*, 30 Gratt. 515; *Renick v. Ludington*, 14 W. Va. 367.

History.—The statute, Westm. 2, 13 Ed. 1, ch. 18, and the writ of elegit as parts of the general law of England became parts of the law of Virginia upon the settlement of the colony, and continued as such after the revolution and formation of the commonwealth. By an act of the general assembly of Virginia passed in 1748, these writs and proceedings thereunder were defined. It was provided, that all persons who should recover judgments in any court of record might, at their election, have either of the writs of fi. fa., elegit, or ca. sa. within one year, for taking the goods, lands, or body of the person against whom such judgment was obtained in the manner prescribed by the statute. *Werdenbaugh v. Reid*, 20 W. Va. 588. See also, *Renick v. Ludington*, 14 W. Va. 367.

Writ Abolished and Supplanted by Judgment Lien.—In *Borst v. Nalle*, 28 Gratt. 423, the court said: "Except as thus modified, in respect to purchasers, by the act of 1843, the lien of the judgment continued the same, in all respects, as to its nature, extent, and the mode of enforcing it, until the general revision of the laws in 1849. Up to that time, as we have seen, it was a mere incident of the writ of elegit, resulting by construction from the mandate of the writ, and dependent for its existence and continuance on the ca-

pacitv to sue out the writ. It was now made for the first time, as to judgments thereafter to be rendered, as express, direct, positive, absolute lien on all the real estate of or to which the judgment debtor should be possessed or entitled, at or after the date of the judgment, or if it was rendered in court, at or after the commencement of the term at which it was so rendered, with the same qualification as to purchasers for valuable consideration without notice, as was made by the act of 1843. Code of 1860, ch. 186, §§ 6, 8. The writ of elegit was preserved and made to conform to the statutory lien of the judgment, and an additional remedy in equity was given for the enforcement of the lien. *Idem.*, § 9. The lien of the judgment being now express, positive, and in no way dependent on the elegit, and the remedy in equity being preferred in practice, the elegit soon fell into disuse, and was finally abolished by the legislature. Code of 1873, ch. 183, § 26, p. 1175." See *Hutcheson v. Grubbs*, 80 Va. 251; *Price v. Thrash*, 30 Gratt. 515; *Renick v. Ludington*, 14 W. Va. 367; *Werdenbaugh v. Reid*, 20 W. Va. 588; Va. Code, § 3581; W. Va. Code, ch. 140, § 2.

Where Fi. Fa. Returned Partly Satisfied.—If a creditor, by judgment or decree, sued out a fi. fa., which was levied, and returned satisfied in part only, he could take out an elegit without pursuing the fi. fa. to a return of nihil. *Coleman v. Cocke*, 6 Rand. 618.

When Title to Land Should Not Be Disturbed.—A title to land should not be disturbed, on an elegit, when derived by sale to raise the purchase money; no security but the bond of the first purchaser, being taken for the payment; and a deed of trust given on the land, which was never recorded. *Childers v. Smith*, Gilm. 196.

When Inadequate.—It was always regarded that the legal remedy by elegit was inadequate where it was shown that the rents and profits of the land would not satisfy the judgment within

a reasonable time. *Price v. Thrash*, 30 Gratt. 515.

Time for Issuing.—*Hutcheson v. Grubbs*, 80 Va. 251, contains the following statement as to the time within which the creditor was permitted to proceed by elegit: "It is undeniable that, prior to the abolition of the writ of elegit, in 1872, if the creditor chose to proceed by elegit, he must have done so within the time prescribed by the statute. The statute provides that, 'on a judgment, execution may be issued within a year; and a scire facias or action may be brought within ten years from the date of the judgment; and where execution issues within the year, other executions may be issued or a scire facias or action may be brought within ten years from the return day of an execution, on which there is no return by an officer, or within twenty years from the return day of an execution, on which there is such return; except,' etc. Code, 1849, chapter 186, § 12; Code, 1873, chapter 182, § 12. And by the following section it is provided that, 'no execution shall issue, nor any scire facias or action be brought, on a judgment in this state, other than for the commonwealth, after the time prescribed by the preceding section except,' etc."

Necessity of Issuance to Bind Lands after One Year.—In *Eppes v. Randolph*, 2 Call 125, it was held, that to enable a judgment creditor to preserve his liens on the lands of his debtor, it was necessary that he should sue out his elegit within a year, or enter of record the fact that he elected to charge the goods and half the lands of his debtor which was equal to issuing an elegit; that if he did neither he might on motion be allowed to enter such election nunc pro tunc.

Necessity for Issuance before Going into Equity.—It was not necessary that a judgment creditor should have issued an elegit on his judgment before going into equity for relief. *Taylor v. Spin-*

dle, 2 Gratt. 44. See the title JUDGMENTS AND DECREES.

To What Place Issuable.—In 1770 an elegit could not issue upon a county court judgment into any other county than that in which the judgment was rendered. *Eppes v. Randolph*, 2 Call 125.

But by an act of 1772 writs of elegit were allowed to run into other counties than that in which the judgment had been rendered. *Eppes v. Randolph*, 2 Call 125.

Property Subject.—By the writ of elegit all the goods and chattels of the debtor, saving his oxen and beasts of the plough, and one moiety of his lands, might be taken by the sheriff and delivered to the creditor by "reasonable price or extent;" and thereby the creditor became the absolute owner of the personal property, and was entitled to hold the moiety of the lands as his freehold until he should have levied thereof his debts and damages. *Werdenbaugh v. Reid*, 20 W. Va. 588; *Borst v. Nalle*, 28 Gratt. 423; *Price v. Thrash*, 30 Gratt. 515; *Stuart v. Hamilton*, 8 Leigh 503.

In 1849 the operation of the elegit was extended so as to embrace, not a moiety only, but all the debtor's real estate. *Hutcheson v. Grubbs*, 80 Va. 251; *Borst v. Nalle*, 28 Gratt. 423; *Price v. Thrash*, 30 Gratt. 515; *Renick v. Ludington*, 14 W. Va. 367.

The mandate of the writ of elegit extended to all the lands and tenements of which the debtor was seized at the date of the judgment or at any time afterwards. *Borst v. Nalle*, 28 Gratt. 423.

Against Real Estate within the State.—The writ of elegit while it was in force was the proper manner of enforcing a judgment against the real estate lying within the state, which the answers to interrogatories showed that the debtor owned. *Spang v. Robinson*, 24 W. Va. 327, 333.

Where Elegit Issued against Bankrupt.—In *McCance v. Taylor*, 10 Gratt.

580, it was held, that an elegit sued out on a judgment against a bankrupt might be in the usual form, and in executing it the sheriff should take notice of the bankruptcy of the debtor, and disregarding all property of the debtor not subject to the lien, levy it upon that which was so subject.

After Judgment on Scire Facias.—If a debtor charged in execution escape, the creditor may sue out a scire facias to have a new execution; and after judgment on such scire facias, an elegit may issue to have delivered to the creditor a moiety of all the lands whereof the debtor was seized at the date of the original judgment or at any time afterwards. *Stuart v. Hamilton*, 8 Leigh 503.

How Lands Extended.—In *Haleys v. Williams*, 1 Leigh 140, it was queried, whether if there be two judgments of different dates, and elegits on each, and a moiety of the debtor's lands be extended on the elder, the whole instead of half only of the other moiety, be not properly extendible on the younger judgment.

Effect of Not Setting Out Metes and Bounds of Moiety.—An elegit is levied on land of the debtor, but the inquisition does not set out the moiety by metes and bounds, and possession is not delivered to the creditor; the debtor makes a conveyance of the land to third persons; afterwards the elegit and return are quashed, on the motion of the creditor, who then files a bill impeaching the conveyance as fraudulent. It was held, that the execution would be treated as if never issued, and therefore the judgment remaining unsatisfied, the plaintiff would be permitted to resort to any remedy which he could find open. *Claiborne v. Gross*, 7 Leigh 331.

Nature of Lien.—The courts declared expressly that the lien created by an elegit was a "legal lien." *Werdenbaugh v. Reid*, 20 W. Va. 588; *Leake v. Ferguson*, 2 Gratt. 420.

The writ of elegit was not made an express lien on the real estate of the debtor, by the statute, but it extended the mandate of the writ so as to make it bind one moiety of the lands and tenements of which the debtor was seized at the date of the judgment or at any time afterwards. *Werdenbaugh v. Reid*, 20 W. Va. 588; *Renick v. Ludington*, 14 W. Va. 367; *Borst v. Nalle*, 28 Gratt. 423; *Price v. Thrash*, 30 Gratt. 515.

The lien of an elegit was an incident of the writ and depended for its existence and continuance upon the capacity to sue out the writ. *Borst v. Nalle*, 28 Gratt. 423; *Renick v. Ludington*, 14 W. Va. 367.

Commencement of Lien.—By reason if the right to extend the lands of the debtor, the courts construed the writ of elegit to be a legal lien on the debtor's lands and tenements from the date of the judgment. *Werdenbaugh v. Reid*, 20 W. Va. 588; *Renick v. Ludington*, 14 W. Va. 367; *Borst v. Nalle*, 28 Gratt. 423.

The lien of an elegit attached when the capacity to sue out the elegit arose and not at the time it could be levied. *Werdenbaugh v. Reid*, 20 W. Va. 588.

Duration of Lien.—The lien created by an elegit existed as long as the judgment remained in force, and as long as the judgment was susceptible of being revived where revival was necessary. *Werdenbaugh v. Reid*, 20 W. Va. 588; *Renick v. Ludington*, 14 W. Va. 367; *Watts v. Kinney*, 3 Leigh 272; *Taylor v. Spindle*, 2 Gratt. 44; *Burbridge v. Higgins*, 6 Gratt. 119; *Borst v. Nalle*, 28 Gratt. 423.

The lien of an elegit, having once attached to the debtor's property, it, like the lien of a *fi. fa.*, continued thereafter without any actual levy so long as the capacity to sue out any elegit on the same judgment existed. *Werdenbaugh v. Reid*, 20 W. Va. 588; *Renick v. Ludington*, 14 W. Va. 367.

Priority of Liens.—The lien on the

debtor's lands created by an elegit was superior to all subsequent liens or conveyances to purchasers for valuable consideration without notice of the judgment. *Werdenbaugh v. Reid*, 20 W. Va. 588.

Several creditors recover judgments against N. and sue out writs of ca. sa. upon which he is taken and charged in execution; then F. recovers judgment against the same debtor, and sues out an elegit, on which his lands are extended, and a moiety delivered to F. and then the debtor is regularly discharged from custody under the writs of ca. sa. as an insolvent debtor, putting into his schedule the whole of the lands which had been extended under F.'s elegit. Held, the lien of the writs of ca. sa. executed, given by the statute, 1 Rev. Code, ch. 134, § 10, does not overreach and avoid the extent under F.'s elegit. *Foreman v. Lloyd*, 2 Leigh 284, overruling *Jackson v. Heiskell*, 1 Leigh 257. See also, *Rogers v. Marshall*, 4 Leigh 432; *Evans v. Greenhow*, 15 Gratt. 53; *Charron v. Boswell*, 18 Gratt. 216; *Findlay v. Toncray*, 2 Rob. 377, 380; *Erschine v. Staley*, 12 Leigh 426.

Position of Creditor under Elegit.—A creditor extending the land of his debtor under an elegit, stands, in judgment of law, as if he had taken a lease for years in satisfaction of his debt; and by virtue of such extent, he acquires a title to the premises which may be the subject of adjudication in this court, as a controversy concerning the title of land. *Lyons v. McGuire*, 22 Gratt. 202.

Title Acquired under Elegit.—The officer executing a writ of elegit did not deliver to the creditor actual possession of the premises, but only the legal possession; which could be enforced by ejectment, or by writ of unlawful detainer when the cause of action had accrued within three years. *Lyons v. McGuire*, 22 Gratt. 202.

Recovery of Possession by Tenant.—If after an extent, the possession of

the premises was withheld by the debtor, or some one claiming under him, the tenant by elegit, might recover the same by action, and hold over even after his term had expired; and this, though his term had expired before the trial of the cause. *Lyons v. McGuire*, 22 Gratt. 202.

Eviction under Elegit.—M. is indebted to W. by bond, and J. guarantees the debt; W. recovers judgment against M. and sues out an elegit, on which a moiety of M.'s land is extended in June, 1824, but W. does not get possession; a warrant had been issued in 1822, from the treasury of the United States against M. for a debt due United States and under this warrant, the land extended to W. is sold in July, 1824, and purchased for the United States in pursuance of instructions from the treasury; M. still holds possession till November, 1825, when the land is rented out under an interlocutory order of the federal court in a suit there pending of the United States against M. and W. touching the title to the land; and by another interlocutory decree, the land is sold, and the proceeds held subject to future order; but no final decree has yet been made in that suit. It was held, that this was not an eviction of W.'s title under his elegit; and that until and unless he should be evicted, the extent of the moiety of the land under his elegit was a satisfaction of the debt due him from M. *Wilson v. Jackson*, 5 Leigh 102.

Quashal of Writ.—A writ of elegit issued in 1812 on a judgment rendered in 1806 (in which year a *fi. fa.* was returned upon it *nulla bona*) ought not to have been quashed because it was issued without obtaining leave of the court; the motion to quash it being made by the defendant against whom the judgment was rendered and not by a purchaser from him. *Avery v. Robinson*, 4 Munf. 546.

A writ of elegit, issued in 1812 on a judgment rendered in 1806 (in which

year a fi. fa. upon it was returned nulla bona) ought not to have been quashed on the ground that no previous entry had been made on the record on the plaintiff's election to take elegit. *Avery v. Robinson*, 4 Munf. 546.

Satisfaction.—On a bill by a creditor against his debtor who has escaped, and the debtor's alienee, to subject lands devised to the debtor after his

escape, and conveyed away by him while at large, a court of equity will decree a sale of so much as is liable to the elegit lien, to wit, a moiety, if it appear that the profits thereof are insufficient to keep down the interest of the debt. But it will go no further. It will not decree a sale of the whole lands. *Stuart v. Hamilton*, 8 Leigh 503.

Eleemosynary Corporations.

See the titles CHARITIES, vol. 2, p. 790; RELIGIOUS SOCIETIES.

ELEVATORS.

See the title NEGLIGENCE.

Liability of Storekeeper for Injury Received by Customer Falling into Unguarded Elevator Shaft.—In an action for injuries received by falling through an elevator shaft in the back part of defendant's store, it was shown that the injury occurred in that part of the store where customers were ordinarily not expected to go, but that the plain-

tiff followed the defendant's clerk back to examine some hams hanging on the rear wall of the store, and fell into the elevator shaft which was unguarded. The jury found for the plaintiff, and the trial court refused to order a new trial. On appeal it was held, that the judgment would not be disturbed. *Smith v. Parkersburg, etc., Ass'n*, 48 W. Va. 232, 37 S. E. 645.

Emancipation of Child.

See the title PARENT AND CHILD.

Emancipation of Married Women.

See the title HUSBAND AND WIFE.

Emancipation of Slaves.

See the titles SLAVES; WILLS.

EMBEZZLEMENT.

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CROSS REFERENCES.

See the titles LARCENY; TROVER AND CONVERSION.

As to relief in equity where a sheriff commits default and is indicted for embezzlement, see the title COMPOUNDING OFFENSES, vol. 3, p. 37.

I. Definition and Nature.**A. DEFINITIONS.**

Embezzlement is a statutory crime. In Virginia it is defined as follows: "If any person wrongfully and fraudulently use, dispose of, conceal, or embezzle any money, bill, note, check, order, draft, bond, receipt, bill of lading, or any other property which he shall have received for another, or for his employer, principal, or bailor, or by virtue of his office, trust, or employment, or which shall have been entrusted or delivered to him by another, or by any court, corporation, or company, he shall be deemed guilty of larceny thereof." Code, § 3716. *Moss v. Harwood*, 102 Va. 386, 46 S. E. 385; *Pitsnogle v. Com.*, 91 Va. 808, 22 S. E. 351.

The crime of embezzlement consists in the felonious conversion and appropriation, by one party, of goods of another, which have been entrusted to his care. *Shinn v. Com.*, 32 Gratt. 899; *Com. v. Adcock*, 8 Gratt. 661; *Wadley's Case*, 98 Va. 803, 35 S. E. 452; *Smith v. Com.*, 4 Gratt. 532.

B. DISTINGUISHED FROM LARCENY.

The fundamental principles, controlling the crime of embezzlement and larceny, are closely allied, their difference consisting mainly in the manner of the asportation and the relation existing between the owner of the goods and the party accused. Hence, unlike larceny, embezzlement can only arise upon the existence of an element of trust between the prisoner at bar and the owner of the property. *Com. v. Adcock*, 8 Gratt. 661; *Shinn v. Com.*, 32 Gratt. 899; *Wadley's Case*, 98 Va. 803, 35 S. E. 452; *Smith v. Com.*, 4 Gratt. 532.

II. Who May Commit the Offense.

Under the 8th section of the act passed February 9th, 1811, entitled "an act to amend an act, entitled 'an act for regulating the navigation of James river above the falls of said river,'" it is not necessary that the party charged with embezzlement under that act, should be the captain of the boat, in order to bring his offense within the act. *Smith v. Com.*, 4 Gratt. 532.

III. Intent.

Intent as an Element of Offense.—In embezzlement, there must be a fraudulent purpose to deprive the owner of his property and appropriate the same. For, if property is converted under a bona fide claim of right, the conversion is not embezzlement. *Wadley's Case*, 98 Va. 803, 35 S. E. 452; *Cook v. Darby*, 4 Munf. 444; *Shinn v. Com.*, 32 Gratt. 899.

But an intention to return money, fraudulently appropriated, will not protect the prisoner from a conviction of embezzlement. *Shinn v. Com.*, 32 Gratt. 899.

The intention to embezzle should be left to the determination of the jury. *Shinn v. Com.*, 32 Gratt. 899, 909.

IV. Defenses.

Civil Liability.—The fact that the accused is civilly liable to the owner of the goods, will not affect the question of his criminal responsibility, if he acted with a felonious intent. *Shinn v. Com.*, 32 Gratt. 899.

Illegality of Corporation Defrauded.—An officer who receives money in his official capacity for his company will not be permitted to question the legality of such company upon an indictment for embezzlement. *Shinn v. Com.*, 32 Gratt. 899.

Insolvency of Corporation Defrauded.—In a prosecution for embezzling the funds of a corporation, the question of solvency of such corporation is immaterial, as it is as much a crime to embezzle the funds of a solvent as of an insolvent corporation. *Wadley v. Com.*, 98 Va. 803, 35 S. E. 452.

Therefore, it is error to instruct the jury that they must find the prisoner guilty if they believe that he embezzled the funds with intent to wrong and defraud the corporation, and thereby render it unable to meet its obligations; but it is not such error as will prejudice the prisoner. *Wadley v. Com.*, 98 Va. 803, 35 S. E. 452.

V. Indictment.

A prisoner, having been remanded by the examining court for embezzling the goods of one party, may, upon proof of a different ownership in such goods, be indicted for embezzling the goods of such later discovered owner; the goods so embezzled being the same in both instances. *Com. v. Adcock*, 8 Gratt. 661.

VI. Evidence.

A. PRESUMPTION OF INNOCENCE.

Where a person was indicted for embezzlement, it was held, that the prisoner is presumed to be innocent, and that presumption of innocence attaches to the proof of every circumstance necessary to establish his guilt. *Wadley v. Com.*, 98 Va. 803, 35 S. E. 452.

B. ADMISSIBILITY.

In the prosecution of a prisoner for embezzlement by substituting worthless for good securities, the worthless character of the securities substituted must be shown by witnesses who are present and testify as to facts within their personal knowledge. The difficulty or even impossibility of procuring such witness can not justify the introduction of improper evidence. *Wadley v. Com.*, 98 Va. 803, 35 S. E. 452.

Upon an indictment against S., the secretary of a building fund association, for the embezzlement of a check, the property of said association, the records of the association whilst he was in office, and oral evidence relating to the organization, objects and business of the building association, the appointment and duties of S. as secretary, his conduct with respect to the funds of the association in his hands, and his disposition and appropriation of the check, for the embezzlement of which he was indicted, are competent evidence against him. *Shinn v. Com.*, 32 Gratt. 899.

C. WEIGHT AND SUFFICIENCY.

Proof that the purchaser of a watch paid \$30 for it, and that it was represented, when purchased, as a gold watch, is sufficient to sustain a charge in an indictment that a gold watch was stolen or embezzled. *Pitsnogle v. Com.*, 91 Va. 808, 22 S. E. 351.

Evidence of Embezzlement as Sustaining Indictment for Larceny.—See the title LARCENY.

Emblements.

See the titles CROPS, vol. 4, p. 94; DOWER, vol. 4, p. 801.

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See the titles BRIBERY, vol. 2, p. 621; JURY; OBSTRUCTING JUSTICE.

EMERGENCY.—The mere signal to put on brakes when approaching an overhead bridge which is very low does not constitute such an **emergency** as to render a brakeman irresponsible for his acts. *Haffner v. Chesapeake, etc., R. Co.*, 96 Va. 528, 31 S. E. 899. See generally, the titles **MASTER AND SERVANT**; **NEGLIGENCE**; **RAILROADS**.

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As to procedure for the establishment of mills and mill dams, see the title MILLS AND MILL DAMS. As to procedure for establishment of public highways, see the title STREETS AND HIGHWAYS.

I. Definitions and Distinctions.

The right of eminent domain is defined to be the right on the part of the state to take or control the use of private property for the public benefit when public necessity demands it. *Roanoke v. Berkowitz*, 80 Va. 616. *Alexandria, etc., R. Co. v. Alexandria, etc., R. Co.*, 75 Va. 780; *Painter v. St. Clair*, 98 Va. 85, 34 S. E. 989.

Eminent domain, according to Vattel, is the right of disposing, in case of necessity and for the public safety, of all the wealth contained in the state. *Roanoke v. Berkowitz*, 80 Va. 616.

"Some law writers, at least, estimate that the state, as representative of the people, may both take, hold, and control property for public use, under the right of eminent domain, 'as the public safety, necessity, convenience, or welfare demand.' *Cooley*, Const. Lim. 524. Others limit the meaning of 'eminent domain' in its application to the appropriation by a sovereign state

of private property for particular uses, for the benefit of the public. 'All other exercises of power over private property, and every species of right in, and control and regulation over, property of a public nature, may properly be referred, as we have shown, to some other of the sovereign powers of the state.'" *Ralston v. Weston*, 46 W. Va. 544, 33 S. E. 326, 328.

Distinguished from Police Power.—

The regulation of the use of property by the owner, so that it may not injure others, is the exercise of the police power and not of the power of eminent domain. *Roanoke Gas Co. v. Roanoke*, 88 Va. 810, 831, 14 S. E. 665; *Richmond, etc., R. Co. v. Richmond*, 26 Gratt. 83. See post, "Regulation of Use of Property," V, A.

The destruction of liquor by a municipal corporation on the eve of the evacuation of the city by the Confederate forces was held an exercise of the police power for the preservation of

peace and good order in the city and was not an exercise of the power of eminent domain. *Wallace v. Richmond*, 94 Va. 204, 26 S. E. 586, overruling *Jones v. Richmond*, 18 Gratt. 517. See the title CONSTITUTIONAL LAW, vol. 3, p. 140.

II. Who May Exercise Power.

A. STATE.

The power of eminent domain is vested in the legislature of the state and may be exercised directly by the state. *Painter v. St. Clair*, 98 Va. 85, 34 S. E. 989; *Alexandria, etc., R. Co.*, 75 Va. 780, 40 Am. Rep. 743; *Hope v. Norfolk, etc., R. Co.*, 79 Va. 289.

"The power of eminent domain is an incident of sovereignty. It is vested in the legislature, and it can only be set in motion by virtue of legislative enactment, by which the time, manner, and occasion of its exercise are directed and controlled, except as restrained by the constitution. The legislature is clothed with exclusive authority to determine when the necessity exists for exercising the power. It may exercise it directly, or it may select such agencies as it pleases, and confer upon them the right, subject only to the limitations contained in the constitution, and with respect to it 'due process of law' only requires that it shall be exercised in subordination to the established principle that private property can not be taken for public use without the consent of the owner, save upon payment to him of just compensation." *Painter v. St. Clair*, 98 Va. 85, 87, 34 S. E. 989; *Alexandria, etc., R. Co. v. Alexandria, etc., R. Co.*, 75 Va. 780.

The time, manner, and occasion of its exercise, directly or indirectly, within the limitation stated, is within the legislative discretion. *Painter v. St. Clair*, 98 Va. 85, 34 S. E. 989.

A contract, by which an exclusive right of way is granted through any land, however small the parcel, is void,

so far as the right is attempted to be made exclusive, as contrary to public policy and as in direct conflict with the state's right of eminent domain. *West Virginia Trans. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600.

B. DELEGATION OF POWER TO AGENTS.

1. To Whom Power May Be Delegated.

See post, "For What Purposes Property May Be Taken," IV.

a. Counties.

The power of eminent domain may be delegated by the legislature to counties for the purpose of acquiring property necessary for county buildings or other public purposes. *Supervisors v. Cox*, 98 Va. 279, 36 S. E. 380; *Board of Supervisors v. Gorrell*, 20 Gratt. 484; *Alexandria, etc., R. Co. v. Alexandria, etc., R. Co.*, 75 Va. 780. See the title COUNTIES, vol. 3, p. 636.

Where the power of eminent domain is conferred upon the board of supervisors of a county, it is for them to determine what land they will procure; and, whether their discretion is wisely or unwisely exercised in the selection, can not be inquired into in the proceeding instituted to condemn the land. *Board of Supervisors v. Gorrell*, 20 Gratt. 484.

b. Municipal Corporations.

The legislature may confer upon municipal corporations the power of eminent domain for the purpose of acquiring land for municipal purposes. *Roanoke v. Berkowitz*, 80 Va. 616; *Alexandria, etc., R. Co. v. Alexandria, etc., R. Co.*, 75 Va. 780; *Charlottesville v. Maury*, 96 Va. 383, 31 S. E. 520.

But neither the mayor nor other executive officers, agents or employees of a municipal corporation have any authority to convert a private culvert into a public one, or to assume control of it for the corporation. *Robinson v. Danville*, 101 Va. 213, 43 S. E. 337.

Where the charter of a city limited its exercise of the right of eminent domain to the acquisition of grounds for the purpose of opening or extending its streets or other public purposes, it was held, that the city had no authority, in the exercise of its power of eminent domain, to order the destruction of all liquor in the city, upon the eve of the evacuation of the city by Confederate forces. *Wallace v. Richmond*, 94 Va. 204, 26 S. E. 586, overruling *Jones v. Richmond*, 18 Gratt. 517. See the title MUNICIPAL CORPORATIONS.

c. Private Persons.

It seems that the power of eminent domain may also be conferred upon private persons for the purpose of constructing works of public utility. *Alexandria, etc., R. Co. v. Alexandria, etc., R. Co.*, 75 Va. 780, 786.

d. Private Corporations.

And it is well settled that private corporations may be authorized to take private property for the construction of works of public utility, and when duly empowered by the legislature so to do, their private pecuniary interests do not preclude their being regarded as public agencies in respect to the public good, which is sought to be accomplished. *Alexandria, etc., R. Co. v. Alexandria, etc., R. Co.*, 75 Va. 780, 786; *Hope v. Norfolk, etc., R. Co.*, 79 Va. 283; *Painter v. St. Clair*, 98 Va. 85, 34 S. E. 989; *Crenshaw v. Slate River Co.*, 6 Rand. 245; *Plecker v. Rhodes*, 30 Gratt. 795; *West Virginia Trans. Co. v. Volcanic Oil, etc., Co.*, 5 W. Va. 382; *Fork Ridge Baptist Cemetery Ass'n v. Redd*, 33 W. Va. 262, 10 S. E. 405; *Railroad Co. v. Foreman*, 24 W. Va. 662; *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69.

The delivery of the certificate of incorporation of a railroad company, or of a copy thereof properly certified, to the clerk of the county court for record in the county in which the principal

office or place of business of the company is located, is not a condition precedent to the proper and lawful exercise of the right of eminent domain. *Wheeling Bridge, etc., Co. v. Camden, etc., Oil Co.*, 35 W. Va. 205, 13 S. E. 369.

Foreign Corporation.—A foreign corporation can not in the courts of the United States condemn the land of the citizen of a state for the use of such corporation, and if the federal courts have not original jurisdiction for such purposes, a proceeding of that kind instituted in a state court can not be removed to the federal courts, because the federal courts can under no circumstances have jurisdiction of such a case. *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812, 814.

2. Construction of Grant of Power.

a. In General.

Grants of corporate powers being in derogation of the common law, are to be strictly construed, and this is especially the case where the power claimed is a delegation of the right of eminent domain, one of the highest powers of sovereignty pertaining to the state itself and interfering most seriously and often vexatiously with the ordinary rights of property. *Alexandria, etc., R. Co. v. Alexandria, etc., R. Co.*, 75 Va. 780, 781; *Painter v. St. Clair*, 98 Va. 85, 34 S. E. 989; *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69; *Adams v. Clarksburg*, 23 W. Va. 203, 207; *Cemetery Ass'n v. Redd*, 33 W. Va. 262, 10 S. E. 405; *Mairs v. Gallahue*, 9 Gratt. 94; *Railroad Co. v. Foreman*, 24 W. Va. 662; *Charlottesville v. Maury*, 96 Va. 383, 31 S. E. 520; *Supervisors v. Stout*, 9 W. Va. 703.

It is a general rule that he who seeks to exercise the extraordinary power of taking private property for public use must follow strictly the mode of procedure prescribed by law. *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69.

The delegated power of eminent domain must be exercised in the manner, and upon the conditions and terms prescribed by the legislature. If the right to exercise that power is conferred upon the corporation by its charter or a special statute, it must still be exercised in accordance with the general law upon the subject, unless a contrary intention clearly appears, for it will not be presumed that the legislature intended to change the policy as expressed in the general law, further than is expressly provided, or necessarily implied in the special legislation. *Charlottesville v. Maury*, 96 Va. 383, 31 S. E. 520.

Thus, where the charter or a corporation provides only for the cutting, taking and carrying away of any wood, stone, gravel or earth which may be deemed necessary to carry out its purposes of incorporation, proceedings to condemn the land out and out are unauthorized and illegal. *Richmond, etc., R. Co. v. Knopffs*, 86 Va. 981, 11 S. E. 881.

The owner of an island in the Appomattox river obtained leave of court to build a mill on his island, and to condemn an acre of land on the main for an abutment for his dam. He placed the abutment on the condemned land, but did not build his mill on the island, but on the main, lower down, with the consent of the owner. It was held, that the mill was not established according to law, and that the mill owner and those claiming under him had no right to the water power of the stream, as against the public right of navigation, and an incorporated company to improve the navigation. *Stokes v. Upper Appomattox Co.*, 3 Leigh 318.

b. Performance of Conditions by Grantee.

Under 2 Rev. Code of 1819, p. 227, § 5, authorizing the court to lay the party applying for the construction of a dam under conditions for preventing the impairment to the convenient

crossing of the stream on which the dam has been erected, a party to whom the privilege of constructing a dam is granted on condition that he shall keep a ferry at the crossing of a road over the stream across which the dam is to be erected, must provide a sufficient boat and ferry the public across without charge. *Mairs v. Gallahue*, 9 Gratt. 94.

The condition as to the maintenance of the ferry is not merely personal to the grant of the privilege but is a condition incident to the grant, attaching to it in the hands of subsequent parties. *Mairs v. Gallahue*, 9 Gratt. 94.

c. Provisions as to Time of Exercise of Power.

Where a statute authorizing the building of a bridge provided that it should be commenced in six months and completed in two years, it was held, that where the completion of the bridge in two years was hindered by the owner of the land in delaying the work by his appeal from the judgment of the county court confirming the report of the commissioners, he would not be allowed to set up the forfeiture, since it was a matter for the commonwealth to determine whether the forfeiture should be enforced. *Plecker v. Rhodes*, 30 Gratt. 795.

Where an act authorizing the building of a bridge required that it should be commenced in six months and completed in two years, it was held, that the fact that the notice to the owner of land of motion to the court for the appointment of commissioners to value the land proposed to be condemned, was more than six months after the passage of the act, was not sufficient to show that the bridge was not commenced within six months, as notice was not necessary to the commencement of the bridge. *Plecker v. Rhodes*, 30 Gratt. 795.

d. Grant of Power to Take Property Already Devoted to Public Use.

See post, "Construction of Grant of Power," III, B, 2.

III. What Property May Be Taken.

A. PRIVATE PROPERTY.

Franchise.—A franchise may be taken for public uses, upon making just compensation therefor. *James River, etc., Co. v. Thompson*, 3 Gratt. 270; *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 398.

Private Property of an Internal Improvement Company.—One internal improvement company may, in the exercise of the right of eminent domain, take the real estate of another in the same manner and generally under the same conditions that it may take the land owned by others, provided the lands proposed to be taken, are not necessary to the enjoyment of its franchises by the defendant company; nor will any mere trivial or temporary use by the defendant company be sufficient to protect its land from such condemnation and appropriation. *Wheeling Bridge Co. v. Wheeling, etc., Bridge Co.*, 34 W. Va. 155, 11 S. E. 1009; *Tuckahoe Canal Co. v. Tuckahoe, etc., R. Co.*, 11 Leigh 42.

Property of Railroad Company.—Since the property of railroad corporations, so far as concerns the ownership thereof, and the profit or gain to be made from their use, is to all intents and purposes private property, although applied to a use in which the public have an interest, it follows that it may be taken for public use as well as the private property of an individual. *Pittsburg, etc., R. Co. v. Benwood Iron Works*, 31 W. Va. 710, 8 S. E. 453; *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812.

It is no obstacle in the way of the appropriation of the land owned by one railroad company, that merely to prevent its condemnation the former has put the land to a use not necessary for the proper exercise of its franchise. *Baltimore, etc., Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812; *Wheeling Bridge*

Co. v. Wheeling, etc., Bridge Co., 34 W. Va. 155, 11 S. E. 1009.

Reversion in Real Estate.—Where necessary for the purposes of a company authorized to acquire property by eminent domain, the reversion of land may be condemned, where the company owns the life estate. *Karn v. Rorer Iron Co.*, 86 Va. 754, 11 S. E. 431.

Rights under Contract.—And contracts made with the state are in subordination to its right to eminent domain. Hence, where the state leased land for a term of years for an insane asylum, agreeing to surrender possession at the end of the term and during the term, in pursuance of an act of legislature, instituted proceedings to acquire title by condemnation, it was held that the act was not in violation of the constitution of the United States as impairing the obligation of contract. *Tait v. Cent. Lunatic Asylum*, 84 Va. 271, 4 S. E. 697.

B. PROPERTY ALREADY DEVOTED TO PUBLIC USE.

1. Right to Take.

In General.—Land, or other property, which has, in conformity to the provisions of the constitution, been devoted to the public use, may afterwards, in like manner, be again taken and, appropriated to the public service, under a subsequent statute. *Alexandria, etc., R. Co. v. Alexandria, etc., R. Co.*, 75 Va. 780; *Richmond, etc., R. Co. v. Johnston*, 103 Va. 456, 460, 49 S. E. 496; *Maxwell v. Central District, etc., Co.*, 51 W. Va. 121, 41 S. E. 125; *Chesapeake, etc., R. Co. v. Washington, etc., R. Co.*, 99 Va. 715, 40 S. E. 20; *Postal Telegraph, etc., Co. v. Farmville, etc., R. Co.*, 96 Va. 661, 32 S. E. 468, disapproving *Postal Telegraph, etc., Co. v. Norfolk, etc., R. Co.*, 88 Va. 920, 14 S. E. 803; *James River, etc., Co. v. Anderson*, 12 Leigh 278.

Upon the construction of the charter of the James River and Kanawha Co. (Supp. to Rev. Code, ch. 377, §§ 29.

34, 35), the company has a right to enter upon and occupy the public streets of a town, as well and in like manner as the lands of individuals, when it shall deem the same necessary for its canal or other works, but it must make compensation in damages to any party injured. *James River, etc., Co. v. Anderson*, 12 Leigh 278.

Taking Part of Railroad Right of Way for Telegraphs.—Under the provisions of the Va. Code, 1887, (§§ 1287, 1288, 1289) a telegraph company may have a right of way along the line of a railroad, condemned for its use, but not so as to affect the railroad company in the enjoyment of its property. *Postal Telegraph, etc., Co. v. Farmville, etc., R. Co.*, 96 Va. 661, 32 S. E. 468, disapproving *Postal Telegraph, etc., Co. v. Norfolk, etc., R. Co.*, 88 Va. 920, 14 S. E. 803. See the title TELEGRAPHS AND TELEPHONES.

Taking Property of One Railroad for Another.—An act, after authorizing a railroad company to construct its road, contained the following restriction: "Provided that in the extension of the said railway it shall in no way interfere with the chartered rights or franchises of any railroad extending between Alexandria and Washington; but this proviso shall not be construed as preventing said Alexandria and Fredericksburg railway from crossing any such railroad." The company took, and the county court of Alexandria county condemned for its use, a strip of 18½ feet, making 8 acres, 25 perches, of the road bed of the Alexandria and Washington Railroad Company, extending the whole length of its road, which had been appropriated in fee simple to the latter company by virtue of its charter. It was held, that this taking of land was an interference with the chartered rights and franchises of the Alexandria and Washington Railroad Company within the prohibition of said proviso, and the county court had no jurisdiction over the subject matter, and its judgment

being null and void, is no impediment to the consideration of the case. *Alexandria, etc., R. Co. v. Alexandria, etc., R. Co.*, 75 Va. 780, 781.

2. Construction of Grant of Power.

While the power to condemn property already devoted to a public use is recognized, the right to exercise it must be manifested either by express legislative authority or by necessary implication. General language is not sufficient for that purpose. *Richmond, etc., R. Co. v. Johnston*, 103 Va. 456, 49 S. E. 496; *Alexandria, etc., R. Co. v. Alexandria, etc., R. Co.*, 75 Va. 780; *Maxwell v. Central District, etc., Co.*, 51 W. Va. 121, 41 S. E. 125; *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812.

"The right of eminent domain is a dominant legislative power only called into exercise by the enactment of a valid statute, and when a party asserts a right to seize land previously appropriated to a public use, he must sustain his claim by producing a statute clearly conferring the asserted authority. It will not be presumed, in the absence of such a statute, that the legislature intended to again seize property which had been once appropriated. The authority to take property seized and appropriated to another public use may be implied from the language of the statute, but this can only be so where the words employed and the evident intent of the statute make it clearly the duty of the courts to give force to the implication. The intent of the legislature to destroy the rights granted by former statutes must unequivocally appear. A grant of authority to appropriate land seized under former statutes, or previously seized for public use, can not, ordinarily, be inferred from a mere general grant. The general rule is that if the two uses are not inconsistent, and both may stand together without material impairment of the first, authority for the second use may be implied from a

general grant; but if they can not co-exist without material impairment of the first, authority for the second use may be implied from a general grant; but if they can not coexist without material impairment of the first, authority to take for the second can not be implied from a mere general grant of authority to condemn." *Richmond, etc., R. Co. v. Johnston*, 103 Va. 456, 460, 49 S. E. 496.

A general power of condemnation, such as is found in §§ 1095, 1096, of the Code, which authorizes the crossing of the tracks of a railway company, by a highway, or of a highway by the tracks of a railway company, is insufficient to authorize the condemnation of property purchased and used by a railroad company for depots, stations and railroad yards. The power to condemn any and all such property is recognized, but the authorities seem uniformly to hold that it must be exercised in obedience to a statute which specifically authorizes its condemnation, and that general language, such as is used in the sections we have quoted, is insufficient to that end. *Richmond, etc., R. Co. v. Johnston*, 103 Va. 456, 459, 49 S. E. 496.

And though the power of eminent domain is delegated to a railroad company, such company has no right, without express statutory authority, to acquire for its own uses land already acquired by another railroad company, as this would be an interference with the rights and franchises of such other company. *Alexandria, etc., R. Co. v. Alexandria, etc., R. Co.*, 75 Va. 780, 40 Am. Rep. 743.

Before an individual or company may invade and destroy in whole or part for other public purposes a public improvement placed on the street by an abutting lot owner in front of his property under agreement with the council of the city, town or village, specific authority for so doing must first be obtained from such council. *Maxwell v.*

Central District, etc., Co., 51 W. Va. 121, 41 S. E. 125.

C. STATUTORY EXEMPTIONS.

Statutory Provisions.—It is provided by § 1105f of the Virginia Code of 1904 that no company shall invade the dwelling house of any person in any county, or any space within sixty feet thereof, without the consent of the owner, except in the case of a railroad company, when it is decided by the commissioners (appointed to ascertain the value of the land or other property, or the interest or estate therein, to be taken) that it would otherwise be impracticable, without reasonable expense, to construct such road, by reason of the conformation of the country. *Richmond, etc., R. Co. v. Wicker*, 13 Gratt. 375; *Hodges v. Seaboard, etc., R. Co.*, 88 Va. 653, 658, 14 S. E. 380.

It is provided by ch. 52, § 5, W. Va. Code, that no railroad company shall invade the dwelling house of any person, or any space within sixty feet thereof, without the consent of the owner, unless it be absolutely necessary for the construction of such road, by reason of its passing through a narrow gauge, defile or narrow space.

The West Virginia Code, ch. 52, § 5, formerly exempted only the dwelling and a space within twenty feet of it. *Chesapeake, etc., R. Co. v. Pack*, 6 W. Va. 397; *McConiha v. Guthrie*, 21 W. Va. 134.

It is provided by § 2, ch. 42, that no land shall be so taken for cemetery purposes which lies within four hundred yards of a dwelling house, unless to extend the limits of a cemetery already located, and then only so that such limits shall not be extended nearer to any dwelling house which is within four hundred yards. *Fork Ridge Baptist Cemetery Ass'n v. Redd*, 33 W. Va. 262, 10 S. E. 405, 406.

Effect of Subsequent Special Statute as Repealing Prior General Statute.—The courts do not favor the repeal of

a statute by implication; and in construing a prior and a subsequent statute, relating to the same subject matter, the latter will not be held to be a repeal of the former, unless the repugnancy between them is irreconcilable; and consequently, where the prior statute is general in its terms and prohibits the taking of a certain species of property in any case whatever, and the subsequent statute is limited or special in its terms and authorizes the taking of such property in certain described localities only, the latter will be held to be a limitation or qualification of the former, and the prohibition will apply to all cases except to the localities thus specified in the subsequent statute; and an express repeal of the qualifying statute will restore the prohibition in the general statute to its original force, and it will then operate as though the qualifying statute had never existed. *McConiha v. Guthrie*, 21 W. Va. 134, 135.

What Property Is Exempt under Statutes.—The provision of § 5, that a company shall not invade the dwelling house of any person, or space within twenty feet of it, applies to such house and space occupied either by the owner, in fee, or a tenant. *Chesapeake, etc., R. Co. v. Pack*, 6 W. Va. 398.

The first, and most of the provisions of § 5, ch. 52, of the West Virginia Code relate to the mere entry by a company, incorporated for the construction of a work of internal improvement, upon the lands of another person, to examine, survey and lay out parts needed for the improvement. But the sentence next to the last, as amended in the act of 1870, which provides that no company shall, under the chapter, invade the dwelling house of any person, or any space within twenty feet thereof, without the consent of the owner, not only forbids such entry for experimental and preparatory purposes, but inhibits the acquisition of the land by judicial proceeding, upon payment of just com-

pensation, without the consent of the owner. *Chesapeake, etc., R. Co. v. Pack*, 6 W. Va. 397.

Land in an incorporated town is not exempt, under the West Virginia statute. W. Va. Code, ch. 52, § 5; *Chesapeake, etc., R. Co. v. Pack*, 6 W. Va. 397.

The proviso which immediately follows the sentence first mentioned, that "this act" shall not apply to any city or incorporated town, is construed as if, instead of the words "this act," the words "preceding sentence" were used. It excepts dwelling houses and the space adjoining them, in cities and incorporated towns, from the protection of the preceding provision, and leaves them, under the general law, subject to be taken upon payment of compensation, without the consent of the owner. *Chesapeake, etc., R. Co. v. Pack*, 6 W. Va. 397, 398.

Land of another person than the owner of the dwelling though within sixty feet of the dwelling is not exempt under the Virginia statute. *Richmond, etc., R. Co. v. Wicker*, 13 Gratt. 375; *Hodges v. Seaboard, etc., R. Co.*, 88 Va. 653, 658, 14 S. E. 380; *McConiha v. Guthrie*, 21 W. Va. 134.

"In my opinion the terms of the statute, standing alone, import that a dwelling house, and a space of sixty feet about it, are exempt from invasion by internal improvement companies, as being reserved to the owner thereof. Without such invasion the owner enjoys his dwelling house and circumjacent land to the extent of his boundary, however large. If, however, public necessity requires that a portion of his property be taken from him, it may be done, but not so as to invade his dwelling house, or a space of sixty feet about it. The law merely reserves to the owner a limited extent of his own property, but does not confer on him any control whatever over the land of the coterminous owner." *Richmond, etc., R. Co. v. Wicker*, 13 Gratt. 375.

Hodges v. Seaboard, etc., R. Co., 88 Va. 653, 658, 14 S. E. 380.

Remedy Where Court Orders Appropriation of Exempted Land.—Section 5, ch. 52, W. Va. Code, as amended by ch. 88 of the acts of 1870, is in force in this state; and therefore, if a judge of the circuit court, having general jurisdiction of proceedings to condemn lands for railroad purposes, on the application of a railroad company enters such proceedings and appoints commissioners to view and ascertain the compensation to be paid for lands, on which there are dwelling houses of the owners, without the consent of such owners, and makes an order that such railroad company may, upon paying into court the compensation ascertained by such commissioners, take such lands for the use of its railroad, without excepting such houses and a space within twenty feet of each of them as provided in said § 5, he thereby exceeds his legitimate powers, and a writ of prohibition will be awarded by this court, on the petition of such owners, to prohibit him from proceeding therein and said railroad company from invading or taking such houses or the land within twenty feet of any of them. *McConiha v. Guthrie*, 21 W. Va. 134, 135.

IV. For What Purposes Property May Be Taken.

A. PRIVATE PURPOSES.

While there is no provision in the constitution forbidding the legislature to pass laws prohibiting the appropriation of private property for private purposes, it is well settled that the taking of private property for private use is contrary to the fundamental principles of republican government. *Fallsburg, etc., Co. v. Alexander*, 101 Va. 98, 101, 43 S. E. 194; *Roanoke Gas Co. v. Roanoke*, 88 Va. 828, 14 S. E. 665; *Heninger v. Peery*, 102 Va. 896, 47 S. E. 1014; *Lewis v. Washington*, 5 Gratt. 265; *Varner v. Martin*, 21 W. Va. 534;

Fork Ridge Baptist Cemetery Ass'n v. Reed, 33 W. Va. 262, 10 S. E. 405; *Salt Co. v. Brown*, 7 W. Va. 191; *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812; *Coffman v. Griffin*, 17 W. Va. 178; *Pittsburg, etc., R. Co. v. Benwood Iron Works*, 31 W. Va. 710, 8 S. E. 453, 454.

"It was doubtless regarded as unnecessary to insert such a provision in the constitution or bill of rights, as the exercise of such an arbitrary power of transferring by legislation the property of one person to another, without his consent, was contrary to the fundamental principles of every republican government; and in a republican government neither the legislative, executive, nor judicial department can possess unlimited power." *Fallsburg, etc., Co. v. Alexander*, 101 Va. 98, 101, 43 S. E. 194; *Varner v. Martin*, 21 W. Va. 534, 548.

B. PUBLIC PURPOSES.

1. Determination of Necessity of Appropriation.

The question of the necessity, propriety, or expediency of resorting to the exercise of the power of eminent domain, in the absence of constitutional provision to the contrary, is a legislative and not a judicial question. *Zircle v. Southern R. Co.*, 103 Va. 22, 45 S. E. 802; *Alexandria, etc., R. Co. v. Alexandria, etc., R. Co.*, 75 Va. 780, 40 Am. Rep. 743; *Roanoke v. Berkowitz*, 80 Va. 616; *Tait v. Central Lunatic Asylum*, 84 Va. 271, 4 S. E. 697; *Roanoke Gas Co. v. Roanoke*, 88 Va. 810, 14 S. E. 665; *Varner v. Martin*, 21 W. Va. 534; *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812.

Whether private property should be taken for the direct and immediate use of the public is a question for the legislature to determine, and when so taken and used, the title of the property condemned is not transferred to a private individual or corporation, but remains in the public directly. The

courts can not sit in judgment upon the public exigencies, which demand this exercise of the right of eminent domain, this being in such case solely a question for the legislature. *Varner v. Martin*, 21 W. Va. 534.

A legislative act declaring the necessity for such appropriation being the customary mode of determining that fact, must be held, for this purpose, the law of the land, and no further finding or adjudication is essential unless it be required expressly by the constitution of the state. *Alexandria, etc., R. Co. v. Alexandria, etc., R. Co.*, 75 Va. 780.

But when the sovereign power attaches conditions to the exercise of the right of eminent domain the enquiry whether the condition has been observed is a matter for judicial cognizance. *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812.

2. Determination of Character of Use.

It is the province of the legislature to declare the public uses for which private property may be taken, but the power of the legislature in this respect is limited by the constitution, and it remains with the courts to say whether the legislative enactment making such declaration and appropriation is in conflict with the constitutional limitation, and if so, to declare it unconstitutional and void. *Charleston, etc., Gas Co. v. Lowe*, 52 W. Va. 664, 44 S. E. 410; *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812; *Varner v. Martin*, 21 W. Va. 534; *Pittsburg, etc., R. Co. v. Benwood Iron Works*, 31 W. Va. 710, 8 S. E. 453; *Fallsburg, etc., Co. v. Alexander*, 101 Va. 102, 43 S. E. 194.

Whether the use to which property sought to be taken under the exercise of eminent domain is public or private is a judicial question, subject to review by the appellate court. *Pittsburg, etc., R. Co. v. Benwood Iron Works*, 31 W. Va. 710, 8 S. E. 453.

In all cases the use for which it is proposed to take private property in

the exercise of this right must be a public use, or for a public purpose, and this, as is conceded, is a question for judicial determination. *Fallsburg, etc., Co. v. Alexander*, 101 Va. 102, 43 S. E. 194.

When the court has determined that the use for which property is condemned is a public use, its judicial function is gone and the legislative discretion is unrestrained. Whether the proposed plan will accomplish the end proposed, or to what extent it will be beneficial to the public, are not matters to be determined by the courts; these are matters belonging to the legislative discretion. *Charleston, etc., Gas Co. v. Lowe*, 52 W. Va. 664, 44 S. E. 410; *Varner v. Martin*, 21 W. Va. 534.

The presumption is always in favor of the public character of a use declared so by legislature. *Varner v. Martin*, 21 W. Va. 534.

And it has been held, that when a statute confers the privilege of making public improvements, that determines that the use is necessary for the public convenience, and the only question to be ascertained by the proceedings in the court is the damages to the owners of the land condemned. *Plecker v. Rhodes*, 30 Gratt. 795.

3. What Constitutes.

a. General Principles.

(1) Definitions and Distinctions.

The use of a thing is strictly and properly the employment or application of the thing in some manner. The public use of a thing is the employment or application of the thing by the public. Public use means the same as use by the public. If the constitution means that private property can be taken only for use by the public, it affords a definite guide to both the legislature and the courts. Though the property is vested in private individuals or corporations, the public retain certain definite rights to its use or enjoyment, and to that extent it remains under the control of the legislature. If

no such rights are secured to the public, then the property is not taken for public use, and the act of appropriation is void. *Charleston, etc., Gas Co. v. Lowe*, 52 W. Va. 666, 667, 44 S. E. 410.

"'Public use' means the same as use by the public, and this, it seems to us, is the construction the words should receive in the constitutional provision in question. The reasons which incline us to this view are: First, that it accords with the primary and more commonly understood meaning of the words; second, it accords with the general practice in regard to taking private property for public use when the phrase was first brought into use in the earlier constitutions; third, it is the only view which gives the words any force as a limitation or renders them capable of any definite and practical application." *Fallsburg, etc., Co. v. Alexander*, 101 Va. 107, 43 S. E. 194; *Zircle v. Southern R. Co.*, 102 Va. 20, 45 S. E. 802; *Charleston, etc., Gas Co. v. Lowe*, 52 W. Va. 666, 667, 44 S. E. 410.

The test whether a use is public or not may be determined by the fact that, where the use is public a trust attaches to the subject condemned for the benefit of the public, of the enjoyment of which it can not be deprived by the company without a reasonable excuse. And by the further fact that the state retains the power to regulate and control the franchises of the company, and to prescribe the amount of charges and tolls which it shall be lawful for the company to exact for the transportation of passengers and freight. *Zircle v. Southern R. Co.*, 102 Va. 20, 45 S. E. 802; *Fallsburg, etc., Co. v. Alexander*, 101 Va. 107, 43 S. E. 194.

"But it is not necessary that each and every individual member of society should have the same degree of interest in this use, or be personally or directly affected by it, in order to make it public. If the use for which the property is

taken be to satisfy a great public want, or public exigency, it is a public use in the meaning of the constitution." *Pittsburg, etc., R. Co. v. Benwood Iron Works*, 31 W. Va. 710, 8 S. E. 464.

"The public use implies a possession, occupation and enjoyment of the land by the public at large, or by public agencies; and the due protection to the rights of private property will preclude the government from seizing it in the hands of the owner and turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the latter may devote it." *Fallsburg, etc., Co. v. Alexander*, 101 Va. 108, 43 S. E. 194.

Where a use is public a trust attaches to the subject condemned for the benefit of the public, of the enjoyment of which it can not be deprived by the company without a reasonable excuse, and the state retains the power to regulate and control the franchises of the company and to fix rates. *Zircle v. Southern R. Co.*, 102 Va. 17, 45 S. E. 802; *West Virginia Trans. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, 601.

Public Use Distinguished from Public Interest or Concern.—The expressions public interest and public use are not synonymous. The establishment of furnaces, mills and manufactures, the building of churches and hotels, and other similar enterprises are more or less matters of public concern, and promote in a general sense, the public welfare. But they lie without the domain of public uses for which private ownership may be displaced by compulsory proceedings. *Charleston, etc., Gas Co. v. Lowe*, 52 W. Va. 664, 667, 44 S. E. 410.

Public Utility Synonymous with Public Use.—The words "public utility" occurring in § 45 of the West Virginia Code were held to be synonymous, with the words "public use." "We do not suppose," said the court "that any different meaning was intended by the

legislature, but if there was, and there is really any difference in the signification, that attached to the language in the higher law, must prevail." *Salt Co. v. Brown*, 7 W. Va. 191, 195.

(3) Use Must Be Fixed and Definite.

The use which the public is to have of such property must be fixed and definite. The general public must have a right to a certain definite use of the private property on terms and for charges fixed by law; and the owner of the property must be compelled by law to permit the general public to enjoy it. It will not suffice, that the general prosperity of the community is promoted by the taking of private property from the owner and transferring its title and control to another, or to a corporation to be used by such other or by such corporation as its private property uncontrolled by law as to its use. Such supposed indirect advantage to the community is not in contemplation of law a public use. *Varner v. Martin*, 21 W. Va. 534, 535; *Railroad Co. v. Benwood Iron Works*, 31 W. Va. 710, 8 S. E. 453; *Cemetery Ass'n v. Redd*, 33 W. Va. 262, 263, 10 S. E. 405; *Charleston, etc., Gas Co. v. Lowe*, 52 W. Va. 666, 44 S. E. 410; *Fallsburg, etc., Co. v. Alexander*, 101 Va. 93, 43 S. E. 194.

A use to be public must be fixed and definite. It must be one in which the public, as such, has an interest, and the terms and manner of its enjoyment must be within the control of the state, independent of the rights of the private owner of the property appropriated to the use. The use of property can not be said to be public if it can be gained, denied, or withdrawn by the owner. The public interest must dominate the private gain. *Fallsburg, etc., Co. v. Alexander*, 101 Va. 93, 43 S. E. 194.

(3) Use Must Be Beneficial and Necessary to Public.

The use of the property, which the public must have, must be a substan-

tially beneficial use, which is obviously needful for the public to have, and which it could not do without except by suffering great loss or inconvenience. *Varner v. Martin*, 21 W. Va. 534, 535; *Railroad Co. v. Benwood Iron Works*, 31 W. Va. 710, 8 S. E. 453; *Cemetery Ass'n v. Redd*, 33 W. Va. 262, 263, 10 S. E. 405; *Charleston, etc., Gas Co. v. Lowe*, 52 W. Va. 666, 44 S. E. 410.

(4) Necessity of Appropriation Must Be Obvious.

When the title of property is thus transferred by condemnation to an individual or to a corporation, the necessity for such condemnation must be obvious. It must obviously appear from the location of the property proposed to be condemned, or from the character of the use, to which it is to be put, that the public could not without great difficulty obtain the use of this land or of other land, which would answer the same general purpose, unless it was condemned. *Varner v. Martin*, 21 W. Va. 535; *Railroad Co. v. Benwood Iron Works*, 31 W. Va. 710, 8 S. E. 453; *Cemetery Ass'n v. Redd*, 33 W. Va. 262, 263, 10 S. E. 405; *Charleston, etc., Gas Co. v. Lowe*, 52 W. Va. 664, 666, 44 S. E. 410.

It is as clearly apparent that the necessity of the use as regards the public interests is not an absolute physical necessity, as that public use is not synonymous, or coextensive with public utility, benefit, advantage or welfare. It is sufficient if it be a reasonably well adapted means for the accomplishment of one or more of the ordinary ends of public necessity or convenience. *Charleston, etc., Gas Co. v. Lowe*, 52 W. Va. 664, 669, 44 S. E. 410.

b. Roads and Highways.

(1) Public Highways.

(a) Right to appropriate.

A public highway is such a public purpose as to authorize the exercise of the power of eminent domain in or-

der to acquire the property necessary for its establishment and maintenance. *Varner v. Martin*, 21 W. Va. 534; *Coffman v. Griffin*, 17 W. Va. 178; *Keystone Bridge Co. v. Summers*, 13 W. Va. 476, 477; *Salt Co. v. Brown*, 7 W. Va. 191, 195; *Heninger v. Peery*, 102 Va. 896, 899, 47 S. E. 1013; *Lewis v. Washington*, 5 Gratt. 265; *Com. v. Beeson*, 3 Leigh 821. See the title **STREETS AND HIGHWAYS**.

It has been held, that the provisions of the road law do not violate the 9th section of our bill of rights declaring, that private property shall not be taken or damaged for public use without just compensation, nor the 10th section of our bill of rights declaring, that no person shall be deprived of life, liberty or property without due process of law. *Keystone Bridge Co. v. Summers*, 13 W. Va. 476, 477.

(b) What Constitutes.

As Dependent on Degree of Accommodation to Public.—No limitation to the power of the county court to establish a road is to be found in the degree of accommodation which it may afford to the public at large. This is a matter which addresses itself not to the authority, but the discretion of the court. *Heninger v. Peery*, 102 Va. 899, 47 S. E. 1013; *Lewis v. Washington*, 5 Gratt. 265; *Varner v. Martin*, 21 W. Va. 534.

As Dependent on Location of Termini.—The true limit to the authority of the court to establish a road, is in the purposes for which the road is to be employed. A terminus of the proposed road must be at the courthouse, or a public warehouse, landing, ferry, mill, coal mine, lead or iron works, or the seat of government, or in an already established road leading to one or more of these places; but the other terminus may be at any place, whether public or private, of any description, and the road may accommodate many or one. *Lewis v. Washington*, 5 Gratt. 265.

But a public highway under the direct control of the public, and kept in repair by it, and which no individual can obstruct without being liable to punishment, may, if the legislature by law so authorize, be established, though it leads only from a public road to a dwelling or farm of a single person. If the power conferred on a county court to open such public highway be general, no limitation of its power will be placed by the courts because of the degree of accommodation, which such public road may afford to the public at large. *Varner v. Martin*, 21 W. Va. 534.

As Dependent on Cost Being Paid by Public.—If all of the proceedings, before a county court, to establish a road are those required to establish a public, as distinguished from a private one, and the order to establish the road is such an order as would be entered upon the establishment of a public road, except that it orders one-half of the land damages to be paid by the applicants and the other half by the county, instead of ordering the whole land damages to be paid by the county, this does not prevent the road established from being a public road or render it doubtful whether it be a private or public road; and it is not an error for which the landowner can complain in the appellate court. *Coffman v. Griffin*, 17 W. Va. 178.

As Dependent on Equal Benefit to All Persons.—Whether a road sought to be established is a public road or one merely for the benefit of private individuals, is not tested by the fact that such individuals receive a greater benefit than the public generally. The test is not simply how many actually use the road, but how many may have a free and unrestricted right in common to use it. If it is free and common to all citizens it is a public road. *Heninger v. Peery*, 102 Va. 896, 47 S. E. 1013.

The circumstance that the road will

be of greater benefit to the applicants than to the public generally is not the criterion in such case. Indeed, that fact might be affirmed of all mere "neighborhood roads." "The test is, not simply how many do actually use them, but how many may have a free and unrestricted right in common to use them." *Elliott on Roads & Streets*, § 192. "If it is free and common to all citizens, then no matter whether it is or is not of great length, or whether it leads to or from a city, village or hamlet, or whether it is much or little used, it is a public road." *Heninger v. Peery*, 102 Va. 896, 899, 47 S. E. 1013.

(8) Private Roads or Ways.

In order to authorize the exercise of power of eminent domain for the construction of roads, the road must be public. The legislature can not authorize the exercise of the power for the purpose of establishing a private road. *Varner v. Martin*, 21 W. Va. 534, 536; *Coffman v. Griffin*, 17 W. Va. 178; *Heninger v. Peery*, 102 Va. 896, 47 S. E. 1013; *Lewis v. Washington*, 5 Gratt. 265. See *Salt Co. v. Brown*, 17 W. Va. 191. See the title PRIVATE WAYS.

A road must be deemed to be a private road, when its control is not under a public officer, and the public is not bound to work it or keep it in order, and where an individual may obstruct its use without being guilty of any public offense. *Varner v. Martin*, 21 W. Va. 534.

The legislature can not authorize the condemnation of land to establish such private road, even though the general public welfare of the community might be promoted by the forcible opening of such private roads. On the principles above laid down, the public have no such direct and tangible use of such roads, as would justify the courts in regarding it as a public use, even though the public might have a right to use such private road, while it was permitted to be kept open, or while the person for whose use it was

opened chose to keep it in repair. *Varner v. Martin*, 21 W. Va. 534, 535.

Section 44, ch. 194, of the acts of 1872-73, which is taken from § 38, ch. 43, of the Code of West Virginia, authorizes the condemnation of lands to establish such private roads, and it is therefore unconstitutional, null and void. *Varner v. Martin*, 21 W. Va. 534, 536.

c. Railroads.

In General.—The legislature of this state has expressly delegated to railway companies the power of eminent domain. In the exercise of that power they represent the sovereignty of the state, and decide, within certain limitations, what and how much land of the citizen they will condemn for their purposes. Within those limitations, their discretion is practically absolute. Courts may supervise the exercise of that power, but will not undertake to control their discretion in taking property for their use, unless there has been a very clear case of abuse of the power. *Zircle v. Southern R. Co.*, 102 Va. 17, 45 S. E. 802; *Charleston, etc., Gas Co. v. Lowe*, 52 W. Va. 664, 668, 44 S. E. 410.

The power of exercising this right of eminent domain may be delegated to a railroad company by its act of incorporation, and in such case it thereby becomes the agency of the state under certain restrictions, to take such lands as it may deem necessary for its railroad. *Alexandria, etc., R. Co. v. Alexandria, etc., R. Co.*, 75 Va. 780.

The act of the legislature of June 4, 1870, having authorized the Alexandria and Fredericksburg Railway Company to extend its road from Alexandria to a point on the Potomac opposite Washington, it only remained to determine what land or other property should be taken for that purpose, and to ascertain and fix the compensation and damages therefor. The power to take the land was expressly vested

in the railroad company by the act of incorporation upon payment of compensation and damages, and no action of any court was necessary to give effect to this legislative provision. *Alexandria, etc., R. Co. v. Alexandria, etc., R. Co.*, 75 Va. 780.

As far as the public is concerned, when the property needed by railroad companies is for a public use, they have the right to invoke the right of the exercise of eminent domain; but when the property is wanted only for the private interest of the railroad corporations, they stand as individuals, or merely as private corporations, and in which the public has no interest, and for whose private purposes the power of eminent domain can not be exercised. *Pittsburg, etc., R. Co. v. Benwood Iron Works*, 31 W. Va. 710, 8 S. E. 453.

Branch Roads.—Where by its charter, power is given a railroad company to condemn for branch or lateral roads, such power includes authority to construct a branch line running in the same general direction as the main line; and the fact that the new line will connect the main line with another railroad, makes it none the less a branch road. *Blanton v. Richmond, etc., R. Co.*, 86 Va. 618, 10 S. E. 925.

A railway built for the purpose of reaching an industrial enterprise is for a public use, and the company is entitled to exercise the power of eminent domain in acquiring property necessary for its construction, provided the general public has the right to use it. This is true, though the private company advance the money temporarily for the construction of the road. This is not a taking for a private use. *Zircle v. Southern R. Co.*, 102 Va. 17, 45 S. E. 802.

Where a railroad corporation sought to condemn land, over which to build a switch, branch road or lateral work, to reach a private manufactory, a steel mill, for the purpose of transporting

freight to and from said steel mill over petitioner's road; it was held, that the use to which the land was to be subjected was a private, not a "public, use." *Pittsburg, etc., R. Co. v. Benwood Iron Works*, 31 W. Va. 710, 8 S. E. 453, 454.

Evidence that all who wish to avail themselves of the proposed switch, branch road, or lateral work can do so is not sufficient to show the use of the work will be for the benefit of the public. *Pittsburg, etc., R. Co. v. Benwood Iron Works*, 31 W. Va. 710, 8 S. E. 453, 454.

d. Street Railroads.

The holder of a street railway franchise, although privately interested in the enterprise thereby provided for, is nevertheless an agency or instrumentality in the hands of the public authorities for the accomplishment of public purposes and benefits and subject to their control, and private property may lawfully be taken and damaged in the execution of the ordinance, but the constitution and statutes provide that just compensation shall be paid to the owner of the property so taken and damaged. *Watson v. Fairmont, etc., R. Co.*, 49 W. Va. 528, 529, 39 S. E. 193.

e. Site for Public Buildings.

The board of supervisors of a county may, on application to the proper tribunal, have land condemned which has been selected by them for the location of the courthouse, clerk's office and jail of the county. *Board of Supervisors v. Cox*, 98 Va. 270, 36 S. E. 380; *Board of Supervisors v. Gorrell*, 20 Gratt. 484.

If additional land within the city limits is needed for its clerk's office, and the same can not be purchased of the owner, it may be condemned by proper proceedings for the purpose. The removal of the records to such clerk's office, when erected, is not such a removal of them out of the county as is prohibited by law. *Board of Su-*

pervisors v. Cox, 98 Va. 270, 36 S. E. 380.

"School houses, courthouses, city buildings and other structures erected for the use of public officers and at public expense from funds raised by taxation are purely of a public nature." Charleston, etc., Gas Co. v. Lowe, 52 W. Va. 664, 668, 44 S. E. 410.

f. Grist Mills.

Numerous cases recognize the right of the owners of mill sites to condemn land for the erection of dams for water grist mills and to be overflowed by the erection of mill dams. Bernard v. Brewer, 2 Wash. 76, 77; Wroe v. Harris, 2 Wash. 126; Noel v. Sale, 1 Call 495; Wilkinson v. Mayo, 3 Hen. & M. 565; Coleman v. Moody, 4 Hen. & M. 1; Dawson v. Moons, 4 Munf. 535; Smith v. Waddill, 11 Leigh 532; Hunter v. Matthews, 1 Rob. 468; Mairs v. Galahue, 9 Gratt. 94; Fallsburg, etc., Co. v. Alexander, 101 Va. 98, 103, 43 S. E. 194; Crenshaw v. Salt River Co., 6 Rand. 245; Varner v. Martin, 21 W. Va. 534, 546; Charleston, etc., Gas Co. v. Lowe, 52 W. Va. 664, 668, 44 S. E. 410. See the title MILLS AND MILL DAMS.

In grist mills the general public have a direct, definite and immediate interest. "They could compel the owner to grind their grain at prices fixed by law, and he could not refuse to grind for any individual, but was compelled to grind for all alike in the order, in which their grain was brought to the mill. He had no choice, but as the public servant he was bound to grind in the order and for the prices fixed by law." Varner v. Martin, 21 W. Va. 534, 547.

It was held, that the law did not give any power to condemn land for a tail race. Coalter v. Hunter, 4 Rand. 58.

g. Factories.

"The legislature could not authorize lands to be condemned for the erection of dams, or for the overflowing of

lands by dams erected for saw mills or manufactories generally, because they obviously want the first qualification we have laid down as necessary to confer this power on the legislature. The general public have no general and fixed use of any such mills and manufactories. They have no use of them which is independent of the owners of such mills and manufactories, and they can be defeated in any sort of use of such mills and manufactories at the pleasure of the owners of them." Fallsburg, etc., Co. v. Alexander, 101 Va. 104, 43 S. E. 194; Varner v. Martin, 21 W. Va. 534.

The legislature can not authorize a corporation to condemn private property in order to locate a plant for the "manufacture and generation of water power, light or heat, to be utilized, transmitted and distributed to any place or places for the company's use, or for the use of other individuals or corporations." The interest of the public, if any, is vague, indefinite and uncertain, and may at any time be denied or withdrawn by the company. The mere recognition of the corporation in its charter as an "Internal Improvement Company," does not make it so, nor bring it within the general laws governing and controlling the operations of such companies. Fallsburg, etc., Co. v. Alexander, 101 Va. 98, 43 S. E. 194.

h. Waterworks.

"The public health of cities requires an abundant supply of pure water, and for this purpose land may be condemned for reservoirs and other facilities for supplying cities with water. * * * In like manner supplies of water may be condemned." Mills Em. Dom., § 18. Charleston, etc., Gas Co. v. Lowe, 52 W. Va. 664, 668, 44 S. E. 410.

i. Sewers.

"The condemnation of property for public sewers or works for the disposition of sewerage, is so manifestly for public use that it has been seldom

questioned and never denied." *Lewis on Em. Dom.*, § 173. *Charleston, etc., Gas Co. v. Lowe*, 52 W. Va. 662, 668, 44 S. E. 410.

j. Gas Plants.

Supplying an incorporated city or town and its inhabitants with natural gas for the purpose of heating and illumination, by a corporation organized under the general laws of the state, and occupying the streets and alleys of such city or town for the purpose by means of the location therein of its pipes, connections, boxes, valves and other fixtures, under an ordinance of the city or town, is a public use for which such company may take private property, in the manner prescribed by ch. 42, of the Code, upon which to locate its pipe line. *Charleston, etc., Gas Co. v. Lowe*, 52 W. Va. 662, 44 S. E. 410.

Such company is bound to furnish gas to every inhabitant of such city or town who applies therefor and complies with the regulations prescribed by the ordinances of the town, or fixed by contract between the council and the company. *Charleston, etc., Gas Co. v. Lowe*, 52 W. Va. 662, 44 S. E. 410.

k. Cemeteries.

It can not be said as a matter of law, however, that a cemetery is in all cases a public use sufficient to justify the exercise of the right of eminent domain. This will depend upon whether the cemetery is a private or public burying place. In order for it to justify the exercise of the power of eminent domain the cemetery must be a public one, and this should appear from the face of the application. *Fork Ridge Baptist Cemetery Ass'n v. Redd*, 33 W. Va. 262, 10 S. E. 405. See the title CEMETERIES, vol. 2, p. 731.

l. Public Landings.

The authority of the county courts to establish public landings is a branch of their police jurisdiction, conferred for the benefit, and to be exercised at the common expense of all the citizens

of the county. It is therefore necessary and proper that the court should look to the necessities of those applying for the landing, how far it may be productive of convenience or inconvenience to the public or individuals, and whether, in view of all the circumstances, a proper case is made for the application of the county resources to the object. *Muire v. Falconer*, 10 Gratt. 12.

m. Underground Right of Way to Coal Mine.

An incorporated company, being the owner of coal lands, desires to obtain a subterranean right of way through or under the lands of another person, for the purpose of mining, and removing its own coal and applies to court for the benefit of the forty-fourth and forty-fifth sections of chapter forty-three of the Code. The report of the commissioners and the evidence in the case, show that the company is the owner of some thirty acres of coal land, from which the coal could not be mined and transported without going through the land of the defendants; that the company use said coal for the purpose of manufacturing salt at their furnaces, and to sell to the people living in and about the town of Hartford City; that the people living in and about said town could obtain coal, also, from other sources and that the public would not use the subterranean way set out and described in the commissioners' report, through the land of the company, but the company only. It was held, that the report and evidence do not show that the purpose for which the property is to be taken is of such public utility as that said report should be confirmed by the court, under the forty-fifth section of said forty-third chapter of the Code. *Salt Co. v. Brown*, 7 W. Va. 191. See the title MINES AND MINERALS.

n. Telegraphs and Telephones.

It is competent for the legislature to confer upon a telegraph or telephone

company the power of eminent domain for the purpose of acquiring a right of way for its line. *Postal Telegraph, etc., Co. v. Farmville, etc., R. Co.*, 96 Va. 661, 32 S. E. 468; *Postal Telegraph, etc., Co. v. Norfolk, etc., R. Co.*, 88 Va. 920, 14 S. E. 803.

Under §§ 1287, 1288, 1289, Va. Code, 1887, a telegraph company may have a right of way along the line of a railroad condemned for its use, so long as it does not affect the railroad company in the enjoyment of its property. *Postal Telegraph, etc., R. Co. v. Farmville, etc., R. Co.*, 96 Va. 661, 32 S. E. 468, disapproving *Postal Telegraph, etc., Co. v. Norfolk, etc., R. Co.*, 88 Va. 920, 14 S. E. 803. See the title **TELEGRAPHS AND TELEPHONES**.

o. Pipe Line Companies.

A company incorporated by the legislature for the purpose of constructing and maintaining a line or lines of tubing, for the purpose of transporting petroleum or other oils through pipes of iron or other materials, to any railroad, navigable stream, etc.; and to transport from the termini of such pipes, petroleum, etc., in tank cars, boats or other receptacles belonging to such company, where the maximum rates for such transportation is also fixed in the act of incorporation, is an "internal improvement" company, upon which the legislature may confer the power of eminent domain, in order to acquire a right of way over lands, and to condemn the same, according to law. *West Virginia Trans. Co. v. Volcanic Oil, etc., Co.*, 5 W. Va. 382.

p. Toll Bridges.

The general assembly has the power to authorize an individual to build a toll bridge over a river and to acquire private property for the abutments necessary. *Plecker v. Rhodes*, 30 Gratt. 795.

Where a special act authorizing the building of the toll bridge authorized an individual to purchase or condemn the land necessary for the abutments

or way to the bridge in the mode prescribed by law, it was held, that the act, ch. 56 of the Code of 1873, is the act to govern the proceeding to condemn the land, and although that act did not refer to toll bridges, it would be considered as amended by the act authorizing the bridge. *Plecker v. Rhodes*, 30 Gratt. 795.

When the statute confers the privilege of building the toll bridge, that determines the question of the public convenience, and the only question to be ascertained by the proceedings in the court is the damages to the owners of the land condemned. *Plecker v. Rhodes*, 30 Gratt. 795.

V. What Constitutes a Taking.

A. REGULATION OF USE OF PROPERTY.

The constitutional provision that "private property shall not be taken for public use without just compensation," applies only to cases of actual taking and appropriation of private property to public uses, and not to cases where the use and enjoyment of private property by its owner are simply so regulated in accordance with the maxim, *salus populi suprema est lex*, that he must so use it as not to injure others. *Roanoke Gas Co. v. Roanoke*, 88 Va. 810, 14 S. E. 665; *Railroad Co. v. Richmond*, 26 Gratt. 83.

"Nor does the prohibition of the noxious use of property, although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation. If the owner of a warehouse in the midst of a city could store in it quantities of gunpowder he might save the expense of transportation and storage at a distant point. If a landlord could let his building for a small-pox hospital, or a slaughter house, he might obtain an increased rent. If a railroad company is permitted to run their cars through the streets of a city propelled by steam, it might be less

expensive and more convenient than if the same were drawn by horses. But all these are restrained, not because the public have occasion to make the like use, or make any use of the property, or to take any benefit or profit to themselves for it, but because it would be a noxious use contrary to the maxim sic utere tuo ut alienum non lædas. It is not an appropriation of the property to a public use but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the right of eminent domain. This distinction is manifest in principle and is recognized by unquestioned authority." *Richmond, etc., R. Co. v. Richmond*, 26 Gratt. 83, 106.

Generally, as to the police power, see the title CONSTITUTIONAL LAW, vol. 3, p. 140.

An ordinance requiring the removal of powder magazines in a city, the sites whereof were sold by the city council to vendees for the purpose of erecting thereon such magazines, does not take private property without compensation, but is constitutional, being a valid exercise of the police power. *Davenport v. Richmond*, 81 Va. 636.

B. INJURIES BY CHANGING GRADE OF STREETS.

See the titles ABUTTING OWNERS, vol. 1, p. 60; STREETS AND HIGHWAYS.

C. IMPOSITION OF ADDITIONAL SERVITUDE IN STREETS.

See the titles ABUTTING OWNERS, vol. 1, p. 60; RAILROADS; STREET RAILROADS; STREETS AND HIGHWAYS; TELEGRAPHS AND TELEPHONES.

D. GRANT OF RIVAL FRANCHISES.

See the title CORPORATIONS, vol. 3, p. 510.

A grant of a privilege to a corporation is not exclusive, unless expressed to be so by its charter; consequently the grant of a privilege to one com-

pany does not prevent the legislature from granting a like privilege to another, though the business of the former is injured or even ruined thereby. *Tuckahoe Canal Co. v. Tuckahoe, etc., R. Co.*, 11 Leigh 42.

Where a party has an exclusive privilege of transportation across a river within half a mile of his ferry the erection of a bridge within half a mile of the ferry is as much prohibited as the establishment of another ferry within the same distance, and it is a damaging of property within the meaning of the constitution of West Virginia for which compensation must be made. *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396.

E. EXTENSION OF LIMITS OF MUNICIPAL CORPORATION.

To extend the boundaries of a city does not constitute a taking within the meaning of the constitutional provisions, although taxpayers of the added territory are subjected, by the act, to liability for the city debt and taxes, and the taxpayers of the county from which the addition to the city was taken lose the contributions of those withdrawn by the act. *Wade v. Richmond*, 18 Gratt. 583. See the title MUNICIPAL CORPORATIONS.

F. DANGER FROM FIRE.

See post, "Danger from Fire," VI, E, 2, c.

G. INJURIES SUSTAINED AFTER PAYMENT OF COMPENSATION.

All the authorities agree that the payment of damages assessed under the statutes applying to that subject, is only a bar to an action for such injuries as could properly have been included in such assessment. The commissioners have the right and are bound to presume that the company will construct its works in a proper manner, and they have no right to award damages upon the supposition that the company will negligently and improperly perform its work. A failure

to construct its works in a proper and skillful manner will, therefore, impose a liability for damages to any one who may sustain any loss or injury by reason of such negligence; it being well settled that such damages are not to be considered as included in the estimate of the commissioners. *Atlantic, etc., R. Co. v. Peake*, 87 Va. 130, 12 S. E. 348; *Southside R. Co. v. Daniel*, 20 Gratt. 344; *Watts v. Norfolk, etc., R. Co.*, 39 W. Va. 196, 19 S. E. 521; *Norfolk, etc., R. Co. v. Carter*, 91 Va. 587, 594, 22 S. E. 517; *Chesapeake, etc., R. Co. v. Chambers*, 95 Va. 503, 28 S. E. 872.

Where the commissioners assess the damages for injury done to land by a railroad company, and the report of the commissioners is confirmed, this does not preclude the landowner from maintaining an action against the company for injury done to the land since the purchase, which could not be foreseen and estimated by the commissioners. *Southside R. Co. v. Daniel*, 20 Gratt. 344; *Atlantic, etc., R. Co. v. Peake*, 87 Va. 136, 12 S. E. 348; *Norfolk, etc., R. Co. v. Carter*, 91 Va. 587, 594, 22 S. E. 517; *Watts v. Norfolk, etc., R. Co.*, 39 W. Va. 196, 201, 19 S. E. 521.

Although damages may have been regularly assessed and paid for land condemned for a dam abutment, and guard bank, and for the increased liability of overflow upon the residue of the land, the party condemning remains liable for any future injury resulting by reason of his failure to keep the guard bank in a reasonably safe and good condition. *Chesapeake, etc., Co. v. Chambers*, 95 Va. 503, 28 S. E. 872.

Although a railroad company may have purchased from the owner a right of way over his land, for the purposes of constructing its roadbed, yet if, in constructing its roadbed, it deposits on other lands of such owner, without his consent, earth, stone, gravel, or other matter, and allows it to remain there, the company is liable to the owner for

the injury thereby sustained. Compensation for such injury is not included in assessing damages for the right of way. *Norfolk, etc., R. Co. v. Carter*, 91 Va. 587, 22 S. E. 517.

VI. Compensation.

A. NECESSITY OF COMPENSATION.

1. Constitutional Provisions.

The constitution provides that private property shall not be taken or damaged for public use without just compensation. *W. Va. Const.*, art. 3, § 9; *Va. Const.*, 1902, art. 4, § 58; *McKay v. Ripley, etc., R. Co.*, 42 W. Va. 23, 24 S. E. 685; *Ralston v. Weston*, 46 W. Va. 544, 33 S. E. 326; *Fallsburg, etc., Co. v. Alexander*, 101 Va. 98, 102, 43 S. E. 194.

Section 14, art. 5, of the old constitution of Virginia provided that no law should be passed by the legislature "whereby private property shall be taken for public use without just compensation." *Fallsburg, etc., Co. v. Alexander*, 101 Va. 98, 102, 43 S. E. 194.

2. For What Property Compensation Must Be Made.

Personal Property.—The constitution prescribing the conditions for the exercise of the right of eminent domain protects private property in personalty as fully as in real estate; neither can be taken against the owner's consent, until payment is first made or secured. *Teter v. West Virginia, etc., R. Co.*, 35 W. Va. 433, 14 S. E. 146.

Stone, Gravel, etc.—The constitutional provision of West Virginia which is intended to protect private property from being taken for public use without compensation to the owner applies as well to the taking of material, such as stone, gravel, etc., for the purpose of constructing a work of internal improvement, as to the taking of land itself upon which such material may be situated. *Teter v. West Virginia, etc., R. Co.*, 35 W. Va. 433, 14 S. E. 146.

Franchise.—A ferry franchise is private property within the meaning of the constitution of West Virginia which declares private property shall not be taken or damaged for public use without just compensation. *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396.

Property Taken for Road Where Road Is Washed Away by Flood.—If a public road be opened and established along the bank of a river, on land of an individual proprietor regularly condemned for the purpose, according to the statute, and the land on which the road was so opened and established, be washed away, in whole or in part, by high waters, the public has no right to take so much other adjoining land of the proprietor as may suffice for the highway, without a new view and condemnation thereof, and compensation for the same, according to the statute. *Com. v. Beeson*, 3 Leigh 821.

And if, in such case, the public be entitled to additional land for the road, the proprietor can not be guilty of any nuisance in the use of the land for his own purposes, until the road shall have been actually laid out, and opened by the public through the instrumentality of its agents. *Com. v. Beeson*, 3 Leigh 821.

Land Taken by Municipality for Wharf.—It has been held, that it is competent for the legislature to confer on municipal corporations, in aid of the navigation of said river, the exclusive right to construct wharves within their corporate limits between ordinary high water mark, and low water mark without compensation to the adjacent lot owner for the land so taken for that purpose. *Ravenswood v. Flemings*, 22 W. Va. 52.

3. Compensation for Injuries to Part of Tract Not Taken.

Where a part of a tract is taken, a damage to the residue is an element of damage to be considered. *Baltimore,*

etc., *R. Co. v. Pittsburg, etc.*, *R. Co.*, 17 W. Va. 812; *Board of Education v. Kanawha, etc.*, *R. Co.*, 44 W. Va. 71, 29 S. E. 503; *Shenandoah Valley R. Co. v. Shepherd*, 26 W. Va. 672; *James River, etc., Co. v. Turner*, 9 Leigh 313; *Muire v. Falconer*, 10 Gratt. 13, 18; *Railroad Co. v. Tyree*, 7 W. Va. 693; *Mitchell v. Thorne*, 21 Gratt. 164; *Railroad v. Foreman*, 24 W. Va. 662; *Watts v. Norfolk, etc.*, *R. Co.*, 39 W. Va. 196, 19 S. E. 521; *Heninger v. Peery*, 102 Va. 896, 899, 47 S. E. 1013; *Richmond, etc., R. Co. v. Humphreys*, 90 Va. 425, 18 S. E. 901; *Bailey v. Com.*, 78 Va. 19, 23; *Norfolk v. Chamberlain*, 89 Va. 196, 243, 16 S. E. 730; *Blair v. Charleston*, 43 W. Va. 62, 26 S. E. 341; *Guinn v. Ohio River, etc., R. Co.*, 46 W. Va. 151, 33 S. E. 87; *Richmond Traction Co. v. Murphy*, 98 Va. 104, 34 S. E. 982; *Reid v. Norfolk R. Co.*, 94 Va. 117, 26 S. E. 428; *Kay v. Glade Creek, etc., R. Co.*, 47 W. Va. 467, 35 S. E. 973; *Tait v. Central Lunatic Asylum*, 84 Va. 271, 4 S. E. 697; *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69.

Necessity for Statutory Provision for Compensation.—A statute which directs commissioners to ascertain the fair rental value of land to be taken, by implication authorizes them to consider the damages to a part not taken, and is not inconsistent with the United States constitution and the Virginia statute (Code, 1883, ch. 56), which provides for damage to the residue in such cases. *Tait v. Central Lunatic Asylum*, 84 Va. 271, 4 S. E. 697.

Injury to One of Two Tracts Used Together.—The question whether two tracts are so connected physically or by use, for one common purpose or otherwise, as to constitute "one tract," within the meaning of the statute, with reference to ascertainment of compensation for damage to the residue, is a question of fact for the jury, under the direction of the court as to the law. *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69.

Where there is evidence tending to show two tracts thus made one, within the meaning of the statute, the exclusion of evidence, otherwise competent, tending to show the amount of damages to the residue of the tract by reason of the taking of the part taken, for the purpose to which the part thus taken is to be appropriated, is error for which a new trial should be granted in an otherwise proper case. *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69.

B. NECESSITY OF STATUTORY PROVISION FOR COMPENSATION.

A statute which imposes upon a mill owner the burden of erecting locks through his dam and attending the locks to admit the passage of vessels, and upon default gives a corporation the right to abate the dam as a nuisance, and which does not provide for the compensation of the mill owner, is unconstitutional and void. *Crenshaw v. Slate River Co.*, 6 Rand. 245.

But where the legislature grants to a corporation or an individual the power to erect certain public improvements, and it is necessary in order to affect these improvements that private property should be taken, the legislature will not be deemed to have intended that the property should be taken without just compensation therefor. *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396; *Western Union Tel. Co. v. Williams*, 86 Va. 696, 11 S. E. 106; *Varner v. Martin*, 21 W. Va. 534.

An act authorizing a telegraph company to construct lines and fixtures along a county road, provided the ordinary use of the road is not obstructed, and not expressly declaring that this may be done without compensation, will not be considered as an attempt to deprive owners of such compensation as is guaranteed to them by the constitution of the state. *Western Union Tel. Co. v. Williams*, 86 Va. 696, 11 S. E. 106.

C. PERSONS ENTITLED TO COMPENSATION.

Where a tract of land has been sold for taxes, and after such sale, and before the title of the purchaser has become absolute, the county court of the county, in which the land lies, has by proper proceedings regularly established a public road over said land without compensation with the consent in writing of the owner thereof in fee, such purchaser afterwards obtains a tax deed for said land and has the same duly recorded, such tax deed will not confer upon him any right to demand and recover any compensation for the land so appropriated for such public road; and if such purchaser afterwards conveys said land to a third party, his deed to such third party will not confer upon him any right to such compensation or damages. *Summers v. Kanawha*, 26 W. Va. 160.

After judgments had been docketed against a landowner, a railroad company condemned a right of way through the tract, and had damages duly assessed by commissioners, and their report confirmed, but the money was not paid into court. Certain grading having been done the railroad was abandoned. The land was then sold to satisfy the judgments, the bed of the road not having been reserved at the sale. Subsequently the railroad enterprise was revived, and the damages assessed as above, with interest thereon, were paid into court. In a contest over this fund, between the creditors and the purchasers at the sale, it was held that the latter were entitled to them. *Jones v. Miller*, 2 Va. Dec. 232. See also, post, "Parties," X, A, 2, c.

Effect of Conveyance of Property Pending Proceedings.—Until the person entitled to acquire the property of another for a public use has so far progressed in condemnation proceedings as to take immediate possession thereof, no right to compensation for the land proposed to be taken, and for

damages to the residue of the tract accrues to the owner, and his conveyance of the locus in quo, in the absence of any reservation, carries with it the right to compensation and damages when the report of the commissioner is confirmed and the money is paid. *Va.-Carolina R. Co. v. Booker*, 99 Va. 633, 39 S. E. 591.

Effect Where Ownership of Land Is in Dispute.—Where corporation has had land condemned for its purposes, and doubt exists as to title, it can acquire clear title only by paying the damages into court according to Code, 1873, ch. 56, § 16, so that the parties in interest may be convened before disposal thereof. *Robinson v. Crenshaw*, 84 Va. 348, 5 S. E. 222.

The application is to establish a landing at a certain place, which is in fact on the lands of two adjoining proprietors; and the precise locality of the dividing line between them is a matter of controversy between them though the line had been previously fixed by processioners. The land being open and unenclosed, it was proper for the jury, in assessing the damages to each, to take the line fixed by the processioners as the true line. *Muire v. Falconer*, 10 Gratt. 13.

With the consent of the party to whom the damages were assessed, the court directed that the damages so assessed to him should be withheld until the dispute about the dividing line should be determined, and that the damages should then be paid to the party to whom it appeared the land belonged. This is no error. *Muire v. Falconer*, 10 Gratt. 13.

D. TIME WITH REFERENCE TO WHICH COMPENSATION IS TO BE ESTIMATED.

The fair cash value of the property at the time the land is taken is the measure of damages. *Richmond, etc., R. Co. v. Humphreys*, 90 Va. 425, 18 S. E. 901.

Where a railroad company without

lawful proceedings entered upon property and constructed its works and afterwards became insolvent and its franchises and property was sold, it was held, that the amount to be awarded for the land taken must be governed by the value of the land at the time of the taking. *Richmond, etc., R. Co. v. Humphreys*, 90 Va. 425, 18 S. E. 901.

Commissioners appointed by a circuit court, under the eleventh section of the forty-second chapter of the Code of West Virginia to ascertain the value of the land proposed to be taken by a railroad company for the purposes of its road and damages to the residue of the tract, etc., ascertain the actual value of the land at the time when taken, without reference to any enhanced value given thereto and common to other landowners along the line of the road by reason of the prospective construction of the railroad company's road through the land, such value, so ascertained, is a just compensation for the land, to the landowner, within the meaning of the constitution. *Railroad Co. v. Tyree*, 7 W. Va. 693.

E. MEASURE AND ELEMENTS.

1. Where Whole Tract Is Taken.

a. In General.

As respects the land taken, including improvements, the measure of damages is the fair cash market value of the land and improvements at the time of the taking in view of the uses to which they have been put. *Richmond, etc., R. Co. v. Humphreys*, 90 Va. 425, 18 S. E. 901.

In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in the sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the use to which it is plainly adapted. Property is not to be deemed

worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Its capability of being made available gives it a market value which can be readily estimated. So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is impossible to formulate a rule to govern its appraisal in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, generally, the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future. *Richmond, etc., R. Co. v. Humphreys*, 90 Va. 425, 18 S. E. 901.

An ordinance to which the landowner refused assent, allowing him to build across the drain to be cut through land proposed to be condemned for the purpose, can not be considered in assessing damages. *Roanoke v. Berkowitz*, 80 Va. 616.

b. Rental Value of Property.

In estimating the permanent damage, the jury may inquire into the value of the property, and, as a guide or assistance in so doing, it is not improper to hear evidence of its rental value or of an offer to purchase, which the plaintiff has refused. *Fox v. Baltimore, etc., R. Co.*, 34 W. Va. 466, 12 S. E. 757.

c. Adaptability of Property to Particular Uses.

As a general rule the compensation to the owner for land taken for public purposes is to be estimated by reference to the uses for which the appropriated lands are suitable, having regard to the existing business or wants of the community or such as may be reasonably expected in the near future. *Railroad Co. v. Shepherd*, 26 W. Va. 672; *Richmond, etc., R. Co. v. Chamblin*, 100 Va. 401, 406, 41 S. E. 750; *Rich-*

mond, etc., R. Co. v. Seaboard, etc., R. Co., 103 Va. 399, 49 S. E. 512.

It would not be proper to disregard the particular use to which the owner had seen fit to devote it, for that would be to exclude, perhaps, the chief element of value. *Richmond, etc., R. Co. v. Chamblin*, 100 Va. 401, 406, 41 S. E. 750.

d. Prospective or Possible Future Value.

In assessing damages, in condemnation proceedings, the commissioners should consider the actual value of the land with all of its adaption to general and special uses at the time of their assessment, and not its prospective, speculative, or possible value, based upon future expenditures and improvements. *Richmond, etc., R. Co. v. Seaboard, etc., R. Co.*, 103 Va. 399, 49 S. E. 512.

Where commissioners appointed by a circuit court, under the eleventh section of the forty-second chapter of the Code of West Virginia, to ascertain the value of the land proposed to be taken by a railroad company for the purposes of its road and damages to the residue of the tract, etc., ascertain the actual value of the land at the time when taken, without reference to any enhanced value given thereto and common to other landowners along the line of the road by reason of the prospective construction of the railroad company's road through the land, such value, so ascertained, is a just compensation for the land, to the landowner, within the meaning of the constitution. *Railroad Company v. Tyree*, 7 W. Va. 693.

e. Gifts of Similar Property.

And upon a question as to the value of property taken in condemnation proceedings by a railroad company, and the privilege of using certain earth and stone work, it is not error to refuse to allow a witness to testify that he had donated similar property to the com-

pany. *Richmond, etc., R. Co. v. Humphreys*, 90 Va. 425, 18 S. E. 901.

2. Where Part of Tract Is Taken.

a. In General.

If the property, for the purposes for which it is adapted, is worth as much immediately after as immediately before the doing of the act claimed to be an injury, no recovery can be had. If worth less, the difference between its former and its depreciated value is a measure of damages. *Guinn v. Ohio River, etc., R. Co.*, 46 W. Va. 151, 33 S. E. 87; *Stewart v. Ohio River R. Co.*, 38 W. Va. 438, 18 S. E. 604; *Rowe v. Shenandoah Pulp Co.*, 42 W. Va. 551, 26 S. E. 320; *Board of Education v. Kanawha, etc., R. Co.*, 44 W. Va. 71, 29 S. E. 503; *Blair v. Charleston*, 43 W. Va. 62, 26 S. E. 341; *Richmond, etc., R. Co. v. Humphreys*, 90 Va. 425, 18 S. E. 901.

The amount of the damages, as respects the residue of the land, is the difference in the market value of the land before and after the taking thereof. *Richmond, etc., R. Co. v. Humphreys*, 90 Va. 425, 18 S. E. 901.

In estimating the value of the residue of a tract, a part of which has been taken for public purposes, the commissioners or jury should consider only such damage, as is peculiar to that particular tract, and not that which it suffers in common with all other tracts in the neighborhood. The damage to be estimated is that which directly or proximately results from the taking or use of the land for the purpose, for which it was taken, but should not include such damage as arises from the fact, that the use of the land taken for the purposes, for which it was taken, would injuriously affect any business carried on upon such tract of land by increasing competition or in any like manner. Such injury is not an injury to the land but to the business, which is or may be transacted upon the land. *Railroad Co. v. Shepherd*, 26 W. Va. 672.

For example, if a part of a public

schoolhouse lot is taken by a railroad company, the measure of damages is the value of the land taken, together with the damages to the residue of the tract, less peculiar benefits thereto arising from the construction of the road. The damages to the residue, less peculiar benefits, is the difference between the value of the property for school purposes before the construction of the road and its market value after the construction, if its value for school purposes has been wholly destroyed; and, if not, then the difference between its value for school purposes before and after the damages suffered. *Board of Education v. Kanawha, etc., R. Co.*, 44 W. Va. 71, 29 S. E. 503.

Injury to access, and increase of difficulty and costs of handling freight on the residue of the land, are proper elements of damage to be considered. *Richmond, etc., R. Co. v. Chamblin*, 100 Va. 401, 41 S. E. 750.

Cost of Fencing Rendered Necessary.—Where a fifteen foot road, with gates, was established through the lands of the owner to the mountain lands of the applicants to enable them to reach their lands for grazing purposes, and the compensation allowed was confessedly insufficient to enable the landowner to protect his property by the erection of fences along the sides of the road, it was held, that the compensation was inadequate. *Heninger v. Peery*, 102 Va. 896, 47 S. E. 1013.

Injury to Way from One Part of Land to Another.—Every man is entitled to a passway over his own land, from one part of it to another, and if this be destroyed by another, the owner of the land is entitled to recover damages therefor, which are not adequately measured by the mere effect which such destruction may have on the value of the part thus made inaccessible. *Norfolk, etc., R. Co. v. Carter*, 91 Va. 587, 588, 22 S. E. 517.

b. Injuries to Trade or Business.

It seems to be well established that

damages to the trade or business of the landowner are generally too remote to be a subject of damages, because they depend upon contingencies too uncertain and speculative to be allowed. 6 Am. & Eng. Ency. Law (1 Ed.) 573. *Richmond, etc., R. Co. v. Chamblin*, 100 Va. 401, 406, 41 S. E. 750; *Shenandoah Valley R. Co. v. Shepherd*, 26 W. Va. 672.

"While it is proper to show how the property is used, it is incompetent to go into the profits of the business carried on upon the property. No damages can be allowed for injuries to the business. The reason is that the owner is entitled only to the value of the property taken and the damage to the remainder, if any." *Richmond, etc., R. Co. v. Chamblin*, 100 Va. 401, 406, 41 S. E. 750.

Damage resulting from the loss of custom to one's mill, wharf or store, though they be on the tract of land, through which a railroad passes, is not such damage as can be estimated by the commissioner or by the jury in assessing damage to the residue of the tract. Such damage is only such as is sustained by the proprietors of the tract, through which the railroad passes, in common with all other owners of mills, wharves and stores in the neighborhood, on land through which the railroad did not pass. It is not properly damage to the property arising from the construction of the railroad, but is more properly speaking damage to the trade of the proprietors resulting from the subsequent use of the railroad. *Shenandoah Valley R. Co. v. Shepherd*, 26 W. Va. 672, 681.

c. Danger from Fire.

In ascertaining damages to a landowner, flowing to the residue of his tract, from the construction of a railroad, danger to buildings, fences, forests, and the like, from fire emanating from locomotives, may be considered as an element of damages, so far as

such danger lessens the value of such residue; but such danger must be real, imminent, and reasonably to be apprehended—not remote or merely possible. The question is, is the residue depreciated in value from that cause, and how much? *Kay v. Glade Creek, etc., R. Co.*, 47 W. Va. 467, 35 S. E. 973.

"When a part of a tract is taken for railroad purposes, danger from fire to buildings, fences, timber, or crops upon the remainder, in so far as it depreciates the value of the property, may be properly considered. It is immaterial that the railroad company is made absolutely liable for all losses by fire which originate from the operation of the road, whether from negligence or otherwise. Such a liability would doubtless render the depreciation in value less than in cases where the company was liable only for fires resulting from negligence. It is to be borne in mind that compensation is not to be given for increased exposure to fire, nor for increased insurance rates, nor for probable losses by fire in the future for which no recovery can be had, but simply for depreciation in the value of the property by reason of danger from fire. The evidence should be limited to showing all the facts in regard to the situation of the property and improvements relatively to the railroad, and perhaps to showing the distance from the road to which the danger extends." *Kay v. Glade Creek, etc., R. Co.*, 47 W. Va. 467, 35 S. E. 973.

d. Injuries from Smoke and Soot.

Evidence that cars were run upon a railroad track in front of the plaintiff's property and at times left standing there and that smoke and soot from the engine could be carried by the wind to the plaintiff's premises, is admissible in an action by the landowner for the permanent injury to his premises caused by the construction of the road. *Fox v. Baltimore, etc., R. Co.*, 34 W. Va. 466, 12 S. E. 757.

3. Injuries to Leasehold.

Where property is injured by a laying out of a railroad, the assessment and payment into court of the damages to the property do not preclude the lessee of the property from recovering for the injury he has sustained as lessee. *Alexandria, etc., R. Co. v. Faunce*, 31 Gratt. 761.

4. Deduction of Benefits.

In General.—It is well settled that special and peculiar benefits accruing to a landowner by reason of the appropriation of part of his property may be set off against damages to the residue of the tract. *Heninger v. Peery*, 102 Va. 896, 899, 47 S. E. 1013; *James River, etc., Co. v. Turner*, 9 Leigh 313; *Muire v. Falconer*, 10 Gratt. 18; *Railroad Co. v. Tyree*, 7 W. Va. 693; *Mitchell v. Thorne*, 21 Gratt. 164; *Railroad Co. v. Foreman*, 24 W. Va. 662; *Watts v. Norfolk, etc., R. Co.*, 39 W. Va. 196, 19 S. E. 521.

But where a railroad company, without lawful proceedings, entered upon certain property and constructed expensive earth and stone work, and then became insolvent and sold its franchise and property to another company, it was held that the purchaser was liable to the landowner for the land taken, and for the damage to the residue of the tract without considering the benefit arising by the construction of the road. *Richmond, etc., R. Co. v. Humphreys*, 90 Va. 425, 18 S. E. 901.

What Benefits Are to Be Considered.

—The benefits to be considered in reduction of damages in condemnation proceedings are confined to such as are direct and peculiar to the owner of the land, excluding those which he shares in common with other members of the community. *Mitchell v. Thorne*, 21 Gratt. 164; *Railroad Co. v. Foreman*, 24 W. Va. 672; *Bailey v. Com.*, 79 Va. 23; *Norfolk v. Chamberlain*, 89 Va. 243, 16 S. E. 730; *Watts v. Norfolk, etc., R. Co.*, 39 W. Va. 196, 19 S. E. 522; *James River, etc., Co. v. Turner*, 9 Leigh 313;

Blair v. Charleston, 43 W. Va. 62, 26 S. E. 341; *Heninger v. Perry*, 102 Va. 899, 47 S. E. 1013.

The advantages to the owner to be taken into consideration are such as particularly and exclusively affect the particular tract or parcel of land, part of which is appropriated—not advantages of a general character which may be derived with the owner in common with the country at large. *James River, etc., Co. v. Turner*, 9 Leigh 313; *Mitchell v. Thorne*, 21 Gratt. 164, 179; *Muire v. Falconer*, 10 Gratt. 12, 13; *Railroad Co. v. Tyree*, 7 W. Va. 693; *Railroad Co. v. Foreman*, 24 W. Va. 662, 672.

In West Virginia, however, it has been held, that if property is enhanced in value by reason of a public improvement, as distinguished from the general benefits to the whole community at large, it is specially benefited, and it is to be assessed for the special benefits, notwithstanding every other piece of property upon or near the improvement may, to a greater or less extent, be likewise specially benefited. *Blair v. Charleston*, 43 W. Va. 62, 26 S. E. 341.

"Many authorities tell us that we must consider as general benefits—and not charged against the owner—not only benefits throughout the city or town, but also benefits common to all persons along the line of the improvement. Likely, we must so construe *James River, etc., Co. v. Turner*, 9 Leigh 313, and *Railroad Co. v. Foreman*, 24 W. Va. 662. But in *Muire v. Falconer*, 10 Gratt. 17, the opinion says the jury must 'show a just regard to the advantages resulting from the passing of the road through the land,' and that the advantages to be excluded are those 'derived to the owner in common with the county at large,' thus not excluding from consideration those advantages directly conferred on property along the line of the improvement; leading us to infer they ought to be deducted from the damages. So in

Mitchell v. Thorne, 21 Gratt. 164, 179. So in *James River, etc., Co. v. Turner*, 9 Leigh 313, the words 'country at large' are used, but the case seems to exclude benefits immediately from the work, shared by all along it." *Blair v. Charleston*, 43 W. Va. 62, 71, 26 S. E. 345.

Proximity to Railroad as Benefit to a Mill.—In estimating the damage resulting to a mill from the construction of a railroad in the street in front of it, the increased wholesale trade consequent upon the increased facility of shipment by reason of its proximity to the railroad, may be set off against the loss of local retail trade, in fixing the value of the property. *Guinn v. Ohio River, etc., R. Co.*, 46 W. Va. 151, 33 S. E. 87.

Removal of Electric Railway Not a Benefit.—The removal from the street of the tracks of an electric street railway is not a benefit which can be set off against the just compensation due from a railroad which has condemned the land occupied by such railway. *Richmond Traction Co. v. Murphy*, 98 Va. 104, 34 S. E. 982; *Reid v. Norfolk R. Co.*, 94 Va. 117, 26 S. E. 428.

F. MEDIUM OF PAYMENT.

Where private property is taken for public use, the owner is entitled to have his compensation paid in money. *Chesapeake, etc., R. Co. v. Patton*, 6 W. Va. 147; *Railroad Co. v. Halstead*, 7 W. Va. 301; *Herron v. Carson*, 26 W. Va. 62, 83.

G. INTEREST.

As a general rule interest is not to be allowed on the valuation money or damages unless the claimant applied to the auditor for his warrant and it was refused; or having obtained it, was refused payment at the treasury. But where, by the consent of the original owner, part of the land taken for public use is directed, by law, to be revalued and restored to him, and the residue to be retained by the commonwealth, but through the default of the agents of the commonwealth such

revaluation has not been made, a court of equity will direct it to be made, and decree the value so ascertained with interest, from the time when such revaluation ought to have taken place, to be paid by the state to such original owner. *Attorney General v. Turpin*, 3 Hen. & M. 548. See the title INTEREST.

H. TIME OF PAYING COMPENSATION.

Property Taken by Internal Improvement Company.—In *West Virginia* where private property is taken by any company incorporated for purposes of internal improvement, compensation must be paid or secured to be paid to the owner beforehand. *W. Va., Const.*, art. 3, § 9; *Spencer v. Point Pleasant, etc., R. Co.*, 23 W. Va. 406; *Arbenz v. Wheeling, etc., R. Co.*, 33 W. Va. 1, 10 S. E. 14; *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396; *Watson v. Fairmont, etc., R. Co.*, 49 W. Va. 528, 39 S. E. 193.

At any time within twelve months after the report of the commissioner has been confirmed, and ordered to be recorded, the sum so ascertained, with legal interest thereon, from the date of the report until payment, may be paid by the applicant to the persons entitled thereto, or into court. *Chesapeake, etc., R. Co. v. Bradford*, 6 W. Va. 220.

Under § 1093 of the Virginia Code of 1887, providing that where any lot or lots along the line of a street or alley is impaired in value by reason of a railroad company crossing or occupying the street with its works, compensation therefor must be made to the owner before crossing or occupying the street, if compensation is not paid beforehand injunction will lie to restrain the occupancy of the street. *Hodges v. Seaboard, etc., R. Co.*, 88 Va. 653, 14 S. E. 380.

In proceedings to condemn land for a public use, the payment of the sum ascertained to be a just compensation is a condition precedent to divesting

the owner of land of his title thereto, and is as indispensable as a conveyance between an ordinary vendor and vendee. Such owner, until payment is made, stands on substantially the same plane as a vendor who has retained title as security for the purchase money. *Southern R. Co. v. Gregg*, 101 Va. 308, 43 S. E. 570.

Property Taken for Roads.—Under the West Virginia statute (acts of 1872-73, ch. 194) providing for establishing roads, if the damages or compensation are assessed under a writ of *ad quod damnum*, the county is chargeable with such compensation; but it is not to be paid until after the road is established and the land actually appropriated. *Keystone Bridge Co. v. Summers*, 13 W. Va. 476.

And it is unquestionably true, that the owner may be, and indeed must be, in all cases, deprived of his property taken for a county road before he receives just compensation, as the law simply provides, that after the road has been established, the county shall be chargeable with the compensation. And it is well settled, that where property is taken by a state directly, or by a town or county under the state authority, it is not essential, in order not to violate this provision of the bill of rights, that the law should provide for the payment of compensation, before the property is taken and actually appropriated. *Callison v. Hedrick*, 15 Gratt. 244; *Keystone Bridge Co. v. Summers*, 13 W. Va. 476, 501.

"It is well settled, that where property is taken by a state directly, or by a town or county under state authority by state authority, it is not essential, in order not to violate this provision of the bill of rights, that the law should provide for payment of the compensation, before the property is taken and actually appropriated." *Keystone Bridge Co. v. Summers*, 13 W. Va. 476, 501.

Property Damaged, but Not Taken.—Where private property is damaged

without being taken, compensation need not be paid beforehand. *Spencer v. Point Pleasants, etc.*, R. Co., 23 W. Va. 406; *Arbenz v. Wheeling, etc.*, R. Co., 33 W. Va. 1, 10 S. E. 14; *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396; *Watson v. Fairmont, etc.*, R. Co., 49 W. Va. 528, 39 S. E. 193.

Time of Allowing Credit for Payment.—The proper time for allowing a credit for the amount paid into court by the petitioner in a proceeding to condemn land, is when it is paid to the defendant, and not before its actual receipt by him. *Chesapeake, etc.*, R. Co. *v. Patton*, 9 W. Va. 648.

I. LIEN FOR COMPENSATION.

Where land has been condemned for a railroad, but the compensation therefor has not been paid, the owner of the land has a lien thereon for such compensation which a court of equity will enforce against the land in the hands of the petitioner in the condemnation proceedings and all persons claiming under him. *Southern R. Co. v. Gregg*, 101 Va. 308, 43 S. E. 570.

The entry of a railroad company upon land condemned for its purposes, and the construction of its roadbed thereon before paying the damages assessed, without objection on the part of the owner, can not be regarded as a waiver by the owner of his lien upon the land for the amount of the damages, especially where the right to enter was neither asked nor obtained. *Southern R. Co. v. Gregg*, 101 Va. 308, 43 S. E. 570.

Land was condemned for the purposes of a railroad company, but the damages assessed were never paid. The company, without express consent, entered and constructed its roadbed. The company failed and its property was sold and afterwards passed successively to several different companies. The owner demanded payment of the superintendents of each of these companies, and they promised payment. The owner was in the employ-

ment of the first company and in easy circumstances, while the company was financially embarrassed. It was held, that there has been no waiver by the owner of his lien on the land for the damages assessed. *Southern R. Co. v. Gregg*, 101 Va. 308, 43 S. E. 570.

J. LOSS OR RELINQUISHMENT OF RIGHT TO COMPENSATION.

By Grant.—When one grants to a railroad company a strip of land for its use in the railroad, all damages to the residue of the tract arising from the construction which can be taken into consideration in the assessment of compensation under proceedings for condemnation are released, and neither he nor his subsequent alienees can recover therefor against the company. *Watts v. Norfolk, etc., R. Co.*, 39 W. Va. 196, 19 S. E. 521.

Injury to a dwelling house upon such residue from the careful blasting of rock in construction is not the subject of an action; but rock so deposited on such land must be removed within a reasonable time, else it will form the basis of an action. *Watts v. Norfolk, etc., R. Co.*, 39 W. Va. 196, 19 S. E. 521.

Injury to a private way from such construction is not the subject of an action, but injury to a public road, peculiarly affecting such landowner, is. *Watts v. Norfolk, etc., R. Co.*, 39 W. Va. 196, 19 S. E. 521.

Injury to a private ferry arising from obstruction of one of its approaches by the proper construction of the railroad, can not be the subject of an action by the landowner against the company. *Watts v. Norfolk, etc., R. Co.*, 39 W. Va. 196, 19 S. E. 521.

Although a railroad company may have purchased from the owner a right of way over his land, for the purpose of constructing its roadbed, yet if, in constructing its roadbed, it deposits on other lands, of such owner, without his consent, earth, stone, gravel or other

matter, and allows it to remain there, the company is liable to the owner for the injury thereby sustained. Compensation for such injury is not included in assessing damages for right of way, and the plaintiff is not barred of his right to recover such compensation by the conveyance of the right of way to the defendant. *Norfolk, etc., R. Co. v. Carter*, 91 Va. 587, 22 S. E. 517.

Failure to Make Application for Payment.—An act authorized the construction of a road from M. to L., and the road was located and a plat thereof returned to the clerk's office; and an owner of land, through which the road was to pass did not apply to the county court within the year to have her damages assessed. The road was in fact made but a part of the distance, and stopped; and at the next session of the legislature a company was incorporated to construct the remainder of the road. This company is entitled to make their road upon the location made under the previous law; and the owner of the land not having applied for damages within the year from the return of the plat, is concluded from recovering them. *Callison v. Hedrick*, 15 Gratt. 244.

In such a case, if the road is changed in any part of it from the location made, the owner of the land may recover damages for that. *Callison v. Hedrick*, 15 Gratt. 244.

VII. Condemnation Proceedings.

A. NATURE AND OBJECT.

Proceedings to condemn property under the power of eminent domain are summary proceedings. *Chesapeake, etc., R. Co. v. Washington, etc., R. Co.*, 99 Va. 715, 716, 40 S. E. 20.

One of the objects of the summary proceedings to condemn land by an internal improvement company is to enable it to acquire title to the land and proceed with its work at once, and have the parties to litigate their rights over

the fund paid into court, without in any way affecting the title acquired in the manner required by the statute. *Chesapeake, etc., R. Co. v. Washington, etc., R. Co.*, 99 Va. 715, 40 S. E. 20.

In a condemnation proceeding the landowner may contest the corporate existence of the plaintiff, or its authority to condemn the particular property for its use, or its compliance with conditions which are prerequisites to its right to condemn. The law favors the settlement in one suit of all matters arising out of one controversy. *Chesapeake, etc., R. Co. v. Washington, etc., R. Co.*, 99 Va. 715, 716, 40 S. E. 20.

The issue is in the nature of an inquisition on behalf of the court to determine the amount which should be awarded to the owner in consideration of the involuntary appropriation of his private property to the public use through the agency of an internal improvement company to which has been directed by general law or otherwise, the right of eminent domain. The question of title is ordinarily not involved, and the jury should assess the value of the fee where the property is taken, or the amount of damages thereto when the property is only damaged. *Ohio River R. Co. v. Ward*, 35 W. Va. 481, 14 S. E. 142.

B. NECESSITY FOR PREVIOUS EFFORT TO AGREE WITH LANDOWNER.

Necessity.—A city council, in Virginia, has no power to institute, and the courts no jurisdiction to entertain, any proceeding to condemn lands wanted for the purposes of the city, until after the council has made an unsuccessful attempt to purchase them from the owner. *Core v. Norfolk*, 99 Va. 190, 37 S. E. 845. Compare *Chesapeake, etc., R. Co. v. Washington, etc., R. Co.*, 99 Va. 715, 40 S. E. 20.

The statute does not contemplate that proceedings under it will be instituted except in those cases in which the land wanted can not be acquired

by private treaty with those, and with all of those, who have an interest in it. *Hope v. Norfolk, etc., R. Co.*, 79 Va. 283.

This is in the nature of a condition precedent, and compliance therewith must affirmatively appear in the proceedings. Va. Code, § 1074. *Core v. Norfolk*, 99 Va. 190, 37 S. E. 845. See also, *Hope v. Norfolk, etc., R. Co.*, 79 Va. 283.

"It is well settled that such provisions are regarded as in the nature of conditions precedent, which are not only to be observed and complied with before the courts can exercise their compulsory powers to deprive the owner of his land, but the party instituting such proceedings must show affirmatively such compliance. *Cooley on Con. Lim.* (6th Ed.), 648-9; *Lewis on Eminent Domain*, § 301; *Mills on Eminent Domain*, § 105. See *Charlottesville v. Maury*, 96 Va. 383, 386, 31 S. E. 520; *Painter v. St. Clair*, 98 Va. 85, 34 S. E. 989." *Core v. Norfolk*, 99 Va. 190, 191, 37 S. E. 845.

Under the provisions of ch. 42, of the West Virginia Code, when a company incorporated for the construction of an internal improvement, makes application to a circuit court to appoint commissioners to ascertain a just compensation to the owner of land proposed to be taken, the applicant must prove, or the owner must admit, or it must in some way appear to the court, that the applicant has a lawful right to take the land for the purpose stated in the application, and the court must decide that fact, before the appointment of freeholders. The right to take the land implies the consent of the owner, unless the land be in a city or incorporated town, when consent is not necessary. Consequently, the consent, when requisite, must be proved or admitted or given in court, before or at the time when the court adjudicates the right to take the land and proceeds to appoint commissioners. *Chesa-*

peake, etc., *R. Co. v. Pack*, 6 W. Va. 397, 398.

Sufficiency of Attempt to Agree.—A mere preliminary correspondence to ascertain the price of the land, before the city has determined to condemn the land, is not a sufficient compliance with the statute. Va. Code, § 1074; *Core v. Norfolk*, 99 Va. 190, 37 S. E. 845.

It was a sufficient attempt to agree, in the language of the statute, upon the damages that would accrue to one corporation by reason of another's passing over its lands and acquiring a portion thereof, that the latter made offers through its agents, to the agents of the former, at its principal office in the state, the president and directors thereof residing out of the state, to support the motion for the appointment of commissioners according to law. The company was not bound to go out of the state to make an offer of agreement. *West Virginia Trans. Co. v. Volcanic Oil, etc., Co.*, 5 W. Va. 382.

Where an offer was made by the county court for land for a road and it was expressly refused, it was held, that the right to institute proceedings in the circuit court existed, whether their failure to agree with the tenants arose from a disagreement as to what was a just compensation in money or from the fact, that part of the compensation was offered in water privileges. *Herron v. Carson*, 26 W. Va. 82, 83.

Attempt to Agree Need Not Appear on Face of Proceedings.—In *Chesapeake, etc., R. Co. v. Washington, etc., R. Co.*, 99 Va. 715, 40 S. E. 20, it was held, that in condemnation proceedings it is not necessary that it should appear on the face of the proceedings that any attempt was made by the plaintiff to purchase the land sought to be condemned.

After the court has acted, when it appears by the record that a proper application in writing was made to the court, and notice given to the owner

of the land, or he appeared, and it is recited that the court was of opinion that the applicant had lawful right to take the land, and the court appointed freeholders, and, with the action of the parties themselves, organized the commissioners, this implies either the consent of the owner, or the location of the land in a city or incorporated town, one or the other of which facts is indispensable, though either is sufficient, to authorize the judgment as to that primary fact. Though after the commissioners have been appointed, if it should appear on the record, or be within the recollection of the court, that there was no proof or admissions of either of these facts, the court before which the case was pending should set aside the judgment and action; and if, under any such circumstances, it failed to do so, and the facts should, by bill of exceptions or otherwise, appear in the record, the court of appeals would reverse the judgment. But when no such thing appears, the court of appeals, must presume that the judgment of the circuit court was proper, and accordingly affirmed it. *Chesapeake, etc., R. Co. v. Pack*, 6 W. Va. 397, 398.

Necessity of Statement as to Attempt to Agree in Petition.—It is not necessary for the applicant, in his petition for condemnation, to expressly state that he can not agree with the owner on terms of purchase, as might be inferred from § 7, ch. 52, when read alone. *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69.

"I observe that Mr. Hutchinson, in his useful work (*Hutch. W. Va. Justices*, § 675, p. 446), who has evidently given the whole subject careful consideration, does give in his form of 'petition to condemn land' the allegation, 'your petitioner further represents that he is unable to agree with the owners,' etc. This would seem to be required by implication from § 7, ch. 52, if that were the only law upon the subject. It certainly does no harm, might be use-

ful in many cases, but is not necessary when the owner is an infant." *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69, 73.

C. JURISDICTION.

County Court.—The general statute relating to corporations (Va. Code, 1873, ch. 56) confers no jurisdiction on a county court to take or appropriate land or other property of individuals or corporations for a railroad company. Its only jurisdiction in such a case is to appoint commissioners to ascertain and report what compensation and damages the owner of the property is entitled to receive, where he and the company can not agree upon the question, and to determine what shall be a just compensation; upon the payment of which, the statute vests the fee-simple title of the property in the company. *Alexandria, etc., R. Co. v. Alexandria, etc., R. Co.*, 75 Va. 780.

The 38th section of ch. 194, acts of 1872-3, directing county courts in certain cases to award writs of ad quod damnum returnable to such county courts is repealed by the 38th section of ch. 14, acts of 1881, which provides that the county court in such cases shall institute and prosecute in their names in the circuit court proceedings to ascertain the just compensation to be paid to the tenants and proprietors of lands taken for a public road. *Heron v. Carson*, 26 W. Va. 62.

But the provisions in ch. 88 of the West Virginia Acts of 1872-3, in reference to the manner in which lands shall be condemned by railroad companies, is not repealed nor abrogated by ch. 114, of the acts of 1875, and the amendatory act of 1879, ch. 8, and therefore the circuit court has no jurisdiction in a case where a railroad company seeks to condemn lands, the jurisdiction in such case being confined to the county court. *Chesapeake, etc., R. Co. v. Hoard*, 16 W. V. 270; *Chesapeake, etc., R. C. v. Patton*, 9 W. Va. 648.

Removal from County to Circuit Court.—Under the statute (Code, 1860, ch. 174, § 1) the case of a railroad company asking the county court to ascertain the compensation to a landowner for the land proposed to be taken for its purposes, which has remained in the court for more than one year without being determined, may be removed to the circuit court. And, in such a case, if the circuit court sets aside the report of the commissioners, it should not send the case back to the county court, but should take jurisdiction of the case, and proceed in it with the same powers that are vested in the county court by the statute. *Virginia, etc., R. Co. v. Campbell*, 22 Gratt. 437.

D. PARTIES.

The statute requires the owner of each parcel of real estate proposed to be taken to be made a party to the proceeding. *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69.

Where there are adverse or conflicting claims to the real estate proposed to be taken, such claimants must be made parties to the proceeding. *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69.

In case of proceedings against an infant owner, if appearance and defense be not made by his guardian the court should appoint a guardian ad litem to defend his interest, neither being, in the strict, proper sense, a party to the suit. *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69. See post, "Notice," VII, F.

E. APPLICATION OR PETITION.

Allegation That Property Is Wanted for a Public Use.—An application to condemn land for public use must distinctly state that the land is needed for public use, and will, when condemned, be devoted to such public use. *Fork Ridge Baptist Cemetery Ass'n v. Redd*, 33 W. Va. 262, 10 S. E. 405.

Statement of Inability to Agree with Landowner as to Price.—It is not nec-

essary for the applicant, in his petition for condemnation, to expressly state that he can not agree with the owner on terms of purchase, as might be inferred from § 7, ch. 52, when read alone. *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69. See ante, "Necessity for Previous Effort to Agree with Landowner," VII, B.

Statement That Land Is Not Near Dwelling.—An application to condemn land for cemetery purposes should also show that the land to be taken does not lie within 400 yards of a dwelling house, unless to extend the limits of a cemetery already located, and then, that such limits will not be extended nearer to any dwelling house which is within 400 yards. *Fork Ridge Baptist Cemetery Ass'n v. Redd*, 33 W. Va. 262, 10 S. E. 405. See ante, "Statutory Exemptions," III, C.

Description of Land.—The application must describe the land sought to be condemned with reasonable certainty. Where the application of a railroad company to condemn land for the use of its road, described the land to be taken, as a strip of land sixty feet in width, being thirty feet wide on each side of the center line of its road, containing 3 and 99-100 acres, beginning at the point where the center line of said railroad as located, crosses the boundary line of the landowner, and thence through his land situated on a certain creek, in a certain county, giving the courses and distance of the lines, the general direction of the curves, and the radius of each curve, it was held that the land proposed to be taken was described with "reasonable certainty" as required by § 5, ch. 18, W. Va. acts, 1881. *Ohio River R. Co. v. Harness*, 24 W. Va. 511.

Description of Estate on Interest of Defendants.—Where there is a misstatement in the application of the estate of parties in the reversion of the land, and the application is acted upon by the commissioners, but before the

report of the commissioners is formally filed the applicant asks leave of the court to discontinue the proceedings because of this mistake, the court should dismiss the proceedings at the costs of the applicant. *Chesapeake, etc., R. Co. v. Bradford*, 6 W. Va. 220.

Petition in Mill Cases.—See the title MILLS AND MILL DAMS.

F. NOTICE.

1. Necessity of Notice.

In cases where private property is sought to be taken for public use, the owner of the property must have notice of the application and an opportunity to contest the taking. Va. Code, 1887, § 1075; W. Va. Code, ch. 52, § 14; *Varner v. Martin*, 21 W. Va. 534; *Pittsburg, etc., R. Co. v. Benwood Iron Works*, 31 W. Va. 710, 8 S. E. 453; *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396; *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812; *Keystone Bridge Co. v. Summers*, 13 W. Va. 476, 488; *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 275, 15 S. E. 73; *Chesapeake, etc., R. Co. v. Washington, etc., R. Co.*, 99 Va. 715, 40 S. E. 20; *Bernard v. Brewer*, 2 Wash. 76; *Board of Supervisors v. Gorrill*, 20 Gratt. 484, 511; *Muire v. Falconer*, 10 Gratt. 12; *Hope v. Norfolk, etc., R. Co.*, 79 Va. 283, 288; *Carpenter v. Garrett*, 75 Va. 129; *Pitzer v. Williams*, 2 Rob. 241; *Tench v. Abshire*, 90 Va. 768, 19 S. E. 779.

Upon an application for leave to build a mill, it should appear to the appellate court by the record, that the party whose property is sought to be condemned, had ten days previous notice of the motion for a writ of ad quod damnum. *Bernard v. Brewer*, 2 Wash. 76.

But a judgment granting leave to the proprietor of the lands on both sides of a stream to erect thereon a mill and dam, is valid and sufficient, though the owner of the land which the inquisition finds will be overflowed had no notice of the time of making the application

for the writ of ad quod damnum, or of the time of executing the same. *Hunter v. Matthews*, 1 Rob. 468. See the title MILLS AND MILL DAMS.

2. To Whom Notice Must Be Given.

Tenant of Freehold.—The statute provides for service of notice upon the tenant of the freehold, if there be such tenant. Va. Code, 1887, § 1075; W. Va. Code, ch. 52, § 14; *Richmond, etc., R. Co. v. Seaboard, etc., R. Co.*, 103 Va. 408, 49 S. E. 512; *Hope v. Norfolk, etc., R. Co.*, 79 Va. 283, 288; *Board of Supervisors v. Gorrell*, 20 Gratt. 512; *Keystone Bridge Co. v. Summers*, 13 W. Va. 476, 488; *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 275, 15 S. E. 69.

The tenant of the freehold to whom notice must be given in beginning proceedings under the statute for the condemnation of lands for public purposes means the "tenant in possession appearing as the visible owner." *Board of Supervisors v. Gorrell*, 20 Gratt. 511; *Hope v. Norfolk, etc., R. Co.*, 79 Va. 283, 288; *Keystone Bridge Co. v. Summers*, 13 W. Va. 488; *Carpenter v. Garrett*, 75 Va. 134; *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 275, 15 S. E. 69.

"President Pendleton, in delivering the opinion of the court in *Wood v. Boughan*, 1 Call 332, intimates, that this was the true construction of these words in the mill law of Virginia, though it was not then so decided. This construction of these words received some countenance from the decisions in *Coleman v. Moody*, 4 Hen. & M. 1; and *Anthony v. Lawhorne*, 1 Leigh 1; and in the case of *Pitzer v. Williams*, 2 Rob. 241; and *Supervisors v. Gorrell*, 20 Gratt. 484; it was expressly decided, that this was the true construction of these words in this law." *Keystone Bridge Co. v. Summers*, 13 W. Va. 476, 488.

A widow to whom dower has not been assigned, and who continues in the possession of the mansion house and plantation thereto belonging, must

be considered as proprietor of the land in the meaning of the statute respecting writs of ad quod damnum; and a motion by the heir, who resides on the land with his mother, to dismiss the proceedings because notice was not served on him as one of the proprietors of the land, was overruled. *Pitzer v. Williams*, 2 Rob. 241.

Infants.—A statute requiring that the owner of each parcel of land proposed to be taken shall be served with notice does not require service on an infant owner in person, but the court may order such service if, at any time during the proceedings, it is suggested that there are infant owners within the county who have attained the age of discretion, and who ought to be personally notified. *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69. See the title INFANTS.

If, at any time during the proceeding, it is suggested that there are infant owners who are in the county, and have attained the age of discretion, who ought to be personally notified, the court may so order. *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69.

Guardians.—The guardian of the infant owner, if there be one, must be notified, and as such has a right to appear, and make any and all proper defense for and on behalf of his ward. *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69.

If the guardian does not appear and defend, the court should appoint a guardian ad litem. *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69. See the titles GUARDIAN AND WARD; INFANTS.

Leinors.—Under the road law, ch. 194, of acts of 1872-3, in the establishing of county roads by a county court, it is unnecessary to cause notice thereof to be given to any person having liens on the land to be taken, or to any claimants of such land, other than the tenant in possession of the land as vis-

ible owner. *Keystone Bridge Co. v. Summers*, 13 W. Va. 476.

The provision of the road law making it unnecessary to cause notice of condemnation proceedings to be given parties having liens on the land to be taken, or to any claimants of such land, other than the tenant in possession, does not violate the constitutional provision that private property shall not be taken or damaged for public use without just compensation, nor does it deprive any person of property without due process of law. *Keystone Bridge Co. v. Summers*, 13 W. Va. 476.

3. Time of Giving Notice.

Ten days previous notice of the application shall be given, in the manner prescribed, to the tenant of the freehold, his guardian or committee. *Keystone Bridge Co. v. Summers*, 13 W. Va. 476; *Bernard v. Brewer*, 2 Wash. 76.

No time being mentioned in the statute for which notice shall be given to a party upon whose land a public landing is to be established, the notice may be served any time before the return day, in which case the owner must show the insufficiency of the service. *Muire v. Falconer*, 10 Gratt. 12.

At whatever stage of the proceedings the owner of the land is notified to appear, after such notice he has the right to contest the appropriation of his land to the use of the petitioner. *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812.

4. Constructive Notice.

Where actual service can not be had on defendant, constructive service, if authorized by statute, is regarded as due process of law. *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812.

5. Appearance or Waiver as Dispensing with Notice.

Where all of the parties interested in the establishment of a road are either notified to appear or waive no-

tice, no objection for want of notice can be made. *Tench v. Abshire*, 90 Va. 768, 19 S. E. 779.

Notice of an application to take land for a mill might be dispensed with, if the record shows that the proprietor appeared and contested the application, upon the merits; but a general appearance will not be sufficient. *Bernard v. Brewer*, 2 Wash. 76.

A party upon whose land a public landing is sought to be established, having made himself a party in the cause, and taken an appeal, upon which all the proceedings subsequent to the report of the viewers were quashed; and it being proved that after the cause went back he was served with notice, and he having appeared and opposed the establishment of the landing, without objecting to the sufficiency of the notice, can not object to it in the appellate court. *Muire v. Falconer*, 10 Gratt. 12.

G. PROCEEDINGS TO ASSESS COMPENSATION.

1. Assessment by Commissioners.

a. In General.

If the parties can not agree upon the amount to be paid for the land taken, five disinterested freeholders shall be appointed by the court of the county or the corporation in which such land or the greater part thereof lies, for the purpose of ascertaining a just compensation for the land. Va. Code, 1887, § 1074; W. Va. Code, ch. 52, § 7. *Crawford v. Valley R. Co.*, 25 Gratt. 467; *Richmond Traction Co. v. Murphy*, 98 Va. 104, 34 S. E. 982; *Crenford Paving Co. v. Baum*, 97 Va. 501, 24 S. E. 906; *Mitchell v. Thorne*, 21 Gratt. 164, 165; *Heninger v. Peery*, 102 Va. 896, 899, 900, 47 S. E. 1013; *Richmond, etc., R. Co. v. Seaboard, etc., R. Co.*, 103 Va. 399, 49 S. E. 512; *Richmond, etc., R. Co. v. Chamblin*, 100 Va. 401, 41 S. E. 750; *Chesapeake, etc., R. Co. v. Pack*, 6 W. Va. 397; *Supervisors v. Stout*, 9 W. Va. 703; *Steenrod v. Wheeling, etc., R. Co.*, 27 W. Va. 1.

b. Qualification of Commissioners.

The statute requires the commissioners to be freeholders. *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69; *Supervisors v. Stout*, 9 W. Va. 703.

Where the mode of procedure prescribed by law, for the condemnation of land provides that the commissioners appointed to make the condemnation and assess the value of the property, shall be freeholders, and the defendant is present at the time the commissioners are appointed, and participates in the procedure of appointment, it is his duty to see that all the commissioners are freeholders. And if he is cognizant at the time the appointment is made, that one of the commissioners is not a freeholder he must enter an objection, and if he fails to do so this amounts to a waiver. *Supervisors v. Stout*, 9 W. Va. 703.

Interest of Commissioner.—A report of commissioners to condemn land for municipal purposes will not be quashed on the ground that a commissioner appointed at the instance of the municipality was interested, where the record does not show that the municipality was ignorant that he was interested when so appointed; and ignorance of the attorney making the motion for the appointment is not evidence of the municipality's ignorance. But if the commissioner was interested and disqualified, and the municipality was ignorant, the report will not be quashed if the record shows that the damages assessed are not excessive. *Roanoke v. Berkowitz*, 80 Va. 616.

c. Appointment of Commissioners.

The filing of the map and profile of the location of the road in the office of the secretary of the state, and in the office of the clerk of the county court of each county in which any part of the road is located, is not a condition precedent to the appointment of commissioners to ascertain a just compensation to the owners of the real estate proposed

to be lawfully taken for the purposes of such road; but the circuit court may in its discretion require such map, or such part as may be needed, to be filed or produced before appointing commissioners. *Wheeling Bridge, etc., Co. v. Camden, etc., Oil Co.*, 35 W. Va. 205, 13 S. E. 369.

A judgment appointing commissioners to fix a just compensation for land proposed to be taken in condemnation proceedings is not such a final judgment as will admit of an appeal. *Ludlow v. Norfolk*, 87 Va. 319, 12 S. E. 612; *Postal Tel. Cable Co. v. Norfolk, etc., R. Co.*, 87 Va. 349, 12 S. E. 618; *Richmond, etc., R. Co. v. Johnson*, 99 Va. 282, 38 S. E. 195.

And where a report of the commissioners is returned to court, and its return entered of record, and the sum fixed as compensation is paid into court, and the landowner moves to set aside the order appointing commissioners and the motion is overruled, upon which an appeal is taken, the appeal is not properly taken because the court not having acted upon the report, there is no final judgment. *Pack v. Chesapeake, etc., R. Co.*, 5 W. Va. 118.

As to necessity for previous effort to agree with landowners, see ante, "Necessity for Previous Effort to Agree with Landowner," VII, B.

d. Nature and Extent of Duties.

The commissioners are charged with no inquiry as to the consent of the owner, and nothing as to that fact can be properly presented to or considered by them. *Chesapeake, etc., R. Co. v. Pack*, 6 W. Va. 397, 399.

When commissioners are appointed by a county or corporation court, under § 6, ch. 56, of the Code of 1880, for the purpose of ascertaining what will be a just compensation to the tenant of the freehold for land taken for a work of internal improvement, it is the duty of such commissioners to hear all the legal and relevant testimony offered by either party bearing

upon the question of such compensation. *Washington, etc., R. Co. v. Switzer*, 26 Gratt. 661.

e. View by Commissioners.

The statute directs that in the performance of their duty to ascertain what is the just compensation for land taken, the commissioners shall themselves view the land. *Cranford Paving Co. v. Baum*, 97 Va. 501, 24 S. E. 906; *Richmond, etc., R. Co. v. Seaboard, etc., R. Co.*, 103 Va. 399, 408, 49 S. E. 512; *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69.

The law lays great stress upon the matter of the view, and justly attaches great weight to the report of the commissioners. They are greatly aided by the evidence of their own senses. *Cranford Paving Co. v. Baum*, 97 Va. 501, 24 S. E. 906; *Richmond, etc., R. Co. v. Seaboard, etc., R. Co.*, 103 Va. 399, 408, 49 S. E. 512.

f. Report.

(1) In General.

The report of the commissioners shall be returned to the court of the county or corporation; unless good cause be shown against it, it shall be confirmed and recorded. Va. Code, 1887, § 1079; W. Va. Code, ch. 52, § 14; *Crawford v. Valley R. Co.*, 25 Gratt. 467; *Richmond Traction Co. v. Murphy*, 98 Va. 104, 34 S. E. 982; *Cranford Paving Co. v. Baum*, 97 Va. 501, 24 S. E. 906; *Mitchell v. Thorne*, 21 Gratt. 165; *Heninger v. Peery*, 102 Va. 896, 899, 900, 47 S. E. 1013; *Richmond, etc., R. Co. v. Seaboard, etc., R. Co.*, 103 Va. 399, 49 S. E. 512; *Richmond, etc., R. Co. v. Chamblin*, 100 Va. 401, 41 S. E. 750; *Chesapeake, etc., R. Co. v. Pack*, 6 W. Va. 397; *Supervisors v. Stout*, 9 W. Va. 703; *Steenrod v. Wheeling, etc., R. Co.*, 27 W. Va. 1.

(2) Form and Requisites.

Necessity of Showing Public Character of Use.—Where land is sought to be taken for a use which is claimed to be a public use, the report of the commissioners and the evidence pro-

duced before them must show that the use is public. *Salt Co. v. Brown*, 7 W. Va. 191.

Report Must Fix Compensation in Money.—The report of the commissioners, made under the provisions of the statute (ch. 42, W. Va. Code) should not be confirmed where the compensation to which the party is entitled is not exclusively given in money, where the party himself objects to the report on this ground. *Chesapeake, etc., R. Co. v. Patton*, 6 W. Va. 147; *Railroad Co. v. Halstead*, 7 W. Va. 301.

Conditional Award of Damages.—

Under the evidence in this cause, it was not error in the trial court to strike out, as surplusage, a clause in the report of the commissioners to assess damages to the effect that the condemned property was to be acquired on condition that the railroad company should, on the application of the defendants in error, construct a designated spur track at a cost of \$500, to be paid by the defendants in error. *Richmond, etc., R. Co. v. Chamblin*, 100 Va. 401, 41 S. E. 750.

The company has no right to construct their road in any other manner than that provided for in the report of the commissioners; and the commissioners have no authority to assess a present amount to be paid for the property and an additional amount to be paid by the company should they subsequently construct their road without the proper culverts. And the company is liable to the actions of the parties injured by a deviation from the mode of construction which governed the unconditional assessment of damages, for the injury resulting from such deviation. *Winchester, etc., R. Co. v. Washington*, 1 Rob. 67.

(3) Conclusiveness.

In General.—The report of the commissioners, if no illegality or irregularity appears on its face, is prima facie evidence of the propriety and correct-

ness of the award, and under the plain mandate, as well as the spirit of the statute, the report must be affirmed and carried into effect by the judgment of the court, unless, in the words of the statute, "good cause be shown against it." *Crawford v. Valley R. Co.*, 25 Gratt. 467; *Richmond Traction Co. v. Murphy*, 98 Va. 104, 34 S. E. 982; *Cranford Paving Co. v. Baum*, 97 Va. 503, 24 S. E. 906; *Heninger v. Peery*, 102 Va. 896, 900, 47 S. E. 1013; *Richmond, etc., R. Co. v. Seaboard, etc., R. Co.*, 103 Va. 399, 49 S. E. 512; *Chesapeake, etc., R. Co. v. Pack*, 6 W. Va. 397.

Great weight is to be allowed to the report of the commissioners to assess damages in condemnation proceedings. *Cranford Paving Co. v. Baum*, 97 Va. 503, 24 S. E. 906; *Heninger v. Peery*, 102 Va. 900, 47 S. E. 1013; *Richmond, etc., R. Co. v. Seaboard, etc., R. Co.*, 103 Va. 399, 49 S. E. 512; *Chesapeake, etc., R. Co. v. Pack*, 6 W. Va. 399; *Crawford v. Valley R. Co.*, 25 Gratt. 467.

The assessment will not be disturbed except in a very clear case of error. The commissioners are disinterested freeholders, selected for their fitness, act under oath, and possess the advantage of inspecting the property and of seeing the witnesses and hearing them testify. The law lays great stress upon the matter of the view, the effect of which can not always be transmitted. Furthermore, the statute requires that their report shall be taken as *prima facie* correct. *Richmond, etc., R. Co. v. Seaboard, etc., R. Co.*, 103 Va. 399, 49 S. E. 512; *Chesapeake, etc., R. Co. v. Pack*, 6 W. Va. 397, 399.

On Question of Damages.—It would require very strong evidence of inadequacy or excess in the appraised value of the land and damages, to influence the court, for that cause alone, to set aside the report. *Chesapeake, etc., R. Co. v. Pack*, 6 W. Va. 397, 399; *Cranford Paving Co. v. Baum*, 97 Va. 501, 24 S. E. 906

A report of commissioners to assess damages to the landowner is taken as conclusive on the question of damages until it is shown to the satisfaction of the court to be incorrect. *Cranford Paving Co. v. Baum*, 97 Va. 501, 24 S. E. 906; *Mitchell v. Thorne*, 21 Gratt. 164; *Supervisors v. Stout*, 9 W. Va. 703.

Where, in proceedings to condemn lands for railroad purposes, the commissioners assessed the damages and designated a named sum as having been allowed for fencing on either side of the roadbed, upon exceptions to the report, it was held that the company had not the option of fencing the roadbed or suffering the penalty; and the assessment of damages, allowing for the costs of fencing, was proper and binding. *Norfolk, etc., R. Co. v. Stephens*, 85 Va. 302, 7 S. E. 251.

If the landowner remits all of compensation awarded in excess of a just compensation, it is no objection that the finding was excessive. *Ohio River R. Co. v. Blake*, 38 W. Va. 718, 18 S. E. 957.

(4) Confirmation of Report.

(a) In General.

The report of the commissioners is presumed to be correct, if regular upon its face, and in the absence of cause shown for setting it aside, it will be confirmed by the court. *Crawford v. Valley R. Co.*, 25 Gratt. 467; *Richmond Traction Co. v. Murphy*, 98 Va. 104, 34 S. E. 982; *Cranford Paving Co. v. Baum*, 97 Va. 501, 24 S. E. 906; *Heninger v. Peery*, 102 Va. 896, 900, 47 S. E. 1013; *Richmond, etc., R. Co. v. Seaboard, etc., R. Co.*, 103 Va. 399, 49 S. E. 512; *Chesapeake, etc., R. Co. v. Pack*, 6 W. Va. 397. See ante, "Conclusiveness," VII, G, 1, f, (3).

(b) Continuance of Motion to Confirm.

In view of the provisions of chapter 46 of the Virginia Code to secure speedy action in condemnation proceedings instituted by internal improvement companies, and to transfer litigation about title from the land to

the fund paid into court, it is not error to refuse a continuance of a motion to confirm the report of commissioners assessing damages until another suit to settle the title to the land has been decided. This is especially so where the party complaining is a party to the condemnation proceedings, and has abundant opportunity of introducing evidence in his behalf, and of being heard by counsel. *Richmond, etc., R. Co. v. Seaboard, etc., R. Co.*, 103 Va. 399, 49 S. E. 512. See the title CONTINUANCES, vol. 3, p. 270.

(3) Exceptions to Report.

(a) Who May Except.

When the report is returned to the court either party may show cause against its confirmation, upon the grounds of excessive or inadequate compensation, improper conduct of the commissioners in refusing or failing to hear legal and proper evidence, or by proof of any other fact tending to show that the report ought not to be confirmed. *Washington, etc., R. Co. v. Switzer*, 26 Gratt. 661.

But where the board of supervisors of a county have certain land condemned for the purpose of building a courthouse, clerk's office and jail thereon, no objection being made by the owners of the land, other persons have no right to object to the confirmation of the report, and in such case the circuit court of the county has no jurisdiction on the application of these persons to award a writ of error and supersedeas to the judgment of the county court refusing to admit them as parties. *Board of Supervisors v. Gorrell*, 20 Gratt. 484.

In such a case the circuit court of the county has no jurisdiction, on the application of these citizens, to award a writ of error and supersedeas to the judgment of the county court refusing to admit such citizens as parties, and confirming the report of the commissioners. *Board of Supervisors v. Gorrell*, 20 Gratt. 484.

(b) Time of Excepting.

Where a report of commissioners appointed to ascertain the damages for land taken by a railroad company shows no error or defect upon its face and is not excepted to in the court below, it can not be objected to in the appellate court, because upon the whole record of the suit it appears that it is possible or even probable that the commissioners may have included improper items in their ascertainment of the damages reported by them. *Steenrod v. Wheeling, etc., R. Co.*, 27 W. Va. 1.

(c) Necessity for Exception to Specify All Grounds of Objection.

Where, on the motion of the company, a rule is made on the tenant of the freehold to show cause why the report and assessment of the commissioners, should not be set aside, upon the ground that the assessment is excessive, and why other commissioners should not make the assessment, upon the hearing, the company will not be confined to the specific objection therein suggested to the confirmation of the report, but the company may impeach it by showing that the commissioners had improperly refused or failed to hear legal testimony offered by the company upon the question of compensation and damage. *Washington, etc., R. Co. v. Switzer*, 26 Gratt. 661.

(d) Effect on Title or Possession of Land.

Where there are exceptions to the report, the party seeking to condemn the land may pay the money into court, and may thereupon enter into and construct its works upon and through that part of the land described in the commissioners' report. But this gives the party condemning no title to the land until there is a final judgment of the court fixing the amount of compensation, and the payment of the same to the party or parties entitled, or into court. Va. Code, §§ 1081, 1083; Robin-

son *v. Crenshaw*, 84 Va. 348, 5 S. E. 222; *Va.-Carolina R. Co. v. Booker*, 99 Va. 633, 39 S. E. 591.

c. Setting Aside Report.

Where it plainly appears that the report is based upon a false premise, and the commissioners have omitted an essential element affecting the amount of compensation to which the landowner is entitled, it will not hesitate to quash the report for that reason and appoint a new commission to reassess the damages. *Heninger v. Peery*, 102 Va. 896, 900, 47 S. E. 1013. See ante, "Confirmation of Report," VII, G, 1, f, (4).

2. Assessment by Jury.

See the title JURY.

a. Right to Jury Trial.

The constitution of West Virginia provides that "when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders," therefore, when an issue is awarded, if either party to the cause require it, the order awarding the said issue shall provide, that it shall be tried by an impartial jury of twelve freeholders. *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396.

Though in a case where a railroad company seeking to condemn land for its track, the defendant, with a view to certain preliminary steps proposed to be taken by him, waives for the time a right to have his damages assessed by him, yet when the preliminary matters are disposed of by the court's refusal to entertain them, he may have his damages assessed by a jury. *Railroad Co. v. Foreman*, 24 W. Va. 662.

And although a railroad company has instituted proceedings, under the West Virginia Code, to condemn land, and has taken possession of the land, under the provisions of the 20th section of chapter 42 of the Code, yet the landowner, or the railroad company, has a right to require that the compensation to be paid, shall be ascertained by an impartial jury of twelve

freeholders. *Chesapeake, etc., R. Co. v. Patton*, 9 W. Va. 147.

Where there are two or more conflicting claims to the same parcel, and more than one of the claimant's demand a trial by jury, such trial must be at one and the same time before the jury. *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69.

b. Qualification of Jurors.

The jurors impaneled to assess the compensation to the landowner must be freeholders. *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396; *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69; *Ohio River R. Co. v. Blake*, 38 W. Va. 718, 18 S. E. 957; *Chesapeake, etc., R. Co. v. Patton*, 6 W. Va. 147.

It is guaranteed by the constitution that the jury shall be freeholders. *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69.

In condemnation proceedings a juror is not rendered incompetent because he is a citizen of the county in which the land is and liable to the county levies, though the county may be interested in the suit. *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812.

Necessity for Record to Show Qualification of Jurors.—The order impaneling the jury should in some way show that the jurors are freeholders, either expressly or by necessary implication. *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69. See also, *Ohio River R. Co. v. Ward*, 35 W. Va. 481, 14 S. E. 143.

When an order is made by the chancellor directing an issue of quantum damnificatus in a suit between the owner of property and an internal improvement company, the order should state that the issue is to be tried by a jury of twelve freeholders, if either party desires it. *Ohio River R. Co. v. Ward*, 35 W. Va. 481, 14 S. E. 143.

But the record need not show in terms that a jury formed under § 17,

ch. 42, of the Code of West Virginia, in a proceeding to take land or material therefrom for public use, are freeholders; for where the record shows that the jurors were "drawn, elected, tried and sworn in the manner required by law" it will be presumed that they were freeholders. *Ohio River R. Co. v. Blake*, 38 W. Va. 718, 18 S. E. 957.

Presumption as to Qualification of Jurors.—When an appeal is taken in a case by a party seeking to exercise the right of eminent domain, it will be presumed by the appellate court that all the jurors who assessed the value of the land and the damages to the residue, were freeholders, though it be not so stated expressly in the record. *Chesapeake, etc., R. Co. v. Patton*, 9 W. Va. 648.

Objection to Jurors for Want of Qualifications.—It is too late after verdict to object to a juror for want of freehold qualifications where the objection is based on affidavit or other matters *dehors* the record. *Ohio River R. Co. v. Blake*, 38 W. Va. 718, 18 S. E. 957.

And an affidavit made after the rendition of the verdict that a portion of the jury were not freeholders, is not a ground for setting aside the verdict. *Chesapeake, etc., R. Co. v. Patton*, 9 W. Va. 648.

c. Oath of Jury.

Although the oath taken by the jury is not in the exact form in which it should be administered, yet, if it be apparent that the jury had before them the proper matters for their consideration and that the landowner could have suffered no damage because of the informality, the verdict is valid. *Railroad Co. v. Foreman*, 24 W. Va. 662.

d. View by Jury.

The parties have a right to have the premises viewed by the jury as well as by the commissioners, for the ascertainment of facts, before rendering

their verdict. *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69.

e. Verdict or Findings.

A jury, may find that a portion of the land sought to be condemned may be taken, and the residue may not. *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812.

Necessity of Date.—A date to the inquisition, upon a writ of *ad quod damnum* is not essential, if it be stated under the hands and seals of the jurors that in obedience to the annexed writ, they viewed the land in question. *Dawson v. Moons*, 4 Munf. 535, 538.

Presumption in Favor of Finding.—In the absence of evidence showing that the damages assessed are insufficient, the inquest taken upon the ground must be deemed conclusive on the question. *Muire v. Falconer*, 10 Gratt. 12.

Where, upon a fair and reasonable construction of the inquisition and proceedings they are substantially responsive to the requirements of the statute, that is sufficient. *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69.

Certainty.—A verdict of a jury ascertaining that a certain sum will be a sufficient compensation for "so much of the real estate of the owner, mentioned and described in the within application as is proposed to be taken," describes the land with sufficient certainty. *Ohio River R. Co. v. Harness*, 24 W. Va. 511.

Requisites and Sufficiency.—And an inquisition taken under the 15th section of the Virginia Act incorporating the Chesapeake and Ohio Canal Company should state specifically and separately the value of the land condemned in perpetuity, and the quantity and quality of the estate in the land condemned for temporary purposes; and should also state separately the damages estimated on each separate source of damage; so that the inquisition will ascertain the

damages which have been estimated, and will protect the company from any future demand for these damages. *Chesapeake, etc., Canal Co. v. Hoyer*, 2 Gratt. 511, 514.

But it is not necessary, either in the writ or inquest, that the land injured should have been set out by metes and bounds; and the finding in the inquest, that the proprietors have been injured by the overflowing of the waters of the river, produced by the erection of the dam, and that the damages assessed, arose from that cause, is sufficient. *Nash v. Upper Appomattox Co.*, 5 Gratt. 332.

Inquest on Defective Writ of Ad Quod Damnum.—Upon an application for the change of a road the writ of ad quod damnum is defective for not directing an inquiry as to the damages to the residue of the tract beyond the peculiar benefits which will be derived in respect to such residue from the road. An inquest taken on such writ is defective, and both writ and inquest will be quashed on motion made at the proper time, but the defendant by failing to make the motion in the county court waives this objection. *Mitchell v. Thorne*, 21 Gratt. 164.

Grounds of Quashal of Inquisition.—The court may quash an inquisition, for error appearing on its face, or made to appear by proof at the hearing. *Chesapeake, etc., Canal Co. v. Hoyer*, 2 Gratt. 511.

Modes of Objecting to Inquest.—The regular mode of objecting to the inquest of the jury on account of the small amount of damages assessed is by a motion to quash the inquest, on which motion evidence may be heard to prove that the damage assessed is sufficient. This objection may, however, be made on the hearing, and evidence may then be introduced by either party to show that the damages assessed are either adequate or inadequate. And upon appeal by the defendant, to the circuit court, he is en-

titled to introduce evidence upon the same point. *Mitchell v. Thorne*, 21 Gratt. 164.

Setting Aside Verdict.—A verdict finding an amount of compensation in a proceeding by a railroad company to condemn land that is so high that it must be attributed to prejudice, passion, bias, partiality, or mistake of law or judgment, will be set aside. *Norfolk, etc., R. Co. v. Nighbert*, 46 W. Va. 202, 32 S. E. 1032; *Guinn v. Ohio River, etc., R. Co.*, 46 W. Va. 151, 33 S. E. 87.

The jury impaneled under a writ of ad quod damnum awarded on an application for leave to build a mill, having found difficulty in agreeing upon the damages to be assessed for the overflowing of certain land, it is announced by the sheriff that they are not likely to agree in a verdict; whereupon the applicant requests that the jury will make another effort to come to an agreement, saying the business is a tedious and troublesome one, and he is willing to pay whatever damages they may think reasonable. A juror then states, that the other jurors wish to assess an amount of damages which he himself thinks too large, and that he is unwilling to concur with them, unless the applicant will consent to pay the damages; and he puts the question to the applicant, whether he is willing to pay the amount (naming it) which the other jurors have fixed upon? The applicant replies that he is; and this juror thereupon concurring with the others, the inquisition is completed. The communications aforesaid take place openly, before the sheriff and all the jurors, as well as other persons assembled; though the owner of the land to be overflowed is not present at the taking of the inquisition. It was held, that this is not such an interference of the applicant with the jury, as to make it proper to set aside the inquisition. *Hunter v. Matthews*, 1 Rob. 468.

H. RIGHT TO OPEN AND CLOSE.

As the party seeking the appropriation of the land has the affirmative of the issue upon the right to take it, such party is entitled to open and conclude the argument. *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812.

And where the damages accruing to the landowner have been assessed and an appeal is taken by him to the circuit court because of the insufficiency of the damages allowed by the jury, the judgment of the county court being *prima facie* right, it is the right and duty of the defendant to open the case. *Mitchell v. Thorne*, 21 Gratt. 164.

I. SEPARATE TRIALS.

Each owner of each parcel has a right to a separate trial and finding, though all may be embraced in one application. *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69.

J. JUDGMENT.

Under the law, the court enters no other judgment than first to determine the legal right to take the land, and, after the commissioners have acted, to confirm their report. From these judgments without other sentence of condemnation, emanates the right of the applicant, within twelve months from the date of the report, to pay the sum ascertained, and thereupon to become invested with the title to the land. *Chesapeake, etc., R. Co. v. Pack*, 6 W. Va. 397, 399.

Upon the finding of the jury, it is error to decree the amount so found against the company in such forms that execution can be issued upon the foot of the decree. The order should be that, when the company pays to the owner, or deposits in court, as the case may be, the sum found by the jury, the injunction shall be wholly dissolved, but until that time it is continued in full force and effect. *Ohio*

River R. Co. v. Ward, 35 W. Va. 481, 14 S. E. 143; *Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 223, 243.

In a proceeding by a corporation to take land under its power of eminent domain, it is error for the court, upon confirming the report of the commissioners and ordering the same to be recorded, to render judgment against the applicant for the amount of damages ascertained by the report. *Chesapeake, etc., R. Co. v. Bradford*, 6 W. Va. 280.

The court having appointed commissioners for the purpose, they returned their report, whereby they ascertained that two hundred and twenty-five dollars was a sufficient compensation for the land proposed to be taken, and for damages to the residue of the real estate of the landholder, which sum the applicant paid into court, and the landowner demanded that his compensation be ascertained by a jury, who by their verdict ascertained his compensation to be nine hundred and ninety-nine dollars; and thereupon the court gave judgment in favor of the landowner against the applicant for the whole amount of the verdict with interest from the date of the judgment and costs, to which the applicant obtained a writ of error. It was held, that the judgment should have been rendered for seven hundred and seventy-four dollars, the excess found by said verdict, over the sum of two hundred and twenty-five dollars, ascertained by said commissioners, with interest from the date of said judgments and costs. That the error in said judgment could have been amended in the manner prescribed by § 5, ch. 134, of the Code. That no motion having been made by said appellant to so amend said judgment, the same under § 6 of said chapter will be amended in this court, and when so amended, will be affirmed with damages and costs to the appellee, as the party substantially prevailing. *Ohio River R. Co. v. Harness*, 24 W. Va. 511.

Effect of Judgment of Condemnation to Second Use.—As one railroad company may under some circumstances condemn the land of another for its purpose, the right to so condemn is determined by the adjudication in the condemnation proceedings, and such determination can not be collaterally attacked. The judgment in the condemnation proceedings concludes all questions that could have been raised or determined therein. *Chesapeake, etc., R. Co. v. Washington, etc., R. Co.*, 99 Va. 715.

Collateral Attack.—In a collateral attack upon a condemnation proceeding before a county court it is not necessary to the validity of its judgment that it should appear on the face of the proceedings how the defendant was notified. It is sufficient that it appears that the defendant was duly notified. *Chesapeake, etc., R. Co. v. Washington, etc., R. Co.*, 99 Va. 715.

As one railroad company may under some circumstances condemn the land of another for its purpose, the right to so condemn is determined by the adjudication in the condemnation proceedings, and such determination can not be collaterally attacked. The judgment in the condemnation proceedings concludes all questions that could have been therein raised or determined. *Chesapeake, etc., R. Co. v. Washington, etc., R. Co.*, 99 Va. 716.

Where the right of eminent domain has been exercised in behalf of a railroad company, and the land has been condemned, damages assessed and paid, and the company placed in the possession of the land, the title thereby acquired, in so far as it is without reservation, becomes adverse to all other claimants of the property so condemned. And such proceedings can not be collaterally attacked except for fraud. *Kanawha, etc., R. Co. v. Glen Jean, etc., R. Co.*, 45 W. Va. 119, 30 S. E. 86.

And where a judgment is rendered for the city in proceedings to condemn

a street, the landowner can not, in a prosecution for obstructing the street, defend on the ground that the proceeding was illegal. *Foster v. Manchester*, 89 Va. 92, 15 S. E. 497. See the title JUDGMENTS AND DECREES.

K. REVIEW OF PROCEEDINGS.

See the title APPEAL AND ERROR, vol. 1, p. 418.

VIII. When Title to Property Taken Passes.

The lawful emanation, execution and return of a writ of ad quod damnum to value land intended to be applied to public uses, immediately divests the title of the individual owner to the land so valued, and transfers it to the state, the owner remaining entitled only to the valuation money and damages assessed by the jury. *Attorney General v. Turpin*, 3 Hen. & M. 548.

Under the present Virginia statute title to land condemned for public purposes remains in the owner until judgment of the court, in which the condemnation proceedings are appended, confirming the report of the commissioners as to the damages assessed, and payment of the money to the party entitled or into court. Va. Code, § 1083; *Va.-Carolina R. Co. v. Booker*, 99 Va. 633, 39 S. E. 591; *Jones v. Miller*, 2 Va. Dec. 232.

Under Special Statutory Provisions.

—Where an act directed the public engineer to lay off a road and sites for bridges thereon, and declared that upon the return of the plots thereof to the clerks' offices of the county courts in which the road located lay, the land should be vested in the commonwealth for the use of the road, it was held that on compliance with the law, the title to the land on which the road was located, was vested in the state. *James River, etc., Co. v. Thompson*, 3 Gratt. 270.

Where Doubt Exists as to Title of Property.—Where a corporation has

had land condemned for its purposes, and doubt exists as to the title, it can acquire clear title only by paying the damages into court so that the parties in interest may be convened before a disposal thereof. Va. Code, 1873, ch. 56, § 16; *Robinson v. Crenshaw*, 84 Va. 348, 5 S. E. 222.

IX. Extent of Interest Acquired in Property Taken.

Under Statute.—Corporations condemning land under Virginia Code, 1873, ch. 56, § 11, must take and pay for the fee simple, and not merely an easement, except it be a turnpike company. *Roanoke v. Berkowitz*, 80 Va. 616.

Where it is declared by statute that upon the exercise of the power of eminent domain, no less interest than the fee shall be taken in the land, the right to condemn the use of the water flowing over the land can not be exercised. *Charlottesville v. Maury*, 96 Va. 383, 31 S. E. 520.

It has been held, that the Virginia statute requiring a corporation condemning land to condemn and pay for the fee simple, is constitutional. *Roanoke v. Berkowitz*, 80 Va. 616.

Prior to Statute.—It was held, that where land was taken for a public highway, it only vests in the commonwealth a right of passage, and the freehold and profits, such as trees upon it and mines under it, belonged to the owner of the soil, who had a right to all remedies for the freehold, subject to the easement. *Bolling v. Petersburg*, 3 Rand. 563. See the title **STREETS AND HIGHWAYS**.

Where, upon an application to a county court for leave to erect a mill and dam, the inquisition finds that a certain quantity of land not belonging to the applicant will be overflowed, and assesses damages to the proprietor, it is erroneous for the judgment granting leave to erect the mill and dam,

to provide, that upon payment of the damages so assessed, the land overflowed shall become vested in the applicant in fee simple; and upon appeal to the circuit court by the proprietor of the land, that court must reverse the judgment with costs, though the appellee himself suggests the error and moves that it be corrected. *Hunter v. Matthews*, 1 Rob. 468.

X. Remedies of Landowner.

A. ACTION AT LAW.

1. Ejectment.

Ejectment will not lie against a railroad company for land upon which, after a report in its favor by commissioners duly appointed, and payment into court of the damages assessed, it has entered for construction of its road, notwithstanding the proceedings were still pending, since it has the right of possession under Virginia Code, § 1081, authorizing it, under such circumstances, to enter for such purpose. *Rudd v. Farmville, etc., R. Co.*, 2 Va. Dec. 346. See the title **EJECTMENT**.

2. Action for Damages.

a. Right of Action.

In General.—When the constitution forbids the taking or damaging of private property and points out no remedy, and no statute gives the remedy for the invasion of the right of property thus secured, the common law, which gives the remedy for every wrong, will furnish the appropriate action for such grievances. *Johnson v. Parkersburg*, 16 W. Va. 402. See the title **ACTIONS**, vol. 1, p. 122.

Where for value received a city allowed a company to lay gas or water pipes in its streets, the company is held to have accepted the privilege subject to the city's right to change the grade of its streets, and with the probability that the right would be exercised. The city may afterwards lower the grade, and if in so doing the pipes become exposed and obstructive, it may re-

quire the company to remove them or have it done by its own agents. If the company have any remedy for such removal of the pipes, it is at law for compensation. *Roanoke Gas Co. v. Roanoke*, 88 Va. 810, 14 S. E. 665.

Possession of Plaintiff.—To maintain an action of trespass for an injury to real estate, it is necessary to allege and prove possession, either actual or constructive, in the plaintiff at the time the injury was done. *Gillison v. Charleston*, 16 W. Va. 282.

The same rule applies to an action on the case brought to recover damages for such injury done to real estate. *Gillison v. Charleston*, 16 W. Va. 282.

In an action by an abutting owner for damages for the construction of a railroad in a street, he may count for permanent damages, and recover the same according to the evidence, although, when the injury occurred, he was not in the actual occupancy of the land, but was only in constructive possession through his tenant under a lease. *Fox v. Baltimore, etc., R. Co.*, 34 W. Va. 466, 12 S. E. 757. See the titles **ABUTTING OWNERS**, vol. 1, p. 60; **RAILROADS**; **STREET RAILROADS**.

Establishment of Road over Premises with Consent of Tenant.—If the road has been established by the consent of the tenant in possession as visible owner, without a writ of *ad quod damnum*, the party entitled to the compensation, if he be some other than this tenant, may affirm the agreement between this tenant and the court, and enforce the payment of the compensation, agreed on, to himself; or he may, if the agreement was made without his authority, require a writ of *ad quod damnum* to assess the compensation, to which he is entitled; but his so doing in no manner affects the right of the public to the use of the road already established, when such tenant

alone was before the court. *Keystone Bridge Co. v. Summers*, 13 W. Va. 476.

The party entitled to compensation, though he be not the tenant in possession as visible owner, who alone was notified of the proceedings, may compel the payment of such compensation in the same manner as any other charge against a county is enforced. *Keystone Bridge Co. v. Summers*, 13 W. Va. 476.

b. Form of Action.

In an action brought to recover damages as compensation for permanent injuries to real estate by the construction of a railroad upon a street adjacent to such property, it is proper for the owner to bring an action of trespass on the case. *Fox v. Baltimore, etc., R. Co.*, 34 W. Va. 466, 12 S. E. 757.

The plaintiff erected a residence outside of the city limits on a turnpike which was afterwards taken into the city. In grading and improving the road, the plaintiff's property was injured. It was held, that he could recover damages in an action of trespass on the case. *Hutchinson v. Parkersburg*, 25 W. Va. 226.

c. Parties.

Equitable Owner.—W. H. is the equitable owner of such a lot, and the legal title to only a moiety of it is in him, but the mere legal title to the other moiety is in his wife, subject to his life estate therein, and H. brings alone such action on the case against such town, not joining his wife as co-plaintiff in such action, and the town pleads to the declaration not guilty, the plaintiff is entitled to recover the whole amount of the damage, which has been thus done by the town to his lot and dwelling. *Hutchinson v. Parkersburg*, 25 W. Va. 226, 227.

A wife in possession as equitable owner of real estate, may, under the provision of our bill of rights, § 9, art. 3, constitution, recover damages

from a railroad company for injuries done to such real estate by the construction and operation of its road, without uniting her husband in the action. *McKenzie v. Ohio River R. Co.*, 27 W. Va. 306. See the title HUSBAND AND WIFE.

A husband who is the equitable owner of land, holding the legal title to one moiety of it only, while the legal title to the other moiety, subject to his life estate, is in his wife, may recover the entire damages done to the lot without joining the wife in the action, where the only plea of the defendant was not guilty. *Hutchinson v. Parkersburg*, 25 W. Va. 226; *McKenzie v. Ohio River R. Co.*, 27 W. Va. 306, 312.

Action for Injury to Wife's Separate Estate.—Under the provisions of our statute, ch. 66, W. Va. Code, a married woman, living with her husband, may maintain an action at law for injuries done to her separate real estate by the construction and operation of a railroad, without uniting her husband in the action. *McKenzie v. Ohio River R. Co.*, 27 W. Va. 306. See the title SEPARATE ESTATE OF MARRIED WOMEN.

d. Declaration.

If the plaintiff desires to recover damages not only for the disturbance to the possession but for permanent injury to the property, the declaration should show by proper averments that its object was to recover damages for such permanent injury. *McKenzie v. Ohio River R. Co.*, 27 W. Va. 306.

If, however, the declaration does not contain such averments of permanent injury to the property, it will not for that cause alone be bad on demurrer; and if the plaintiff offers to the jury without objection by the defendant evidence of such permanent injury, the plaintiff may recover therefor on such declaration, and such recovery will be a bar to any future action for such injury. *McKenzie v. Ohio River R. Co.*, 27 W. Va. 306.

e. Evidence.

In an action of trespass on the case for wrongfully and injuriously building an embankment on defendant's own land, so as to cause an obstruction and reflow of water on plaintiff's land, it is not error to refuse introduction of testimony on the part of the defendant, that the drain constructed by the defendant, to carry the water from the land of the plaintiff, was such a drain as is usual and customary to be constructed at such embankments on railroads generally, and have been found sufficient for the purposes of carrying off the water at like places. *Beaty v. Baltimore, etc., R. Co.*, 6 W. Va. 385.

In an action by an abutting owner for injury to his property by the construction of a railroad in the street in front of his property, he may give evidence developing the character of its use and the manner in which it affects the use of its property. *Fox v. Baltimore, etc., R. Co.*, 34 W. Va. 466, 12 S. E. 757. See the title ABUTTING OWNERS, vol. 1, p. 60.

f. Province of Court and Jury.

The assessment of damages is peculiarly the province of the jury, and where there is a motion to set aside a verdict, because of excessive or inadequate damages, the court must not encroach upon such province of the jury, save in strong cases of injustice. No mere difference of opinion, however decided, justifies an interference with the verdict for this cause, but the amount must be so out of the way as to evince passion, prejudice, partiality, or corruption in the jury. *Battrell v. Ohio River R. Co.*, 34 W. Va. 232, 12 S. E. 699.

g. Revivor.

A proceeding has been instituted under the 9th section of the act of February 23d, 1835, Sess. Acts, p. 82, in relation to the Upper Appomatox Company, for the purpose of recovering damages to land occasioned by the improvement of the company. The jury have returned their verdict ascertaining

the damages; and the company has filed exceptions, and obtained a continuance of the cause; and then the plaintiff dies. It was held, that the proceeding may be revived by the proper party against the company. The administrator, and not that heirs of the plaintiff, is the proper party to revive the proceeding. *Upper Appomattox Co. v. Hardings*, 11 Gratt. 1. See the title ABATEMENT, REVIVAL, AND SURVIVAL, vol. 1, p. 2.

B. INJUNCTION.

See the title INJUNCTIONS.

1. When Injunction Lies.

a. In Virginia.

Injunction is the proper remedy in all cases where there has been an unlawful taking of private property. *Hodges v. Seaboard, etc.*, R. Co., 88 Va. 653, 14 S. E. 380; *Manchester Cotton Mills v. Manchester*, 25 Gratt. 825, 828.

Whether or not there is a statute forbidding the invasion of the owner's dwelling house or the space of sixty feet about it, an injunction will lie to prevent an invasion and occupation of this space by a railroad company where compensation has not been paid beforehand, as provided for by statute. *Hodges v. Seaboard, etc.*, R. Co., 88 Va. 653, 14 S. E. 380.

Conceding that the plaintiffs can establish that they are entitled to compensation; that the injury they complain of is such that it can not be adequately compensated in damages, and that it is therefore proper for a court of equity to grant the relief to which they may appear to be entitled; yet it is not proper for the court, pending the enquiry into their right to compensation, and before its assessment by law, to interfere by injunction, or otherwise, to stay the proceedings of the defendant railroad company, in laying or using the tracks on the land in respect to which the injury is alleged to be done or threatened, unless it be manifest that said company is tran-

scending its authority, and that the interposition of the court is necessary to prevent injury that can not be adequately compensated in damages. Code, 1873, ch. 56, § 13; *Supervisors v. Gorrell*, 20 Gratt. 484, 514; *Norfolk, etc.*, R. Co. v. Smoot, 81 Va. 495.

It is not competent for the court of chancery to award an injunction to stay the proceedings of a railroad or canal company in the prosecution of its work of any kind, unless it be manifest, both that it is transcending its authority given by its charter, and that the interposition of the court is necessary to prevent injury that can not be adequately compensated in damages; the two circumstances must concur to warrant a court in awarding such process. *James River, etc., Co. v. Anderson*, 12 Leigh 278, 314, citing *Tuckahoe Canal Co. v. Tuckahoe, etc.*, R. Co., 11 Leigh 42.

b. In West Virginia.

(1) Taking of Property.

Where private property is being taken without compensation, equity has jurisdiction to enjoin the act. *Foley v. County Court*, 54 W. Va. 16, 46 S. E. 246; *Spencer v. Point Pleasant, etc.*, R. Co., 23 W. Va. 406; *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396; *Boughner v. Clarksburg*, 15 W. Va. 394; *Yates v. West Grafton*, 33 W. Va. 507, 11 S. E. 8; *Mason City, etc., Co. v. Mason*, 23 W. Va. 211; *Ward v. Ohio River R. Co.*, 35 W. Va. 481, 14 S. E. 142; *Pierpoint v. Harrisville*, 9 W. Va. 215; *Watson v. Fairmont, etc.*, R. Co., 49 W. Va. 528, 529, 39 S. E. 193; *Arbenz v. Wheeling, etc.*, R. Co., 33 W. Va. 1, 10 S. E. 14; *Taylor v. Baltimore, etc.*, R. Co., 33 W. Va. 39, 10 S. E. 29; *Smith v. Point Pleasant, etc.*, R. Co., 23 W. Va. 451; *Campbell v. Point Pleasant, etc.*, R. Co., 23 W. Va. 448.

A court of equity will grant an injunction to prevent a town from constructing pavements on a person's land, where he had not dedicated the ground to public use, or where the ground

had not been condemned according to law, for that purpose. *Pierpont v. Harrisville*, 9 W. Va. 215; *Boughner v. Clarksburg*, 15 W. Va. 394; *Mason City, etc., Co. v. Mason*, 23 W. Va. 211.

Injunction will lie to restrain a town from opening streets and alleys through a person's land against his consent, without first having the same lawfully taken and condemned and compensation to such person ascertained in the manner prescribed by law. *Mason City, etc., Co. v. Mason*, 23 W. Va. 211.

Where private property is being taken for public use without compensation, equity has jurisdiction to enjoin the act, though there be controversy as to the title or boundary of the land, and to pass on the right of the parties finally. *Foley v. County Court*, 54 W. Va. 16, 31 S. E. 246.

(2) Damaging of Property.

If property is not being actually taken for a public use without compensation, but is being damaged merely, injunction will not lie. *Spencer v. Point Pleasant, etc., R. Co.*, 23 W. Va. 406; *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396; *Boughner v. Clarksburg*, 15 W. Va. 394; *Yates v. West Grafton*, 33 W. Va. 507, 11 S. E. 8; *Mason City, etc., Co. v. Mason*, 23 W. Va. 211; *Ward v. Ohio River R. Co.*, 35 W. Va. 481, 14 S. E. 142; *Pierpoint v. Harrisville*, 9 W. Va. 215; *Watson v. Fairmont, etc., R. Co.*, 49 W. Va. 528, 529, 39 S. E. 193; *Arbenz v. Wheeling, etc., R. Co.*, 33 W. Va. 1, 10 S. E. 14; *Taylor v. Baltimore, etc., R. Co.*, 33 W. Va. 39, 10 S. E. 29; *Smith v. Point Pleasant, etc., R. Co.*, 23 W. Va. 451; *Campbell v. Point Pleasant, etc., R. Co.*, 23 W. Va. 448; *Foley v. County Court*, 54 W. Va. 16, 31 S. E. 246.

Construction of Railroad in Street or Highway.—An abutting lot owner can not restrain the construction of a street railway in the street upon which his property fronts until the damage to his

property resulting from such use of the street is ascertained and paid or secured, unless the injury to his property is so great as to destroy its value and therefore amount to a virtual taking of the property for the use of the railway company. *Watson v. Fairmont, etc., R. Co.*, 49 W. Va. 528, 39 S. E. 193; *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396; *Spencer v. Point Pleasant, etc., R. Co.*, 23 W. Va. 406; *Arbenz v. Wheeling, etc., R. Co.*, 33 W. Va. 1, 10 S. E. 14; *Taylor v. Baltimore, etc., R. Co.*, 33 W. Va. 29, 10 S. E. 29; *Yates v. West Grafton*, 34 W. Va. 783, 12 S. E. 1075.

Section 9, art. 3, of the constitution provides that compensation shall be paid to the owner of the property for such damages and gives him an action at law therefor, but does not, as in cases where the property is actually taken, require the compensation to be paid or secured before the injury is inflicted; and, having an adequate remedy at law for the injury, the owner of such lot can have no relief in a court of equity on account thereof, if the legislature has authorized the construction and operation of the railway in such street. *Watson v. Fairmont, etc., R. Co.*, 49 W. Va. 528, 529, 39 S. E. 193; *Spencer v. Point Pleasant, etc., R. Co.*, 23 W. Va. 406; *Arbenz v. Wheeling, etc., R. Co.*, 33 W. Va. 1, 10 S. E. 14.

When a railroad company, by consent of a town council, is building its road through the streets of a town, and the owner of an adjoining lot seeks an injunction, till a court of equity ascertain the damages he will sustain, giving as a reason for such injunction that the court of common law will furnish no adequate remedy, as the plaintiff would have to bring repeated suits to recover for the damages he might sustain, as he would recover in any one suit only the damages which he might have sustained prior to the institution of such suit, and on its termination would have to bring a like suit for

his damages subsequently sustained, and so on for an indefinite period, this reason furnishes no ground for the interposition of a court of equity, as all damages of a permanent character may be recovered in such case in the first suit at law, and there is not only no necessity for such repeated suits at law, but after such first suit, in which the entire damages are recovered, no second suit could be brought, except to recover damages which did not necessarily result from the building and proper use by the railroad company of its track in such street. A second suit could only be brought for the careless running of cars in such street or for other wrongs done by the railroad company, not including the injury necessarily resulting from the running of its cars in such street, which is the right of the company. *Smith v. Point Pleasant, etc., R. Co.*, 23 W. Va. 451; *Spencer v. Point Pleasant, etc., R. Co.*, 23 W. Va. 406; *Campbell v. Point Pleasant, etc., R. Co.*, 23 W. Va. 448.

Thus, having an adequate remedy at law for such damages as may result to his property from the act complained of, the plaintiff is precluded, upon the ordinary principles of equity jurisprudence from coming into a court of equity for such relief, and to complain of an alleged wrong or injury to the public generally committed by said company. In this view of the case, it is a matter of no consequence to him whether the company is acting in excess of the powers conferred by its charter, for it would be estopped from setting up as a defense in his action against it for the damages the illegality of the act in question. *Watson v. Fairmont, etc., R. Co.*, 49 W. Va. 528, 39 S. E. 193.

Where a railroad company is authorized to construct its road along the county road the owner of the adjoining land can not enjoin the company from constructing its railroad along the road in the manner required by the statute, unless the injury therefrom will en-

tirely destroy the value of their property, and thereby be equivalent to a taking of it by the company. *Yates v. West Grafton*, 34 W. Va. 783, 12 S. E. 1075. See the titles *ABUTTING OWNERS*, vol. 1, p. 60; *RAILROADS*; *STREET RAILROADS*.

Where Property Injured Is Actually Destroyed.—Under peculiar circumstances, however, as where the property injured is entirely destroyed in value as effectually as if it had been actually taken by the railroad company in constructing its road, and the property is thereby virtually taken, the owner of the property may enjoin the company from proceeding with the building of its road until the damages are ascertained and paid or secured. *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396; *Watson v. Fairmont, etc., R. Co.*, 49 W. Va. 528, 39 S. E. 193; *Ohio River R. Co. v. Gibbons*, 35 W. Va. 57, 12 S. E. 1093.

2. Bill for Injunction.

In the case of taking land for public use without compensation, no averment of irreparable injury is necessary, the very "taking" being such. *Foley v. County Court*, 54 W. Va. 16, 31 S. E. 246.

Where the bill contained no allegation that a city had taken for its own uses the property of a gas company without compensation, but the petition for the appeal did contain such allegation, it was held, that a party can not make one case by his bill for the court below and another by his petition, for the appellate court. *Roanoke Gas Co. v. Roanoke*, 88 Va. 810, 14 S. E. 665.

3. Indemnity in Lieu of Injunction.

The court may, in a proper case, permit a railway company to give a bond of indemnity, instead of enjoining it from taking land for its right of way before paying the compensation. *Campbell v. Point Pleasant, etc., R. Co.*, 23 W. Va. 448

EMOLUMENTS.—In *Turpin v. Locket*, 6 Call 183, it is said: "The fair interpretation, therefore, is, that **emoluments** and 'privileges' (which are the rewards for services by the officers administering the government), not being descendible, the offices, from which the services were to proceed, ought not to be hereditary." See generally, the title PUBLIC OFFICERS.

Empanel.

See the title JURY.

Employer and Employee.

See generally, the title MASTER AND SERVANT.

EMPLOYEE—EMPLOYMENT.—In *Heath v. Johnson*, 36 W. Va. 782, 15 S. E. 981, it is said: "The teacher, on the other hand, whatever may be the case in other states, is not in this state a public officer, but is an **employee**, and his position not a public office, but an **employment**."

Section 5, of charter of city of Lynchburg, granting authority to impose a license tax upon persons engaged in certain enumerated callings, and "upon any other person or **employment**, which it may deem proper, whether such person or **employment** be herein specially enumerated or not," does not empower the city to impose such tax upon a railroad corporation; which is neither a person nor an **employment**, within the ordinary acceptation of those words. The court said: "If we shall find no language in the statute indicating that these words were used with reference to a higher and different class of persons and **employment** than those enumerated in the preceding special words, we must construe the words 'persons' and **employment** as applicable to persons and **employments** ejusdem generis with the enumerated classes." *Lynchburg v. Norfolk, etc., R. Co.*, 80 Va. 237, 248.

In *Plumer v. Com.*, 3 Gratt. 648, it is said: "We are not wont to speak of a minister of the gospel, as in the 'business' or **employment** of the 'individuals' of his church; nor in the 'business' or **employment** of his congregation. He is not their servant, at least in any secular sense." And the court held, that **employment** as used in the statute taxing incomes should be construed as ejusdem generis, with the other subjects of taxation and persons, confined to secular **employments**. See generally, the title LICENSES.

Employers' Liability Act.

See the titles FELLOW SERVANTS; MASTER AND SERVANT.

Employers' Liability Insurance.

See the titles ACCIDENT INSURANCE, vol. 1, p. 71; INSURANCE; LIFE INSURANCE; MASTER AND SERVANT.

EMPOWER.—See *Milhollen v. Rice*, 13 W. Va. 357.

Enabling Statutes.

See generally, the title STATUTES.

ENCLOSED LANDS.—Enclosed lands within the meaning of the statute requiring railroads to fence their roadbeds are lands surrounded by a fence, and a fence is a visible or tangible obstruction, which may be a hedge, ditch, wall, or a frame of wood, or any line of obstacle interposed between two portions of land so as to part off and shut in the land, and set it off as private property. The fence need not be a lawful fence. *Kimball v. Carter*, 95 Va. 77, 27 S. E. 823. See generally, the title **FENCES**.

Encroachments.

See the titles **ABUTTING OWNERS**, vol. 1, p. 60; **ADJOINING LANDOWNERS**, vol. 1, p. 175; **NUISANCES**; **STREETS AND HIGHWAYS**.

Encumbrances.

See the titles **COVENANTS**, vol. 3, p. 759; **VENDOR AND PURCHASER**.

ENDEAVOR.—In *Goldsmith v. Goldsmith*, 46 W. Va. 426, 33 S. E. 267, it is said: "The word *endeavor* is the sole basis of the position of counsel. It is said to mean 'to use efforts,' 'to attempt,' 'to try,' 'to strive,' and so on. Generally, it means that, but that depends on the place, context, and circumstances under which it is found."

ENDED.—An indorsement upon a sealed agreement was in the following words: "All matters and things embraced in the within contract have been fully adjusted and settled, and this contract is, for value received, declared *ended* and settled." In construing this indorsement the court said: "The contract itself is abrogated—*ended*. What does *ended* mean? It means final, definite, complete, conclusive. It imports what will be, when the Apocalyptic Angel, with one foot on the sea and the other upon the earth, shall lift his hand to heaven, and swear, by Him that liveth forever and ever, that there shall be 'Time no longer!'" *Bonsack Machine Co. v. Woodrum*, 88 Va. 515, 13 S. E. 994.

END OF WAR.—In *Innis v. Roane*, 4 Call 390, it is said: "In that aspect, the words *end of the war* are not to be confined to a single day; but the object is to be looked to; and that was ascertained when the great purposes of the war were accomplished; for, from that time, the services of the appellees were no longer wanted. Which, indeed, was the sense of the constituted authorities; for they withdrew the officers from command, and bid them retire upon half pay, liable, if wanted, to be called into service again. '*End of the war*' was an equivocal expression, to be understood according to circumstances; Co. Litt. 249; and serving until the war was, in fact, ended, was a substantial compliance with the requisition, and all that a court of equity will insist upon: for, in many cases, that court enforces a compliance with contracts where the courts of law will not." See also, the title **WAR**.

Endorsement.

See the titles **BILLS, NOTES AND CHECKS**, vol. 2, p. 426; **BONDS**, vol. 2, p. 530.

Endowment Insurance.

See the title **LIFE INSURANCE**.

ENEMY.—See the titles ALIENS, vol. 1, p. 291; WAR.

In *Grinnan v. Edwards*, 21 W. Va. 357, it is said: "A war having been declared, or recognized to exist between two belligerents, whether it be a foreign or a civil war, what is its effect upon their citizens, or subjects? They thereby become **enemies** of each other. What then, is an **enemy**? By the law of nations, an **enemy** is defined to be, 'one with whom a nation is at open war.' 'When the sovereign ruler of the state declares war against another sovereign, it is understood, the whole nation declares war against that other nation; all the subjects of one, are **enemies** to all the subjects of the other and during the existence of the war, they continue **enemies** in whatever country they may happen to be,' and all persons residing within the territory occupied by the belligerents, although they in fact are foreigners, are liable to be treated as **enemies**. Vattel Law of Nations, book 3, ch. 5, §§ 69-71; Halleck's Int. Law, ch. 17, § 8; *White v. Burnley*, 20 How., pp. 249-250, and 2 Black, p. 636."

Engineers.

See the titles ARBITRATION AND AWARD, vol. 2, p. 689; WORKING CONTRACTS.

Engrossing.

See the title MONOPOLIES.

Enlistment.

See the titles CONTRACTS, vol. 3, p. 316; INFANTS; WAR.

Enquiry of Damages.

See generally, the title INQUESTS AND INQUIRIES.

English Statutes.

See the title COMMON LAW, vol. 3, p. 24.

Entails.

See the titles ESTATES; REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS.

Entering Appearance.

See the title APPEARANCES, vol. 1, p. 667.

Enticement.

See the titles ABDUCTION AND KIDNAPPING, vol. 1, p. 56; APPRENTICES, vol. 1, p. 684; HUSBAND AND WIFE; MASTER AND SERVANT.

ENTIRE.—See *Lyons v. Brown*, Gilmer 118.

Entire or Severable Contracts.

See the title CONTRACTS, vol. 3, p. 384.

Entirety, Estates by.

See the title JOINT TENANTS AND TENANTS IN COMMON.

ENTITLED.—In construing a homestead act, the court said: "It declares that 'he shall be **entitled** to hold' property to be selected by him. 'He shall be **entitled** to hold' plainly means that he may if he chooses have the right to hold such property as he may choose to select and set apart as his homestead, not exceeding in value \$2,000; and when he so chooses to exercise such right to hold it, and chooses so to select it and set it apart, that property over which such right is so exercised, and which is so set apart, shall be exempt from execution, sale, etc. And this right may be exercised at any time before sale. But if he never does exercise this right, such property is liable to sale for a satisfaction of his debts." *Reed v. Union Bank*, 29 Gratt. 724. See the title **HOMESTEAD EXEMPTIONS**.

In *Sommers v. Allen*, 44 W. Va. 120, 28 S. E. 788, it is said: "The affidavit says that the affiant believes that plaintiffs 'should' recover, instead of **entitled** to recover. Are 'should' and **entitled** tantamount? The word **entitled** means that the party has legal ground to recover, while 'should' may mean merely the expression of the affiant's opinion. I do not think this will do under the rigid doctrines relating to attachments."

Entitling Contempt Proceeding.

See the title **CONTEMPT**, vol. 3, p. 258.

ENTRY.—See the title **PUBLIC LANDS**.

Entries.—This term has been confined to **entries** upon unappropriated lands and held, not to embrace **entries** for escheated lands. *Alexander v. Greenup*, 1 Munf. 143.

Entry and Detainer.

See the title **FORCIBLE ENTRY AND DETAINER**.

Entry for Land.

See the title **PUBLIC LANDS**.

Entry of Judgment.

See the title **JUDGMENTS AND DECREES**.

Entry, Writ of.

See the titles **EJECTMENT**, vol. 4, p. 871; **FORCIBLE ENTRY AND DETAINER**; **WRIT OF RIGHT**.

EQUAL—EQUALLY.—**Equal Degree.**—See *Case upon the Statute for Distribution*, Wythe 317.

Equal in Value.—In *Bedinger v. Com.*, 3 Call 474, it is said: "The words, 'if the matter in controversy be **equal in value**, exclusive of costs, to one hundred dollars, in the district courts, or one hundred and fifty in the general court, or high court of chancery,' are decisive, as they, necessarily, relate to civil causes only; for, the expression, '**equal in value**,' can apply to nothing else."

Equally Divided.—In *Self v. Tunc*, 6 Munf. 472, it is said: "If these words, 'heirs of her body,' had stood alone, in the limitation after the death of *Mary Bailey* and her husband, we are of opinion that her title would have been

absolute, as, in that case, they would have been considered words of limitation; but the addition of the words, '**equally to be divided**' between them, compels us to construe them as words of purchase, and as a description of the persons who were to take." See also, *Bolling v. Robertson*, 6 Munf. 220.

D. M. and A. M. have each five children, and R. M. M. is the child of A. M. Testator regards R. M. M. with great favor, and gives him a plantation and a legacy of two thousand dollars. Testator then says: "I will and bequeath to the children of A. M. and D. M. and to R. M. M. all the funds remaining after every just claim against my estate has been satisfied, to be **equally** divided between them." Held; that the fund is to be divided into ten shares, one of which is to be given to each of the children of A. M. and one to each of the children of D. M.; and thus giving to R. M. M. but one-tenth of the fund. *McMaster v. McMaster*, 10 Gratt. 275. See also, the title **WILLS**.

Equal Protection of Laws.

See the title **CONSTITUTIONAL LAW**, vol. 3, p. 202.

Equitable Assets.

See the title **EXECUTORS AND ADMINISTRATORS**.

Equitable Assignments.

See the title **ASSIGNMENTS**, vol. 1, p. 762.

Equitable Attachment.

See the title **ATTACHMENT AND GARNISHMENT**, vol. 2, p. 83.

Equitable Conversion.

See the title **CONVERSION AND RECONVERSION**, vol. 3, p. 498.

Equitable Defenses.

See the title **ACTIONS**, vol. 1, p. 142.

EQUITABLE ELECTION.

CROSS REFERENCES.

See the titles **DOWER**, vol. 4, p. 782; **WILLS**.

"**Election** is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both." 2 Sto. Eq. Jur., § 1075; *Bouvier's Law Dic.* (Ed. 1897), 646, quoted in *Allison v. Allison*, 99 Va. 472, 39 S. E. 130.

The doctrine of election rests upon the equitable principle that he who accepts a benefit under a deed or will must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right in-

consistent with it. *Penn v. Guggenheimer*, 76 Va. 839.

Any person who is entitled to any benefit under a will or other instrument, must, if he claims that benefit, abandon every right or interest, the assertion of which would defeat, even partially every provision of the instrument. *Rutherford v. Mayo*, 76 Va. 117.

In no case is a person to be put to an election unless it is clear that the provisions of the instrument under which he is entitled to any benefit, would be in some degree defeated by the assertion of his other rights. *Rutherford v. Mayo*, 76 Va. 117.

Equitable Estoppel.

See the title ESTOPPEL.

Equitable Liens.

See generally, the title LIENS.

Equitable Mortgages.

See the title MORTGAGES AND DEEDS OF TRUST.

EQUITABLE RELEASE.—In *Stribling v. Splint Coal Co.*, 31 W. Va. 82, 5 S. E. 326, it is said: "The words, 'is to be released' while they do not operate as a legal release, do clearly show an intention to release the lien, and therefore amount to an **equitable release**, which is valid and effective in a court of equity." See generally, the title RELEASE.

Equitable Separate Estate.

See the title SEPARATE ESTATE OF MARRIED WOMEN.

Equitable Set-Off.

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I. Preservation of Distinction between Law and Equity Courts.

In no state is the distinction between the law and the equity courts and the principles governing each more rigidly adhered to than in Virginia. *Suttle v. Richmond*, etc., R. Co., 76 Va. 284. See the title JURISDICTION.

II. Pleading and Practice.

A. GENERAL RULE.

Necessity for Pleadings—No relief can be granted in equity without proper pleadings. *Martin v. Kester*, 46 W. Va. 438, 33 S. E. 238.

Matters not charged in the bill or averred in the answer, and not in issue in the cause, are not proper to be con-

sidered on the hearing. *Hunter v. Hunter*, 10 W. Va. 321; *Burley v. Weller*, 14 W. Va. 284; *Smith v. Lowther*, 35 W. Va. 300, 13 S. E. 999.

A decree must have for its basis a proper pleading giving adequate facts to support it. *Turner v. Stewart*, 51 W. Va. 493, 41 S. E. 924; *Handlan v. Handlan*, 37 W. Va. 486, 16 S. E. 597.

While a court of equity having jurisdiction for one purpose may go on and give full relief as to all matters comprehended under the allegations of fact in the pleadings, yet it is limited in its relief to the allegations of the bill or other pleadings, and can not decree beyond their scope. *Waldron v. Harvey*, 54 W. Va. 608, 46 S. E. 603; *Donahoe v. Fackler*, 8 W. Va. 249. See the titles JUDGMENTS AND DECREES; PLEADING.

Admissions in Pleadings.—See the titles ANSWERS, vol. 1, p. 414; PLEADING.

Allegations and Proof Must Agree.—In a court of equity, as well as in a court of law, the allegations and proof must agree. A recovery will not be allowed upon a case, although proved, which differs essentially from that alleged in the bill. See the title VARIANCE.

Construction of Pleadings.—In chancery pleadings it is the disposition and practice of courts of equity to regard substance rather than mere form or name, and to so mold and treat the pleadings as to attain the real justice of the case. *Sturm v. Fleming*, 22 W. Va. 404. In this case it was held, that a complaint styled by the pleader a petition, which has all the elements of a bill in the nature of a bill of review, will be treated as such if it has the necessary parties, with sufficient averments and prayer for relief. See also, *Coombs v. Shisler*, 47 W. Va. 373, 377, 34 S. E. 763. See the titles BILL OF REVIEW, vol. 1, p. 384; INTERPRETATION AND CONSTRUCTION.

Judge Snyder in his opinion in *Sturm v. Fleming*, 22 W. Va. 404, says:

"I do not deem it necessary to enter upon any extended review of the authorities to prove that the form of chancery pleadings has in England, and perhaps to a greater degree in this country, ceased to be of any practical importance. Such pleadings in both countries have been greatly simplified. An informal claim or complaint is substituted in many cases for a bill; and the bill, when used, is only a concise narrative or statement of the material part of the complainant's case, with a prayer for the appropriate relief, or for general relief, which will be sufficient in most cases. A rigid and technical construction of bills and other pleadings is exploded. *Mayo v. Murchie*, 3 Munf. 384. * * * The name and the form are immaterial; substance is all that is required. In Virginia, the practice of courts of equity, which is the rule of practice in this state, allows the greatest liberty with respect to pleadings." Quoted in *Skaggs v. Mann*, 46 W. Va. 209, 33 S. E. 110.

B. BILL.

1. Requisites and Sufficiency.

a. Allegation of Facts Entitling Plaintiff to Relief.

(1) Necessity.

General Rule.—It is an elementary principle of equity that every fact essential to the plaintiff's title to maintain the bill and obtain the relief must be stated in the bill. *Parker v. Carter*, 4 Munf. 273; *Eib v. Martin*, 5 Leigh 132; *Universal L. Ins. Co. v. Devore*, 83 Va. 267, 2 S. E. 433; *Brown v. Wylie*, 2 W. Va. 502; *McGugin v. Ohio River R. Co.*, 33 W. Va. 63, 10 S. E. 36; *Hyre v. Lambert*, 37 W. Va. 26, 16 S. E. 446. See also, *Fowler v. Saunders*, 4 Call 361.

Every averment necessary to entitle a plaintiff to be entertained in a court of equity must be contained in the bill. *Vanbibber v. Beirne*, 6 W. Va. 168.

It is undeniably a fundamental rule that every bill in equity must clearly show on its face that the plaintiff is

entitled to the relief demanded, or such an interest in the subject matter as clothes him with a right to institute and maintain a suit concerning it. *Carter v. Carter*, 82 Va. 624; *Saunders v. Baltimore, etc., Ass'n*, 99 Va. 140, 37 S. E. 775.

"Every fact necessary to make out the case must be certainly and positively alleged, for the court pronounces its decree as based upon the allegations as well as on the evidence." *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611; *Barton Ch. Prac.* 264; *Story Eq. Pl.*, §§ 256, 257; *Cleaver v. Matthews*, 83 Va. 801, 3 S. E. 439; *Universal L. Ins. Co. v. Devore*, 83 Va. 267, 2 S. E. 433; *Nash v. Nash*, 28 Gratt. 686." *Hood v. Morgan*, 47 W. Va. 817, 35 S. E. 911.

A plaintiff can no more obtain relief without the proper averments in his bill than he can without proof of such averments when made. The one is as essential as the other, and both must concur, or relief can not be granted. *Pusey v. Gardner*, 21 W. Va. 469; *Currey v. Lawler*, 29 W. Va. 111, 11 S. E. 897; *Bierne v. Ray*, 37 W. Va. 571, 16 S. E. 804.

It is incumbent on the plaintiff to show, by his allegations and proofs, his right to a decree before he can require the defendant to sustain the affirmative allegations of his answer. *Bryant v. Groves*, 42 W. Va. 10, 24 S. E. 605.

Where a bill in equity fails to show in the party suing an interest in the subject matter and a proper title to institute a suit concerning it, the bill is demurrable. *Carter v. Carter*, 82 Va. 624.

"The plaintiff can not maintain his suit, unless he both avers, and establishes by proof where the averment is denied, that he has an interest in the subject matter of the suit, or right to the thing demanded, and a proper title to institute the suit. These are essential to sustain his right to any re-

lief. *Story Eq. Pl.*, § 728; *Mitf. Eq. Pl. (by Jeremy)* 231, 232. If such want of title appears upon the face of the bill, it should be taken advantage of by demurrer. If, however, the bill shows a title apparently good, the defendant may by plea or answer show either that nothing was ever vested in him or that the title which he had has been transferred to another. *Story Eq. Pl.*, §§ 260, 261, 728." *Barr v. Clayton*, 29 W. Va. 256, 11 S. E. 899, 900. See the titles *ANSWERS*, vol. 1, p. 389; *DEMURRERS*, vol. 4, p. 456.

Showing as to Want of Adequate Remedy at Law.—See the title *ADEQUATE REMEDY AT LAW*, vol. 1, p. 173.

Defects Not Supplied by Subsequent Interrogatories.—A defect in the charging part of a bill can not be supplied by a subsequent interrogatory. *Parker v. Carter*, 4 Munf. 273.

Aided by Other Pleadings.—If matter appear in the answer of a defendant in equity, which is nowise alleged in the bill, it can not justify a decree for plaintiff against defendant, though it might have been ground for such decree, if it had been alleged in the bill. *Eib v. Martin*, 5 Leigh 132.

Where there is an answer supported by evidence, though on its face the bill may not show a case proper for equity jurisdiction, and though the defendant has failed to demur, nevertheless the court must, at the hearing, consider not only whether the bill alone makes such a case, but also whether the bill, aided by the answer and the proofs taken together, makes a case proper for interposition of the jurisdictional powers peculiar to a court of equity. *Graveley v. Graveley*, 84 Va. 151, 4 S. E. 218. See also, the title *ANSWERS*, vol. 1, p. 391.

(3) Definiteness and Certainty.

General Rule.—The bill must state the claim of plaintiff with accuracy and clearness; also the injury or griev-

ance and the relief. *Universal L. Ins. Co. v. Devore*, 83 Va. 267, 2 S. E. 433.

"The rules governing the general frame of bills in equity and other pleadings are based on general convenience, and are, in the main, the rules of all modern Codes of Civil Procedure. The bill should state the plaintiff's case with reasonable certainty—that is, the right he claims, the injury complained of, and the relief he seeks—with such accuracy and clearness, and with such detail of the essential circumstances of time, place, manner, etc., as will inform the defendant of the nature of the case he is called upon to meet, stating, not conclusions of law, but the facts out of which arise his right to some specific relief. The case intended to be made must be certain, and the allegation of the necessary material facts to make it must also be certain. See *Story, Eq. Pl. (10th Ed.)*, §§ 239, 242. Every fact necessary to make out the case must be certainly and positively alleged, for the court pronounces its decree as based upon the allegations, as well as on the evidence; but it is generally enough to state the main fact, and the circumstances which go to establish it need not be minutely charged." *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611, quoted in *State v. McEldowney*, 54 W. Va. 695, 47 S. E. 650.

A bill which lacks definiteness and certainty is demurrable. *Cleaver v. Matthews*, 83 Va. 801, 3 S. E. 439. See the title DEMURRERS, vol. 4, p. 456.

Degree of Certainty Requisite.—

Reasonable certainty in the statement of the plaintiff's case is sufficient. *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611; *Anderson v. Jarrett*, 43 W. Va. 246, 27 S. E. 348.

"Great strictness is not generally required in equity pleading, certainly not in the structure of bills and answers, but it is an elementary rule of the most extensive influence that the bill should

state the right, title, or claim of the plaintiff with accuracy and clearness; that it should in like manner state the injury or grievance of which he complains, and the relief which he asks of the court. There must be such certainty in the averment of the title upon which the bill is founded, that the defendant may be distinctly informed of the nature of the case which he is called upon to meet. *Story's Eq. Pl.*, § 241." *Universal L. Ins. Co. v. Devore*, 83 Va. 267, 2 S. E. 433.

A bill in equity, notwithstanding it contains many vague and irrelevant allegations, will not be held bad on demurrer, if taken as a whole it states facts which entitle the plaintiff to relief. *Moore v. Harper*, 27 W. Va. 362, quoted in *Eakins v. Hawkins*, 48 W. Va. 364, 37 S. E. 622. See also, *Frank v. Brenneman*, 8 W. Va. 462.

All that is now required is that the material allegations should be put in issue by the pleadings so that the parties may be duly apprised of the essential inquiry and be enabled to meet it by testimony. The name and the form are immaterial. Substance is all that is required. *Sturm v. Fleming*, 22 W. Va. 404.

Facts and Not Conclusions of Law to Be Stated.—

The bill must state not conclusions of law but facts from which the court can draw the proper legal conclusions. *Norris v. Leman*, 28 W. Va. 336; *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611; *State v. McEldowney*, 54 W. Va. 695, 47 S. E. 650.

In a pleading a statement of what is only a conclusion of law, without facts given, or what is only the opinion of the party on facts not given, is bad. *Iron Co. v. Quesenberry*, 50 W. Va. 451, 40 S. E. 487. See the titles LEGAL CONCLUSIONS; PLEADING.

Statement on Information and Relief.

—In a bill in equity the plaintiff should distinctly allege the facts constituting his claim to relief, and, where they are

stated to be on information, he should allege that he believes them to be true. *Hyre v. Lambert*, 37 W. Va. 26, 16 S. E. 446.

In *Iron Co. v. Quesenberry*, 50 W. Va. 451, 40 S. E. 487, the bill was held objectionable, in that material averments were stated upon information and belief, whereas they should be positive.

Sufficiency of Bill Read in Connection with Exhibits.—If a bill, when read in connection with exhibits filed and made a part thereof, states the case with such a degree of certainty and consistency as will enable the defendant to make defense and the court to decree upon the case made, it is sufficient. *Hutchinson v. Maxwell*, 100 Va. 169, 40 S. E. 655. See the title EXHIBITS.

(3) Multifariousness.

See generally, the title MULTIFARIOUSNESS.

b. Allegations as to Parties.

Necessity.—A bill in chancery should by proper allegations show on its face, that the proper parties are made to the suit. *Norris v. Lemen*, 28 W. Va. 336; *McKay v. McKay*, 28 W. Va. 514.

A bill in which the name of the plaintiff is not stated as required by the chancery practice before the Code of West Virginia took effect, or as authorized by the Code, on general demurrer is defective. *Houston v. McCluney*, 8 W. Va. 135.

The bill should show on its face who are proper defendants thereto; and that each defendant named is properly made a defendant. *Norris v. Lemen*, 28 W. Va. 336.

One of the essential qualifications necessary to a bill in chancery is that it should, either in the caption or in the body of the bill, name some person or persons as parties defendant, and describe them as having some interest in the subject matter of the suit, and pray for some relief against them; and these requisites are as essential to a bill of

review as to an original bill, and without them a paper purporting to be a bill of review should be dismissed on demurrer, or stricken from the files on motion. *Kanawha Val. Bank v. Wilson*, 35 W. Va. 36, 13 S. E. 58.

A bill which makes a person a party in the caption thereof but contains no allegation showing such person's interest or claim to interest in the subject matter in controversy, is demurrable. *Preston v. West*, 55 W. Va. 391, 47 S. E. 152.

If a person is not named in the bill, and no allegation with reference to him appears therein, the naming of him in the summons does not make him a party to the suit, although he may have been served with process. *Chapman v. Pittsburg, etc., R. Co.*, 18 W. Va. 184.

"No matter that the process names certain parties as defendants. The bill must have parties, for it is the basis on which the structure of the suit rests, and on which the matters of the suit become res adjudicata. A person may be named in and served with process, yet is not a party unless named in the bill; and not only named in it, but there must be allegations relating to him showing why he is a party, what matters touch and concern him, involved and to be decreed upon in the suit. *Chapman v. Railroad Co.*, 18 W. Va. 184; *Moseley v. Cocke*, 7 Leigh 224; *McCoy v. Allen*, 16 W. Va. 724; *McNutt v. Trogden*, 29 W. Va. 471, 2 S. E. 328; *Shaffer v. Fetty*, 30 W. Va. 248, 4 S. E. 278; *Bland v. Stewart*, 35 W. Va. 513, 14 S. E. 215. And though a man be named in the bill simply in narration of its facts, and it contain certain matter touching him, and he is made a party in the process, yet, if he be not made a party to the bill, it would be bad, and the decree null. In other words, he must be a party to the process, a party to the bill, and the bill must allege matter touching him so far as it seeks to affect him. The observance of these fundamental rules is

all important in practice, as departure from them renders the decree not only erroneous, but generally void, as inspection of cases above cited will show." *Cook v. Dorsey*, 38 W. Va. 196, 18 S. E. 468.

Such a defect in the bill for want of parties to it, can be taken advantage of, without demurrer, on the hearing, or on appeal unless expressly waived in the lower court. *Cook v. Dorsey*, 38 W. Va. 196, 18 S. E. 468.

Sufficiency.—A bill in equity may in frame, as to parties, follow the chancery practice used before the enactment of § 37, ch. 125, W. Va. Code, or the form prescribed by that section, but it must do one or the other. *Cook v. Dorsey*, 38 W. Va. 196, 18 S. E. 468.

"If the Code frame of bill be adopted, plaintiffs and defendants should be named in the caption, which makes them such without prayer for process, or prayer that they be treated as such. In some clear and sufficient way a bill must have parties plaintiff and defendant. A decree can go only on matters properly stated by allegation in the bill, and for or against parties made parties as to such matters by the bill; otherwise, it is no bill. In *Houston v. McCluney*, 8 W. Va. 135, it was held, that when the name of the plaintiff is not stated in the bill, as required by chancery practice before the Code, or as authorized by the Code, it is bad on demurrer. So it must be as to a defendant. The case of *Kanawha Val. Bank v. Wilson*, 35 W. Va. 36, 13 S. E. 58, is very pointed authority to sustain our holding in this case." *Cook v. Dorsey*, 38 W. Va. 196, 18 S. E. 468.

"By equity practice (outside this statute) the bill contained formal parts, one being for the name of the complainant, and it is essential that the complainant be here named. *Bart. Ch. Pr. 258*; *Sand. Eq. 18*; *Daniell, Ch. Pr. 357*; *Story, Eq. Pl., § 26*. It also contained a part for the prayer that process issue against the defendant to answer. Here, strictly speaking, the de-

fendant must be named, as it was a rule, commonly received as a test, that no one could be considered a defendant against whom, as one here named, process was not prayed. *Story, Eq. Pl., § 44*. 'They only are parties defendant against whom process is prayed, or who are specifically named and described as defendants.' 1 *Daniell, Ch. Pr. 287*, and note 4. But as, under the Virginia practice, process issued, not under the prayer, but before the bill was filed, and as § 5, ch. 170, W. Va. Code, 1849, required summons to issue to begin a suit, the presence of this part of a bill, and the naming a person as a defendant in it, was not a test of whether he was a defendant; yet certain it is that somewhere, or in some way, in the bill he must be made a defendant, distinctly and clearly, by language not simply mentioning him in narration of facts, but as a person to be acted upon by decree, so as to make it a finality for and against him as an estoppel. *Sand. Eq. 32*. A prayer, not that process issue, but that certain persons be treated as defendants, and required to answer the bill, would certainly make them defendants." *Cook v. Dorsey*, 38 W. Va. 196, 18 S. E. 468.

"The bill in Virginia practice contained a part specially designed for naming defendants, and required them to be there named, and the prayer for process was that the defendants above named answer. *Bart. Ch. Pr. 263*." *Cook v. Dorsey*, 38 W. Va. 196, 18 S. E. 468.

"The first requisite of every bill in chancery, whether original or by way of supplement or review, is that there shall be parties thereto made such by proper description and name. The form of such a bill as laid down in skeleton in our Code is as follows: 'The bill of complaint of A. B. (state the names of all the plaintiffs) against C. D. (state the names of all the defendants, if known, and, if not, designate them as the unknown parties or unknown heirs,

etc., as the case may be) filed in the circuit court of county. The plaintiff complains and says that (here state all the facts constituting a claim to relief). The said plaintiff therefore prays that (here state the particular relief desired). He also asks such other and general relief as the court may see fit to grant.' It will thus be perceived that the briefest and most modernized form of a bill requires parties defendant to be set out in the body of the bill as those having an interest in the subject matter, and against whom relief is prayed. A bill of review is no exception to this general rule." *Kanawha Valley Bank v. Wilson*, 35 W. Va. 36, 13 S. E. 58.

When a bill in chancery makes the individuals composing a firm defendants, the bill ought to set out the full names of the members of the firm, or allege that their names in full are unknown, and could not be ascertained by the plaintiff after diligent inquiry; and, if it fails to do so, the defendant should be excused by the court from answering or demurring to such bill until proper insertions be made in the bill of the names of the individuals constituting the firm, or it be made to appear to the court that their names can not be ascertained. But such defect is not a good ground for a general demurrer. *Rogers v. Verlander*, 30 W. Va. 619, 5 S. E. 847.

In the prayer of a bill, parties are described as "Whitley & McConkey," and in the charging part the same parties are prayed to be made defendants, except that these parties are described as "McConkey & Co." In the first part of the decree, they are styled "McConkey & Co.," and in the latter part they are called "Whitley & McConkey." It being apparent that they are the same parties, there is no error in overruling a demurrer for that cause. *Highland v. Highland*, 5 W. Va. 63.

c. Prayer for Relief.

(1) Necessity.

In General.—No relief can be granted

in equity without proper pleading and prayer for the same. *Martin v. Keister*, 46 W. Va. 438, 33 S. E. 238.

A bill in chancery which makes out a case for specific execution of an award, but does not pray for general or special relief, is sufficient, if no objection be taken by the defendant, and he answers on the merits of the complaint, and submits himself to the decree of the court. *Quære*, would this objection be sustained on a demurrer to the bill? *Smith v. Smith*, 4 Rand. 95.

Necessity for Prayer for Both Specific and General Relief.—A bill in equity should contain a prayer for both specific and general relief, but under a prayer for general relief, only, there may be granted any relief warranted by the facts alleged; and under a prayer for specific and general relief, may be given the relief asked specifically, and any further relief warranted by the allegations, so it be not inconsistent with the specific relief asked. Where there is no prayer for general relief, but prayer for specific relief, and this can not be granted, other relief can not be given, though the facts would warrant it if there were a specific prayer for it, or a prayer for general relief. There must always be a special prayer for injunction. *Vance Shoe Co. v. Haught*, 41 W. Va. 275, 23 S. E. 553.

"Good chancery pleading gives a statement of the specific relief asked, commonly called the 'prayer for specific relief' and, besides, a prayer for general relief. *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611. All works on chancery pleading call for this prayer for special or specific relief, and the form in our Code contemplates it. Chapter 125, § 37. Still, where it is omitted, is it fatal? I think not. The old form of bill did not contain it, but stated facts, and inserted a prayer for general relief, and any relief warranted by law upon those facts could be granted. This seems logical. Such a bill is regarded good

yet, except as to injunctions. Story, Eq. Pl., § 41; Bart. Ch. Prac. 266; Sand. Eq. 58. The relief under the prayer for general relief can only be such as the facts stated warrant, but I think all relief they do warrant may be given under a general, without a specific prayer. Under it a distinct or different claim from that stated in the bill can not be given. It must be based on facts alleged. *Pickens v. Knisely*, 29 W. Va. 1, 11 S. E. 932; Bart. Ch. Prac. 265. And, if particular relief be asked, further relief, not specifically asked, may be given under the general prayer, provided, always, it be justified by the facts stated, and be not inconsistent with that which is asked; for it is not permitted to tell the defendant that a particular relief is asked, and surprise him with a relief inconsistent with that asked. Bart. Ch. Prac. 266. If the general prayer be omitted, and the specific relief sought is not given, other relief can not be. Bart. Ch. Prac. 266; Daniell, Ch. Prac. 378, note a; Story, Eq. Pl., § 42, note a. How important the prayer for general relief." *Vance Shoe Co. v. Haught*, 41 W. Va. 275, 23 S. E. 553.

Where a bill asks certain specific relief, and contains no prayer for general relief, no other than such specific relief can be granted. *Goff v. Price*, 42 W. Va. 384, 26 S. E. 287.

A trust creditor and the trustee, to whom the property had been turned over by the trust debtor to sell, file a bill of injunction to restrain a third party from wrongfully removing the trust property out of the state, but do not pray for general relief. Held, if the plaintiffs desire any relief proper to be given in the case as made, other than that specifically prayed for, the bill must contain a prayer for general relief, but such general prayer may be added by amendment or amended bill. *McCrum v. Lee*, 38 W. Va. 583, 18 S. E. 757. See the title AMENDMENTS, vol. 1, p. 325.

(2) Effect of Prayer for General Relief.

In General.—When the bill contains allegations to support a decree and a prayer for general relief, a decree may be predicated thereon, although not specifically prayed for. Bart. Ch. Pr. 281. *Brown v. Wylie*, 2 W. Va. 502; *Vance Shoe Co. v. Haught*, 41 W. Va. 275, 23 S. E. 553; *Goff v. Price*, 42 W. Va. 384, 26 S. E. 287; *Furbree v. Furbree*, 49 W. Va. 191, 202, 38 S. E. 511; *Stewart v. Tennant*, 52 W. Va. 559, 44 S. E. 223; *Waldron v. Harvey*, 54 W. Va. 608, 46 S. E. 603. And see *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. 26; *Raper v. Sanders*, 21 Gratt. 60.

"Under the general prayer, the plaintiff is entitled to any relief which the material facts and circumstances put in issue by the bill will sustain." *James v. Bird*, 8 Leigh 510; *Hurt v. Jones*, 75 Va. 341, 352.

"The correct rule, in reference to the effect of the prayer for general relief, I take to be, that whenever the object of the bill is to recover money for any debt, or on the breach of any contract, or on account of any other matter, and, it is shown that the complainant is entitled to any sum on account of the particular matters and transactions alleged in the bill, though it may be on other grounds, and for different reasons, and for a less amount than is alleged and claimed in the bill, the amount to which the claimant may be so entitled, may be decreed to him under the general prayer for relief, if there be such prayer in the bill. *Bank of Washington v. Arthur*, 3 Gratt. 173." *Hall v. Pierce*, 4 W. Va. 107.

A bill which is in form a foreign attachment, and the proceedings whereon were as in a foreign attachment suit, if it sets out a case for equitable relief, and contains a prayer for general relief, will be treated as a bill for equitable relief, and under the prayer for general relief, relief will be given ac-

cording to the equity stated in the bill, if sustained by the proofs. *Anderson v. De Soer*, 6 Gratt. 363.

Bill to set aside a will states the facts showing the probate is a nullity, but asks for an issue devisavit vel non, and for general relief. The court may disregard the prayer for an issue, and give the proper relief under the prayer for general relief. *Ballow v. Hudson*, 13 Gratt. 672.

Must Be Consistent with That Actually Prayed.—Though if the plaintiff in a bill of equity in his special prayer mistake the due relief, it may be given under the general prayer if consistent with that which is actually prayed, yet, if inconsistent therewith, it can not be obtained. No relief can be granted under the general prayer entirely distinct from and independent of the special relief prayed. *Brown v. Wylie*, 2 W. Va. 502; *Hurt v. Jones*, 75 Va. 341.

Under the prayer for general relief the plaintiff can not recover a claim distinct from that demanded or put in issue by his bill. *Sheppard v. Stark*, 3 Munf. 29; *James v. Bird*, 8 Leigh 510; *Hurt v. Jones*, 75 Va. 341; *Hamby v. Henritze*, 85 Va. 177, 7 S. E. 204; *Piercy v. Beckett*, 15 W. Va. 444; *Pickens v. Knisely*, 29 W. Va. 1, 11 S. E. 932.

A prayer for general relief, however broad, can justify no other relief than such as the case made calls for. *Bank v. Craig*, 6 Leigh 399.

"It is argued that the prayer for general relief makes the decree good over the defect just stated. This can not be so. Under a prayer for general relief you can get relief not specifically asked provided the facts alleged in the bill and the nature of the case warrant it, not otherwise. *Hogg's Eq. Proceed.*, § 105; *Vance Shoe Co. v. Haight*, 41 W. Va. 275, 23 S. E. 553." *Waldron v. Harvey*, 54 W. Va. 608, 46 S. E. 603.

"Judge Story, in speaking of that

part of the bill which contains the prayer for relief, says: 'The usual course is for the plaintiff in this part of his bill to make a special prayer for the particular relief to which he thinks himself entitled, and then to conclude with a prayer of general relief at the discretion of the court. The latter can never be properly and safely omitted; because if the plaintiff shall mistake the relief, to which he is entitled, in his special prayer, the court may yet afford him the relief to which he has a right under the prayer of general relief, provided it is such relief as is agreeable to the case by the bill.' *Story's Eq. Plead.*, § 40. Again, 'but, even when a prayer of general relief is sufficient, the special relief prayed at the bar must essentially depend upon the proper frame and structure of the bill; for the court will grant such relief only as the case stated will justify; and will not ordinarily be so indulgent as to permit a bill framed for one purpose to answer another, especially if the defendant may be surprised or prejudiced thereby.' And the illustration he gives is just the converse of the case in hand. 'Thus,' says he, 'if a bill is brought for an annuity, or rent charge of ten pounds per annum, left under a will, and the counsel for the plaintiff pray at the bar, that they may drop the demand of the annuity or rent charge, and insist upon the land itself, out of which the annuity or rent charge issues, the court will not grant it, for it is not agreeable to the case made by the bill.' *Id.*, § 42. And the relief which may be supplied under the general prayer must not only be consistent with the case made by the bill, but also with the relief specially prayed. 1 *Dan. Ch. Prac.* (4 Amer. Edv.), 378, 379, and notes. Under the general prayer the plaintiff is entitled to any relief which the material facts and circumstances put in issue by the bill will sustain; but it must be consistent with the case made, and if inconsistent with it, and with the specific relief

prayed, will always be refused. *Parker, J.*, in *James v. Bird*, 8 Leigh 510, 513.

"In *Hiern v. Mill*, 13 Ves. R. 114 (cited in 1 Dan. Ch. Prac. 380), Lord Eldon said: 'The rule is, that if the bill contains charges, putting facts in issue that are material, the plaintiff is entitled to the relief which those facts will sustain, under the general prayer; but he can not desert the specific relief prayed, and under the general prayer ask specific relief of another description, unless the facts and circumstances charged by the bill will, consistently with the rules of court, maintain that relief.' The test of the relief to be granted is not the case proved, but the case stated in the bill upon which the issue is made up." *Hurt v. Jones*, 75 Va. 341.

W. sought the aid of a court of equity to enforce a supposed lien of a trust deed on certain real estate sold to B., and to stay waste on the same, and prayed for "such other and further relief in the premises as comports with equity and good conscience and is applicable to the case." Held, that it was error for the court below to rescind a contract by deed, for the sale of the land between the parties, under the prayer of the special object of the bill, or the prayer for general relief. *Brown v. Wylie*, 2 W. Va. 502.

When a bill contains sufficient allegations for one character of relief sought, and insufficient for others, and the circuit court overrules a demurrer thereto, and grants relief to the full extent of the prayer of such bill, the appellate court will reverse the decrees entered, sustain the demurrer in part, and remand the cause, with leave to the plaintiff to amend. *Billingsley v. Menear*, 44 W. Va. 651, 30 S. E. 61.

(3) Prayer for Alternative Relief.

The bill may be framed with a double aspect, and ask relief in the alternative, but the states of fact upon which such relief is prayed must not be inconsistent. *Zell Guano Co. v.*

Heatherly, 38 W. Va. 409, 18 S. E. 611; *United States Blowpipe Co. v. Spencer*, 40 W. Va. 698, 21 S. E. 789.

The alternative case stated must be the foundation for precisely the same relief. *Brown v. Bedford City, etc., Co.*, 91 Va. 31, 20 S. E. 968.

"A bill must not state two inconsistent states of facts, and ask relief in the alternative. But it may state the facts, and ask relief in the alternative, according to the conclusion of law the court may draw from them; so that, if one kind of relief sought be denied, another may be granted. And it may state facts of a different nature, not inconsistent with each other, and equally supporting the prayer for relief. In both these cases the bill is said to have a double aspect.' 1 *Fost. Fed. Pr.* (2d Ed.), § 70; *Story, Eq. Pl.*, § 246." *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611.

A bill in chancery is not multifarious, and therefore demurrable, simply because it contains a prayer for alternate relief, inconsistent with its prayer for specific relief. *Korne v. Korne*, 30 W. Va. 1, 3 S. E. 17.

"Because the bill prays for relief in the alternative, the counsel for the appellee claim that it was thereby rendered multifarious, and the demurrer should have been sustained. A bill can not be made multifarious by its prayers. If the specific or alternate relief asked is inconsistent with the averments of the bill, the same will be disregarded, and relief given under the prayer for general relief, if there is such prayer, and the facts averred entitle the plaintiff to any relief. *Story, Eq. Pl.*, §§ 40, 42b. Whether a bill is multifarious or not must be determined by the frame and structure of the bill; that is, from its allegations, and not from its prayer." *Korne v. Korne*, 30 W. Va. 1, 3 S. E. 17. See the title MULTIFARIOUSNESS.

If the plaintiff in a bill of equity in his special prayer mistake the due

relief, it may be given under the general prayer, if consistent with that which is actually prayed. If inconsistent it can not be obtained; and therefore, if a plaintiff doubt as to the proper relief, he may frame his prayer in the alternative, to have either one relief or the other as the court may decide. No relief can be granted under the general prayer entirely distinct from and independent of the special relief prayed. *Brown v. Wylie*, 2 W. Va. 502.

If bill states case in alternative according to what construction is given an agreement set up therein, and case made according to the adopted construction, with prayer for general relief, entitles plaintiff to some relief, though not to all asked for, the bill will be retained and such relief be given as plaintiff appears to be entitled to. *Poindexter v. Burwell*, 82 Va. 507.

d. Signatures.

Necessity.—A paper writing, purporting to be a bill in chancery, original or amended, not signed by any one, is demurrable, and should be stricken from the record, unless properly amended by leave of the court. *Story Eq. Pl.*, § 47. *Dever v. Willis*, 42 W. Va. 365, 26 S. E. 176.

Until a bill is so signed, whether original or amended, it can not be regarded as complete, and therefore a proper part of the record. *Dever v. Willis*, 42 W. Va. 365, 26 S. E. 176.

Waiver of Objection.—An objection to a bill in chancery, made for the first time in the appellate court, for the reason that it is not signed by counsel, will not be entertained. *Jones v. Shufflin*, 45 W. Va. 729, 31 S. E. 975.

e. Seal.

A bill in equity in the name of an incorporated city, signed by counsel, need not have the city seal annexed. *Moundsville v. Ohio River R. Co.*, 37 W. Va. 92, 16 S. E. 514.

"The first point presented in argu-

ment as error is that the bill is not attested by the seal of the city. If we treat a municipal corporation as a private aggregate corporation, still we hold that a bill of an aggregate corporation need not have the seal annexed. The books of equity pleading, so far as I see, only require bills by such corporations to be drawn in the name of the corporation and signed by counsel, and I see no requirement of a seal. In *Coal & Iron Co. v. Detmold*, 1 Md. Ch. 371, it is pointedly decided that such a bill need not have the corporate seal, and that the fact that it is the bill of the corporation is sufficiently vouched for by the signature of counsel. 1 *Daniell*, Ch. Pr. 311, note 7. No case is cited to support the point except *Teter v. West Virginia*, etc., R. Co., 35 W. Va. 433, 14 S. E. 146. That case holds correctly that the answer of a corporation must be signed by its president, with its seal affixed; but it does not follow that a bill must be so attested. The reason an answer must have the seal is that under the common chancery practice answers must be sworn to, and, as corporations can not be sworn, the seal must verify the act—a reason not applying to bills." *Moundsville v. Ohio River R. Co.*, 37 W. Va. 92, 16 S. E. 514.

2. Objections to Bill.

General Rule as to Manner of Raising.—When any objection to a bill is apparent on its face, it may be demurred to, but when not apparent on the bill itself the proper mode of defense is by plea or answer. *Harris v. Thomas*, 1 Hen. & M. 18. See the titles ANSWERS, vol. 1, p. 389; DEMURRERS, vol. 4, p. 456; PLEADING.

Dismissal.—It is a settled rule of the court, that if it appear from the face of the bill that the matter thereof is not proper for a court of equity, it should be dismissed, even after answer filed, and though there be no plea to the jurisdiction. *Ambler v. War-*

wick, 1 Leigh 195; Pollard *v.* Patterson, 3 Hen. & M. 67. See the title DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 4, p. 683.

3. Amendments and Supplemental Bills.

See the titles AMENDMENTS, pp. 316, 338; SUPPLEMENTAL PLEADINGS.

C. ANSWER.

See the title ANSWERS, vol. 1, p. 389.

D. REPLICATION.

See the title REPLICATION.

E. DECREE.

See the title JUDGMENTS AND DECREES.

Equity of Redemption.

See the titles CHATTEL MORTGAGES, vol. 3, p. 812; DOWER, vol. 4, p. 798; MORTGAGES AND DEEDS OF TRUST; PLEDGE AND COLLATERAL SECURITY.

Erasure.

See the titles ALTERATION OF INSTRUMENTS, vol. 1, p. 307; WILLS.

ERECT.—In Carroll *v.* Lynchburg, 84 Va. 804, 6 S. E. 133, it is said: "There is no difference in the meaning of the word erect when applied to a whole building, and when applied to a part of a building. In both cases it means 'to build.'"

Erroneous Assessment.

See the title TAXATION.

Error.

See generally, the title APPEAL AND ERROR, vol. 1, p. 581.

Error, Writ of.

See the title APPEAL AND ERROR, vol. 1, p. 432.

ESCAPE.

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I. Definitions.

In General.—An escape is the deliverance of a person who is lawfully imprisoned, out of prison, before such a person is entitled to such deliverance by law. It is the departure of a prisoner from custody before he is discharged by due process of law. 1 Bouv. L. Dict. 687.

Escape of Debtor in Execution.—By the common law there were but two kinds of escapes of a debtor in execution, voluntary or negligent. *Stone v. Wilson*, 10 Gratt. 529.

Voluntary escapes are such as are by the express consent of the sheriff or jailor. *Stone v. Wilson*, 10 Gratt. 529.

Negligent escapes are such as where the prisoner escapes without the consent of knowledge of the sheriff or jailor. *Stone v. Wilson*, 10 Gratt. 529.

II. Proceedings against Prisoner.

A. BY ESCAPE WARRANT.

1. By Whom Issued.

It is established by Va. statute that a justice of the peace may issue an escape warrant to retake and secure persons who escape out of prison. 1 Rev. Va. Code, ch. 136, § 1; *Jones v. Timberlake*, 6 Rand. 678; *McClintic v. Lockridge*, 11 Leigh 253; *Fawkes v. Davison*, 8 Leigh 554; *Carthrae v. Clarke*, 5 Leigh 268; *Windrum v. Parker*, 2 Leigh 361.

2. Requisites of Warrant.

Warrant Must Show Escape from Prison.—The statute, 1 Rev. Va. Code, ch. 136, § 1, which, "for the more ef-

fectual retaking and securing persons who escape out of prison," enacts that "if any person committed, rendered or charged in custody, in execution or upon mesne process, to any county or corporation prison or to the jail of any district, shall thence escape, a justice may issue an escape warrant," does not authorize such warrant in the case of a person who escapes out of the custody of a sheriff, before being committed to prison; and if a person be taken and detained in custody under an escape warrant which shows on its face that the escape was not from any prison, but merely from the custody of the sheriff, he may be discharged by writ of habeas corpus. *McClintic v. Lockridge*, 11 Leigh 253; *Jones v. Timberlake*, 6 Rand. 678.

Although an escape warrant ought regularly to show on its face that the person who issues it is a justice of the peace, yet, on a habeas corpus sued out by the person arrested under it, if it is proved that he is a justice, the prisoner ought not to be discharged. *Jones v. Timberlake*, 6 Rand. 678; *McClintic v. Lockridge*, 11 Leigh 253.

B. BY INDICTMENT.

Proceedings against convicts under the 54th section of the penitentiary act must be by indictment. *Com. v. Ryan*, 2 Va. Cas. 467.

III. Punishments and Penalties.

A. FELONY.

By the common law the offense of prison breaking was deemed in all cases a felony; but by the common law, as

modified by the act passed in 1794, if a person is actually committed to jail for any treason or felony for which if convicted he might be sentenced to loss of life or limb and breaks his prison he is a felon, but if he is confined for an inferior offense he is punishable for misdemeanor. *Com. v. Ryan*, 2 Va. Cas. 467.

B. WHERE PARTY ESCAPES BEFORE HIS TERM IS UP.

Where a party has been indicted and the verdict of the jury finds him guilty and orders that he be imprisoned for a certain time and before that time has expired the party escapes from jail and is afterwards retaken, he is to be kept in prison beyond the prescribed period for the length of time he was out when he escaped; and this though he has already been indicted for the escape. *Cleek v. Com.*, 21 Gratt. 777.

C. PUNISHMENT OF CONVICTS BY SPECIAL ACT.

The 54th section of the penitentiary act prescribes a punishment for convicts escaping from that prison; the punishment consists in such additional confinement and hard labor, agreeably to the directions of the act, and such additional corporal punishment not extending to life or limb, as the court before who such person shall be convicted of said escapes shall, in the exercise of a sound discretion, adjudge and direct. *Com. v. Ryan*, 2 Va. Cas. 467.

D. ESCAPE WHILE APPEAL PENDING.

Where a prisoner convicted of felony obtains a writ of error and then escapes from jail and is still at large, the appellate court will order that the writ of error be dismissed by a certain day unless it shall be made to appear to the court before that day, that the plaintiff in error is in custody of the proper officer of the law. *State v. Conners*, 20 W. Va. 1; *State v. Sites*, 20 W. Va. 13; *Sherman v. Com.*, 14 Gratt.

677; *Leftwich v. Com.*, 20 Gratt. 716. And see *Franklin v. Peers*, 95 Va. 602, 29 S. E. 321, approving *Sherman v. Com.* and *Leftwich v. Com.*, 20 Gratt. 716.

No Necessity for Notice.—The appellate court may make such order of dismissal upon motion based on affidavits without previous notice of the grounds of such motion to the plaintiff in error or to his counsel. *State v. Sites*, 20 W. Va. 13.

Part of Order Dismissed.—And on such escape under the circumstances mentioned above, the appellate court will discharge so much of the order awarding the writ of error as directed it to operate as a supersedeas to the judgment. *Sherman v. Com.*, 14 Gratt. 677.

Notice of Escape Brought to Court Too Late.—But see *Leftwich v. Com.*, 20 Gratt. 716, which though approving the general rule says that after it has heard and reversed a case without having been informed of the escape of the prisoner, the court will not set the reversal aside.

IV. Responsibility of Officers for Escape.

A. CRIMINAL LIABILITY.

The sheriff in Virginia is ex officio jailor of his county, but may devolve the duties of jailor on a deputy, and will not be criminally liable for a negligent escape permitted by him. If, however, a prisoner is permitted to go at large with the knowledge and approval of the sheriff, and by his discretion and authority, and while so at large the prisoner escapes, the sheriff is himself criminally liable for the escape. *Watts v. Com.*, 99 Va. 872, 39 S. E. 706; *Com. v. Lewis*, 4 Leigh 664.

Sufficiency of Indictment.—An indictment against a jailor, for permitting a prisoner in his custody to have an instrument in his room with which he might break jail and escape, and for failing carefully to examine at short

intervals the condition of the jail, and what the prisoner was engaged at in said jail, in consequence of which the prisoner escaped, does not state an indictable offense, although if this were an indictment against the defendant as jailor, for negligently permitting a prisoner committed to his custody to escape, there could be no doubt but it would be good; as it is well settled that such an indictment can be sustained. *Com. v. Connell*, 3 Gratt. 587.

B. CIVIL LIABILITY.

1. Actions by Creditors.

Right of Election.—When there has been either a tortious escape or a voluntary discharge of a debtor by the sheriff, the creditor has the right of election either to procure an escape warrant from a justice of the peace for the purpose of retaking the fugitive, or to bring an action of debt against the sheriff for the escape. *Fawkes v. Davison*, 8 Leigh 554; *Carthrae v. Clarke*, 5 Leigh 268; *Windrum v. Parker*, 2 Leigh 361.

At Common Law.—And see *Stuart v. Hamilton*, 8 Leigh 503, which says that upon the escape of a debtor, the creditor had at common law, and independent of the statute of Will. 3, a right to proceed against the sheriff, or to retake the defendant or to bring an action of debt or scire facias upon the judgment, and thereupon have any execution whatever.

Effect of Debtor's Voluntary Return.—When the debtor voluntarily returns without any escape warrants being sued out, there is no necessity for the creditor to make his election, as, by the voluntary return, the debtor is considered as held under original process, and the creditor can still hold him or bring an action of escape against the sheriff. There is no reason for presuming that the creditor elected to pursue his remedy against the sheriff and not to hold his right to keep the debtor in prison because he did not

take any action to imprison the debtor, as the debtor already having voluntarily returned to prison there is no other step which the creditor could take. *Carthrae v. Clarke*, 5 Leigh 268.

Elegit after Debtor's Escape.—If a debtor charged in execution escape, the creditor may sue out a scire facias to have a new execution; and after judgment on such scire facias, an elegit may issue to have delivered to the creditor a moiety of all the lands whereof the debtor was seized at the date of the original judgment or at any time afterwards. *Stuart v. Hamilton*, 8 Leigh 503.

Motion against Sheriff.—Under the act, 1 Rev. Va. Code, 1819, ch. 134, § 48, p. 542, a motion may be maintained against a sheriff for an escape. 1st. Where the return on the execution states that the officer has taken the body of the debtor and has it ready to satisfy the execution, and the plaintiff can show the escape aliunde. 2d. When the return shows such a state of facts as would entitle the plaintiff to a verdict in an action of debt for an escape. *Stone v. Wilson*, 10 Gratt. 529.

Necessity for Separate Suit against Sheriff.—A judgment can not be entered against the defendant and sheriff, upon his return that the writ was executed, and the defendant escaped; the proper remedy against the sheriff for an escape, being by a separate suit. *Waugh v. Carter*, 2 Munf. 333.

2. Defenses to Actions.

a. Held Sufficient.

Prisoner Released under Insolvent Debtor Act.—A sheriff, who has released a debtor, taken in custody upon a ca. sa., by authority of a warrant of discharge from a magistrate under the act for the relief of insolvent debtors, is not liable to the judgment creditor in an action of debt for an escape, although it is shown that the notice by the debtor to the creditor, of his intention to apply for the benefit of the

act, was insufficient. *Price v. Holland*, 1 Pat. & H. 289.

Prison-Bonds Bond Taken.—Where a sheriff has taken a prison-bonds bond from a debtor he has no authority to authorize or prevent an escape and therefore he can not be held liable for the debtor's escape. *Meredith v. Duval*, 1 Munf. 76, 80; *Vanmeter v. Giles*, 1 Rob. 328; *Lyle v. Stephenson*, 6 Call 54; *McGuire v. Pierce*, 9 Gratt. 167.

b. Held Insufficient.

No Jail or an Insufficient One.—Neither the fact that there was no jail provided nor that the one provided was insufficient is a good excuse for the sheriff's allowing the prisoner to escape. *Stone v. Wilson*, 10 Gratt. 529; *Parsons v. Lee*, Jeff. 49.

Without Consent or Negligence.—A return by the sheriff that a debtor taken in execution had escaped without his consent or negligence without adding that he had made immediate pursuit of the prisoner or that the prisoner could not be retaken is not sufficient to protect the sheriff; to add the latter is as much a matter of defense which the sheriff is bound to show as that the escape was made without any negligence on his part. *Stone v. Wilson*, 10 Gratt. 529.

Recapture after Suit Brought.—Recapture is not a good defense to an action of escape brought against the sheriff, if the recapture was made after the action was brought even though before issue was joined. *Parsons v. Lee*, Jeff. 49.

Insolvency of Prisoner.—It is no defense to an action of escape brought against the sheriff, that he, knowing of the insolvency of the prisoner, asked the plaintiff, who had a judgment against him, security for the prison fees and that they were refused, it was still his duty to hold him twenty days and for releasing him before that time he was liable in the action brought against him. *Webb v. Elligood*, Jeff. 59.

3. Evidence.

Burden of Proof.—Where an action of escape is brought against the sheriff, the burden of proof is on the plaintiff to prove the escape; on the defendant to prove that there was no consent or negligence on his part and that due means were used to retake the prisoner. *Stone v. Wilson*, 10 Gratt. 529; *Johnson v. Macon*, 1 Wash. 4; *Johnston v. Macon*, 4 Call 367.

Succeeding Sheriff Disqualified.—In an action brought against the sheriff for escape, the succeeding sheriff is not a proper witness to prove that the prisoner was not turned over to him, as it goes to exonerate himself. *Johnston v. Macon*, 4 Call 367.

Presumption Arising from Lapse of Time.—Where an escape warrant is sued out for a debtor, the presumption which arises from the length of time which has intervened since the day the warrant was issued, and before the prisoner was arrested thereunder, that the debt for which the prisoner was held has been discharged, is rebutted by the fact that there was no jail in the county where the warrant was issued in which the debtor could be placed. *Jones v. Timberlake*, 6 Rand. 678.

4. General Verdict Insufficient.

General Rule.—When an action of escape is brought against the sheriff it is not sufficient for the jury to bring in a general verdict of guilty but they must expressly find that such debtor escaped with the consent or through the negligence of such sheriff or officer; or that such prisoner might have been retaken and that the sheriff or his officers neglected to make immediate pursuit. *Johnson v. Macon*, 1 Wash. 5; *Johnston v. Macon*, 4 Call 367; *Vanmeter v. Giles*, 1 Rob. 328; *Hooe v. Tebbs*, 1 Munf. 501.

An Exception.—But see *Burley v. Griffith*, 8 Leigh 442, which holds that this rule applies only to debtors con-

fined under execution. And that where an action on a case is brought by the owner of a slave committed to jail for safe-keeping under § 4 of the act passed February 25, 1829, against the sheriff for suffering the slave to escape, the verdict for the plaintiff need not have been expressly that the slave escaped with the consent or through the negligence of the defendant.

5. Measure of Damages.

Although in an action against a sheriff and his surety upon the official bond of the sheriff the recovery can only be of such damages as the relator may have sustained by reason of the breach of the condition of the bond, yet these damages are not necessarily equal to the amount of the debt. *Perkins v. Giles*, 9 Leigh 397.

ESCHEAT.

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CROSS REFERENCES.

See the titles ALIENS, vol. 1, p. 291; DESCENT AND DISTRIBUTION, vol. 4, p. 588; FOREIGN LAWS.

I. Property Subject to.

A. IN GENERAL.

Where the property of a British subject was sold during the Revolutionary War, by his attorneys in this country, without deed, before the act of October 1779, relative to escheats of British property, the sale was valid, notwithstanding the purchase money was not paid, and an escheat had been taken after the sale, but before the passing of the act. *King v. Hanson*, 4 Call 259.

A testator devised his real estate in Virginia to his executors to be sold by them, and gave the rents and profits of said lands, which might accrue before

the sale, to his alien sisters, subject to the payment of his just debts and of certain legacies to his executors. Held, that the title of the alien sisters was good against the commonwealth claiming the money for which the lands were sold; the testator having died without any lawful heirs, and his personal estate being sufficient to pay his debts. *Com. v. Martin*, 5 Munf. 117.

B. TRUST ESTATES.

Land was purchased by an alien, but the conveyance was made to a citizen, upon an express trust that he should hold the same for the benefit of the alien and his heirs. Held, that the in-

terest in such trust estate belongs to the commonwealth. *Hubbard v. Goodwin*, 3 Leigh 492.

Where an agent for a company of British merchants, in the year 1771, purchased, on their behalf, a tract of land in Virginia, for a sum payable on demand, and received possession thereof for their use, and a credit for the money was entered in their books, the equitable title to, and possession of such land was thereby completely vested in the company, and escheated to the commonwealth, under the act of escheats of 1779, subject, however, to the payment of so much only of the purchase money remaining unpaid as did not exceed the sum for which the land was sold by the escheator, the British company being still liable for the balance of said purchase money. *Day v. Murdoch*, 1 Mumf. 460.

Profits before Escheat.—Where land, which an alien had purchased and conveyed to a citizen to hold in trust for himself and his heirs, escheats to the commonwealth, equity will not give the commonwealth the profits thereof, which accrued before the decree executing the deed of trust for the benefit of the state. *Hubbard v. Goodwin*, 3 Leigh 492.

II. Escheat Proceedings.

A. PARTIES.

Where an alien possessed of real estate died intestate without any known heirs, a sale of such real estate, to satisfy a debt against the alien, in a suit to which the state was not made a party, can not affect the title of the state. *Sands v. Lynham*, 27 Gratt. 291, 21 Am. Rep. 348.

An *amicus curiæ* can not move to quash an inquisition of escheat, unless he has an interest himself, or represents somebody who has. *Dunlop v. Com.*, 2 Call 284.

In a *monstrans de droit* to an inquisition of escheat, prosecuted under 1 Rev. Va. Code, 1819, ch. 82, § 7, the

monstrant is plaintiff. *French v. Com.*, 5 Leigh 512, 27 Am. Dec. 613.

B. COMPOSITION OF JURY.

Upon an inquest of office respecting property escheated, prior to the act of 1794, the jury might have been composed of twelve jurors or of a greater or smaller number. See Va. Code, 1887, § 2376; *Bennet v. Com.*, 2 Wash. 154.

C. CONFISCATION PERFECTED BY OFFICE FOUND AND LAPSE OF TIME.

R. B., a British subject, who owned lands in this country at the date of independence, died in 1776, and devised all his estate to his son, R. B., who was then an infant, and resided with his father in Great Britain. Under the act of 1779, an inquisition was taken, which described the land as the property of R. B., the elder; but no traverse, or *monstrans de droit*, was ever filed. The confiscation was complete by the finding of the office, and the failure to except within the thirty days allowed by the act; and, therefore, a bill brought long after the peace, in order to inhibit a sale of the land by the public agent, was not sustainable, as the treaty had no operation, the confiscation having been already perfected by the office, and the lapse of time. *Com. v. Bristow*, 6 Call 60.

The infancy of the owner in such case, or his absence out of the state, made no difference. *Com. v. Bristow*, 6 Call 60.

D. WHEN TITLE VESTS IN STATE.

Inquisition of escheat for want of heirs vests possession in the commonwealth immediately, if the possession be vacant, but not otherwise; for if any one have adversary possession of the escheated land at the time of the office found, entry or seizure by the officers of the commonwealth is necessary to give it possession. And even when the possession is vacant at the time of the office found, the inquisi-

tion, in order to have the effect per se of vesting the possession in the commonwealth, must be duly returned to the proper courts, according to the statute. 1 Rev. Code, ch. 82, § 2. See Va. Code, 1887, § 2368; *Com. v. Hite*, 6 Leigh 588, 29 Am. Dec. 232.

E. EFFECT OF PRIOR SALE ON INQUISITION.

The finding of an inquest of escheat in favor of the commonwealth will not take away the title of a purchaser claiming by a deed of bargain and sale legally executed and recorded before the inquest was sealed, though without the knowledge of the bargainee till afterwards. *Com. v. Selden*, 5 Munf. 160. See also, *King v. Hanson*, 4 Call 259.

F. EFFECT OF IRREGULARITIES OF ESCHÉATOR.

As the title of the state does not depend upon the inquisition, it can not be affected by any errors or irregularities of the escheator. *Sands v. Lynham*, 27 Gratt. 291, 21 Am. Rep. 348.

G. ADMISSIBILITY OF EVIDENCE.

Copy of Deed.—In escheat proceedings between the heirs of the alien and the commonwealth, where both parties claim under the same person, and the inquisition refers to a deed to the alien for the land, recorded in a certain county, a copy of said deed is evidence, although it was not recorded upon proper proof. *Fiott v. Com.*, 12 Gratt. 564.

III. Rights of Creditors and Heirs.

A. RECOVERY BY CREDITORS.

Upon a petition under 1 Rev. Code, 1819, ch. 82, § 14, by the creditor of a person whose lands have been escheated, where judgment has been rendered for the whole amount of the demand, when the whole is not proved to be due, and it is uncertain to what part the proof extends, an appellate court will reverse the judgment and dismiss the petition. *Watson v. Lyle*, 4 Leigh 236.

Upon such petition, the escheator, who is defendant, has the same right to plead the statute of limitations in bar of the petition, that a representative of the debtor would have to plead the statute in bar of an action. *Watson v. Lyle*, 4 Leigh 236.

B. RECOVERY BY HEIRS.

The monstrent must show good title in himself in order to entitle him to a judgment of amoveas manus against the commonwealth. *French v. Com.*, 5 Leigh 512, 27 Am. Dec. 613.

IV. Disposition of Escheated Lands.

The commonwealth, under the existing laws, can not grant escheated lands, without a previous inquest of office, and then not upon entries and surveys, as in the case of waste and unappropriated lands, but upon sales by the escheator. *Alexander v. Greenup*, 1 Munf. 134, 4 Am. Dec. 541.

V. Statutory and Treaty Provisions.

Construction.—The statute, 1 Rev. Va. Code, 1819, ch. 86, § 40, declaring entries or locations of lands that have been settled for thirty years prior to the entry or location, etc., invalid, and releasing any title which the commonwealth may be supposed to have thereto, has no application to escheated lands. (It is otherwise by the present statute. See Va. Code, 1887, § 2374.) *French v. Com.*, 5 Leigh 512, 27 Am. Dec. 613.

Where a citizen of Switzerland, who had removed thence to Virginia without denationalizing himself, leaves real estate in Virginia, his heirs, citizens of Switzerland, have by the treaty between the United States and the Swiss Confederation of the 25th of November, 1850, the absolute right to sell said property, and to withdraw and export the proceeds thereof within such time as the laws of Virginia permit. *Hauenstein v. Lynham*, 100 U. S. 483, reversing *Hauenstein v. Lynham*, 28 Gratt. 62.

ESCROW.

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CROSS REFERENCES.

See the titles **BILLS, NOTES AND CHECKS**, vol. 2, p. 422; **BONDS**, vol. 2, p. 520; **DEEDS**, vol. 4, p. 364.

I. Definition.

An escrow, *ex vi termini*, is a deed delivered to some third person, a stranger, to be by him delivered to the grantee, upon the performance of some condition. *Nash v. Fugate*, 32 Gratt. 595, 609; *Ward v. Churn*, 18 Gratt. 801; *Humphreys v. Richmond, etc., R. Co.*, 88 Va. 431, 13 S. E. 985; *Spring Garden Bank v. Hulings Lumber Co.*, 32 W. Va. 357, 9 S. E. 243; *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249.

II. The Depositary.

A. DUTIES OF DEPOSITARY.

The depositary of an escrow is the

agent of both parties. As the agent of the grantor, it is his business to withhold the deed until the condition is performed; as the agent of the grantee it is his business to hold it for him and to deliver it to him after the condition is performed. *Humphreys v. Richmond, etc., R. Co.*, 88 Va. 431, 13 S. E. 985.

B. GRANTEE OR OBLIGEE.

1. Instrument Perfect on Its Face.

A deed, perfect on its face, can not be delivered as an escrow to the grantee or obligee, upon a condition upon which it is to be a valid deed. In all such cases the condition is void,

and the deed is at once operative. *Miller v. Fletcher*, 27 Gratt. 403; *Kyger v. Sipe*, 89 Va. 507, 16 S. E. 627; *Lyttle v. Cozad*, 21 W. Va. 183, 200; *Wendlinger v. Smith*, 75 Va. 309, 317; *Ward v. Churn*, 18 Gratt. 801; *Hicks v. Goode*, 12 Leigh 479; *Preston v. Hull*, 23 Gratt. 600; *Nash v. Fugate*, 24 Gratt. 202; *Humphreys v. Richmond, etc.*, R. Co., 88 Va. 431, 13 S. E. 985; *Nash v. Fugate*, 32 Gratt. 595; *Currie v. Donald*, 2 Wash. 58; *American Button-Hole, etc., Co. v. Burlack*, 35 W. Va. 647, 14 S. E. 319.

"If a man deliver a writing sealed to the party to whom it is made, as an escrow to be his deed, upon certain conditions, etc., this is an absolute delivery of the deed, being made to the party himself;" for the delivery is sufficient, without the speaking of words, * * * and tradition is only requisite; and then when the words are contrary to the act, which is the delivery, the words are of none effect; not what is said, but what is done, must be regarded. But it may be delivered to a stranger, as an escrow, etc., because the bare act of delivery to him, without words, worketh nothing." *American Button-Hole, etc., Co. v. Burlack*, 35 W. Va. 647, 14 S. E. 319.

In *Nash v. Fugate*, 32 Gratt. 595, 609, it is said in effect that when the books speak of delivery to a stranger as an essential to an escrow, it is in contradistinction to a delivery to the party in whose behalf the deed is made.

Notice of Conditions.—When the instrument is delivered directly to the obligee, the delivery can not be regarded as conditional in respect to the party who makes it, unless the condition is made known to the obligee. *Ward v. Churn*, 18 Gratt. 801, 813; *Virginia Passenger, etc., Co. v. Patterson (Va.)*, 51 S. E. 157.

Where a deed is intended to be delivered as an escrow, it should be so stated; otherwise the delivery will be treated as an absolute delivery. *Currie v. Donald*, 2 Wash. 58.

If a bond, perfect on its face, is delivered to the obligee as an escrow, to be valid upon another person's executing it, it is valid, though the condition is not complied with. *Miller v. Fletcher*, 27 Gratt. 403, 21 Am. Rep. 356.

A bond which was a complete and perfect instrument on its face at the time of its delivery to the obligee, was executed by a person as surety, upon the condition that it should not be delivered until executed by another person, and it was placed in the hands of the principal obligor, and without being so executed, it was delivered by the obligor to his obligee, who was not informed of the condition. Held, the bond is the valid bond of the surety, and he can not set up the condition against the obligee. *Hahn v. Roller*, 1 Va. Dec. 44.

If a bond, perfect on its face, signed by the principal debtor, and then signed by another as his surety, and delivered to such principal obligor with the distinct understanding that it was not to be binding until others signed, is delivered by the principal debtor to the obligee, who is not informed of the condition, then the bond is valid and binding on him who signed on condition; for there is nothing on the face of the bond to put the obligee on inquiry. *American Button-Hole, etc., Co. v. Burlack*, 35 W. Va. 647, 14 S. E. 319. And see *Newlin v. Beard*, 6 W. Va. 110, 123.

Co-Obligor.—See post, "Co-Obligor," II, C.

Though a bond is perfect on its face, it may nevertheless be delivered as an escrow by a surety who has signed it, to the principal debtor, for this is not a delivery to the obligee, the creditor. *Nash v. Fugate*, 32 Gratt. 595, 34 Am. Rep. 780.

Notice of Condition.—But the surety will be bound if the principal debtor delivers the bond to the obligee, who has no notice of the unfilled condition. *Nash v. Fugate*, 32 Gratt. 595, 34 Am. Rep. 780.

The validity of a trust deed is not affected by having on it an extra seal. There being no evidence of a conditional delivery, the presumption is that the deed was duly delivered as the deed of those whose names are signed upon it *Kyger v. Sipe*, 89 Va. 507, 511, 16 S. E. 627, citing *Ward v. Churn*, 18 Gratt. 801; *Miller v. Fletcher*, 27 Gratt. 403.

Estoppel.—A surety, who executes and delivers to his principal, a bond complete and perfect on its face, is estopped to claim that it is a mere escrow, as against the obligee who receives the instrument bona fide, for a valuable consideration in ignorance of the agreement which renders it a mere escrow. *Hahn v. Roller*, 1 Va. Dec. 44, citing *Nash v. Fugate*, 24 Gratt. 202.

Parol Evidence.—See post, "Instrument Incomplete on Its Face," II, B, 2.

Parol evidence is inadmissible to prove that a deed, perfect on its face, was delivered to the grantee on a condition. *Miller v. Fletcher*, 27 Gratt. 403; *Watson v. Hurt*, 6 Gratt. 633; *Towner v. Lucas*, 13 Gratt. 705; *Woodward v. Foster*, 18 Gratt. 200; *Sangston v. Gordon*, 22 Gratt. 755; *Colhoun v. Wilson*, 27 Gratt. 639; *Southern Mutual Insurance Co. v. Yates*, 28 Gratt. 585; *Barnett v. Barnett*, 83 Va. 504, 2 S. E. 733; *Tait v. Central Lunatic Asylum*, 84 Va. 271, 4 S. E. 697; *Shenandoah Val. R. Co. v. Dunlop*, 86 Va. 346, 10 S. E. 239; *Peyton v. Stuart*, 88 Va. 50, 16 S. E. 160; *Barton's Law Pr.* (2d Ed.) 630; *Nash v. Fugate*, 32 Gratt. 595; *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. 544; *Owens v. Boyd Land Co.*, 95 Va. 560, 28 S. E. 950.

A sealed instrument, perfect on its face, can not be delivered by a sole obligor, or by all the obligors to the obligee on condition. The delivery in such case is valid, and the condition void, and parol evidence will not be received to prove the condition. *Blair v. Security Bank*, 103 Va. 762, 50 S. E. 262, citing *Ward v. Churn*, 18 Gratt. 801; *Miller v. Fletcher*, 27 Gratt. 403.

Parol Evidence—Unsealed Instruments.—Between the original parties to an unsealed contract, whether negotiable or not, it is always competent to show that the contract was delivered to the payee, or to any other person, on condition that it was not to take effect except in a given event, or upon a given condition, or was only to be used for a special purpose. *Blair v. Security Bank*, 103 Va. 762, 50 S. E. 262, citing *Solenberger v. Gilbert*, 86 Va. 778, 11 S. E. 789; *Catt v. Olivier*, 98 Va. 580, 36 S. E. 980.

In *Bishop on Contracts* it is said: "The delivery of a deed to the grantee in person gives it immediate force, even though accompanied by an oral stipulation that it shall not take effect until a specified contingency has transpired. Such stipulation, or condition, is simply void. But it is otherwise of a written contract not under seal; a parol condition that its operation shall commence only on the transpiring of a future event will be good. If at the first impression this distinction seems technical, a minuter examination will show it to be otherwise. In the case of a specialty, there could be no incorporation into it of a parol condition postponing its effect without destroying its character as a sealed instrument. But oral and written simple contracts being equally parol ones, the degree of this instrument is not reduced by the oral condition." *Bishop on Contracts*, § 357. *Blair v. Security Bank*, 103 Va. 762, 50 S. E. 262.

"The doctrine is important, and its limitations should be clearly defined, lest in the practical application the wise rule which declares that "parol contemporaneous evidence is inadmissible to vary or contradict the terms of a valid written instrument" be violated. The distinction, too, in this connection, must not be overlooked between unsealed and sealed instruments. In case of the former, it is always competent, between the original parties, to prove that a paper perfect on its face,

whether negotiable or not, was delivered to the payee, or any other person, on condition that it is not to take effect except in a given event, or upon a given condition, or is only to be used for a given purpose. *Solenberger v. Gilbert*, 86 Va. 778, 11 S. E. 789; *Catt v. Olivier*, 98 Va. 580, 36 S. E. 980; *Ware v. Allen*, 128 U. S. 590; *Burke v. Dulaney*, 153 U. S. 228; *Kelly v. Oliver* (N. C.), 18 S. E. 698; *McCormick v. Faulkner* (S. Dak.), 58 Am. St. 839." *Blair v. Security Bank*, 103 Va. 762, 50 S. E. 262.

2. Instrument Incomplete on Its Face.

In General.—The doctrine that a deed can not be delivered to the grantee as an escrow is applicable only to the case of deeds which are, on their face, complete contracts, requiring nothing but delivery to make them perfect according to the intention of the parties; and it is not applicable to deeds which, on their face, import that something more is to be done, besides delivery, to make them complete and perfect contracts according to the intention of the parties. In support of this proposition, *Hicks v. Goode*, 12 Leigh 479, is cited in *Tardy v. Shelby*, 84 Ala. 327, 4 So. Rep. 278; *American Button-Hole, etc., Co. v. Burlack*, 35 W. Va. 647, 654, 14 S. E. 319; *Wendlinger v. Smith*, 75 Va. 309, 400 Am. Rep. 727; *Ward v. Churn*, 18 Gratt. 801, 807; *Hicks v. Goode*, 12 Leigh 479, is distinguished in *Miller v. Fletcher*, 27 Gratt. 403, 407; *Nash v. Fugate*, 32 Gratt. 595, 602, 603.

If an instrument shows expressly a condition on its face, or is not on its face a complete and perfect instrument, so as of itself to put the obligee upon inquiry, then a delivery by one obligor to the obligee will not prevent the co-obligors, who signed on condition, from averring and proving such conditional delivery in bar of the action. *American Button-Hole, etc., Co. v. Burlack*, 35 W. Va. 647, 14 S. E. 319.

Joint Bonds.—In *Hicks v. Goode*, 12

Leigh 479, a bond prepared, intended and purporting on its face, to be the joint bond of G. and J. to four commissioners under decree in chancery for sale of land, is signed and sealed by G. and by him delivered to one of the obligees, upon condition that J. also shall execute it, otherwise it shall not be binding on G., but be null and void; J. never executes it; in debt on the bond against G., he pleads that the bond was delivered to the obligee as an escrow, to be his deed only upon the condition that J. also should execute it, which J. never did, et sic non est factum. Held, the plea is a good bar. Cited in *Baylor v. Dejarnette*, 13 Gratt. 152, 172.

In *Hicks v. Goode*, 12 Leigh 479, 491, the court said: "I have not observed a single case in which the doctrine (that a deed can not be delivered in escrow to the obligee) has been applied to any deed which was not, on its face, perfect and complete, requiring nothing to be done to give it full efficacy as a deed according to the intention of the parties, but the mere delivery of it as a deed."

Execution of Instrument by Others.

—*Hicks v. Goode*, 12 Leigh 479, is cited in *Ward v. Churn*, 18 Gratt. 801, 808, for the proposition that, where an instrument indicates on its face that others are to execute, besides those who did execute it, it may be shown by evidence that the delivery, though made to the grantee or obligee, was conditional upon the execution of the instrument by the other parties, and not absolute. See *Hicks v. Goode*, 12 Leigh 479, cited in *Harris v. Harris*, 22 Gratt. 737, 779; *Lyttle v. Cozad*, 21 W. Va. 200; *Baylor v. Dejarnette*, 13 Gratt. 152, 172; *Mackey v. Mackey*, 29 Gratt. 158.

In *Lyttle v. Cozad*, 21 W. Va. 183, 200, the court said: "There are also older cases in Virginia, in which the court held, that when an instrument was incomplete on its face and in-

licated that others were intended to sign it, it was not binding on those who did sign it, although the condition may not have been known to the obligee when it was delivered to him. See *Ward v. Churn*, 18 Gratt. 801, 813, *Preston v. Hull*, 23 Gratt. 600." *Hicks v. Goode*, 12 Leigh 479.

Although the face of the paper indicates that it was intended originally that other persons should sign it, the obligee has a right to infer from the unconditional delivery, that the original intention has been relinquished by the party who makes the delivery. *Ward v. Churn*, 18 Gratt. 801, 813, cited in *Turnbull v. Mann*, 99 Va. 41, 37 S. E. 288.

But in such a case if the delivery is upon a condition made known to the obligee, his assent to it will be presumed from the acceptance of the instrument, and he will not be allowed to repudiate the condition thus assented to, and to treat the delivery as absolute and unconditional. *Ward v. Churn*, 18 Gratt. 801, 813, cited in *Humphreys v. Richmond, etc., R. Co.*, 88 Va. 431, 453, 13 S. E. 985.

Parol Evidence.—See ante, "Instrument Perfect on Its Face," II, B, 1.

If a sealed instrument is not perfect on its face, the instrument itself affects the obligee with notice of its incompleteness, and parol evidence may be received to annex conditions to the delivery. *Blair v. Security Bank*, 103 Va. 762, 50 S. E. 262, citing *Crawford v. Jarrett*, 2 Leigh 630; *Ward v. Churn*, 18 Gratt. 801; *Wendlinger v. Smith*, 75 Va. 309, 40 Am. Rep. 727; *Hicks v. Goode*, 12 Leigh 479, 37 Am. Dec. 677.

The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties; that can not be qualified or varied from its natural import, but must speak for itself. The rule does not prohibit an inquiry into the object of the parties in executing and receiving the instru-

ment. Indeed, it seems to be well settled that whatever relates to the point of execution, whether tending to show the time of delivery, or that the delivery is in the nature of an escrow, or to disprove it altogether, may be established by parol. *Nash v. Fugate*, 32 Gratt. 595, 609, 34 Am. Rep. 780.

In *Nash v. Fugate*, 32 Gratt. 595, 609, it was said: Between the immediate parties oral evidence may be given of a contemporaneous agreement consistent with the written contract, as for example that a bill was transferred as an escrow or upon an express condition which has not been complied with. Citing *Woodward v. Foster*, 18 Gratt. 200.

Parol evidence is admissible to show that an agreement was delivered to obligee or grantee to take effect only upon the happening of a condition which is shown never to have happened. *Humphreys v. Richmond, etc., R. Co.*, 88 Va. 431, 13 S. E. 985, citing *Nash v. Fugate*, 32 Gratt. 595.

Where the testimony offered to show that the bond was delivered as an escrow, is met by opposing testimony equally satisfactory, a surety on such bond will be liable. *Gentry v. Allen*, 32 Gratt. 254.

Approval of Sale.—In *Wendlinger v. Smith*, 75 Va. 309, 40 Am. Rep. 727, G., executor of V., makes a contract with W., to sell to W. a lot of ground. The contract is perfect on its face and absolute; but at the foot of it is a paper referring to it, and indicating that the devisees of V. expressed their approval of the sale. This paper has to it nine seals, only four of which have names attached to them. This writing is presumably a part of the instrument, and indicates that all the devisees of V. were to approve it. Whether their approval was to be a condition upon which the contract was to take effect, is uncertain upon the face of the papers; and therefore parol evidence to prove the condition is competent.

C. CO-OBLIGOR.

In General.—As we have seen where a deed, perfect on its face, is delivered by the obligor directly to the obligee, it is not competent to prove by parol evidence that the delivery was upon a condition which has not been complied with, even though the obligee is fully apprised of the condition at the time. But there is a wide distinction between a delivery directly to the obligee by all the parties signing the paper, and a delivery by part of them to the principal obligor and by the latter to the obligee. When the books speak of the delivery to a stranger as essential to an escrow, it is in contradistinction to a delivery to the party in whose behalf the deed is made. "One of the reasons of this rule is said to be, 'The delivery to the party is sufficient without speaking of any words; and when the words are contrary to the act, which is the delivery, the words are of no effect.' This reason has, obviously, no sort of application to the case of a surety who makes a conditional delivery to the principal obligor. The principal in such case is not the agent of the obligee but of the surety, who intrusts the bond to the principal on the faith of the latter's representation. If the delivery to one who is an entire stranger to the instrument is consistent with its terms, it would seem that the delivery to a co-obligor is equally so. For although the latter is a party, he is not the party to whom the deed is made. A delivery to a co-obligor without words will give no more effect to the instrument than to a stranger without words." *Nash v. Fugate*, 32 Gratt. 595, 34 Am. Rep. 780.

But in distinguishing delivery on condition to a co-obligor as contrasted with an entire stranger to the instrument, the court said: "It is true that the principal obligor has no greater power than a stranger to whose custody the bond is committed; but in such a case the question is not what is the power conferred, but what is the power the

obligee has the right to suppose is conferred." *Nash v. Fugate*, 24 Gratt. 202, 210.

If an instrument be accepted and handed back, by the obligee to an obligor, the principal debtor, to get another to sign as surety or cosurety, and such other sign and deliver to such principal obligor on the express condition that it is not to be delivered until the condition be complied with, such surety on condition may plead and prove it not to be his deed; for, in such case, the principal debtor is pro hac vice the agent of the obligee and the condition made known to such agent, at the time of such delivery to him, is notice to his principal, the obligee, and such obligee is bound by it. *American Button-Hole, etc., Co. v. Burlack*, 35 W. Va. 647, 14 S. E. 319; *Newlin v. Beard*, 6 W. Va. 110; *Hahn v. Roller*, 1 Va. Dec. 44.

Limitations of General Rule—Notice.—If a sealed instrument, perfect on its face, is delivered by one obligor to his co-obligor to be delivered to the obligee on condition, and the co-obligor notifies the obligee of the condition, the condition is valid, but if he fails to impart such notice to the obligee, the condition is void, and the delivery absolute. *Blair v. Security Bank*, 103 Va. 762, 50 S. E. 262, citing *Nash v. Fugate*, 24 Gratt. 202; S. C., 32 Gratt. 595.

"If a bond, perfect on its face, is delivered in escrow to a third person, who delivers it to the obligee, with or without notice of the condition, the delivery is ultra vires, and the obligor is not bound; the question of the good or bad faith of the obligee is immaterial. *Ward v. Churn*, 18 Gratt. 801, 806, 98 Am. Dec. 749. But in case of a delivery by a co-obligor to the obligee, the validity of the condition annexed by one or more of the obligors upon delivery to the co-obligor depends upon whether the obligee has or has not notice of the condition. If he has notice, the condition is valid; otherwise, it is void. *Nash v. Fugate*, 24 Gratt. 202;

S. C., 32 Gratt. 595, 34 Am. Rep. 780. The above observations are applicable where the bond is perfect on its face. If imperfect, parol evidence is admissible to show the conditions, no matter by whom delivered, the instrument itself affecting the obligee with notice of its incompleteness. *Crawford v. Jarrett*, 2 Leigh 630; *Ward v. Churn*, 18 Gratt. 801, 98 Am. Dec. 749; *Wendlinger v. Smith*, 75 Va. 309, 40 Am. Rep. 727." *Blair v. Security Bank*, 103 Va. 762, 50 S. E. 262.

A bond signed by a principal obligor and sureties, apparently perfect and complete, may be avoided by parol proof that the obligee, at the time he received it from the principal obligor, had notice that other persons were to sign it, in order to make the instrument effectual as to those who did sign it. But in such a case the evidence ought to be very clear and satisfactory. *Nash v. Fugate*, 32 Gratt. 595; *Newlin v. Beard*, 6 W. Va. 110; *Solenberger v. Gilbert*, 86 Va. 778, 11 S. E. 789; *Ward v. Churn*, 18 Gratt. 801; *Lyttle v. Cozad*, 21 W. Va. 183.

If a bond, with no imperfection on its face, be signed by the principal debtor, and then signed by another or others as his surety, and delivered to such principal obligor with the distinct understanding that it was not to be binding on them, until the condition was complied with by being signed by the two others named; and the principal obligor delivers the bond to the obligee, informing him, at the time, of such understanding; and the obligee takes the bond, saying that he will procure the signature of the one required, and he fails to do so, and brings suit—such one, signing on condition, may plead and prove that the instrument is not his deed. *American Button-Hole, etc., Co. v. Burlack*, 35 W. Va. 647, 14 S. E. 319.

Sufficiency of Notice.—The presence of scrolls on the instrument not attached to signatures is not sufficient to

put obligee on inquiry. *Nash v. Fugate*, 32 Gratt. 595, 605.

A bond is signed by the principal obligor and a number of sureties, and there are several scrolls below the names of the sureties who sign it. In other respects the bond is complete and perfect on its face; but the sureties sign it and deliver it to the principal obligor, on condition that he shall obtain additional sureties to execute it, before he delivers it to the obligee; but he violates the condition, and delivers it to the obligee, without obtaining additional sureties. Held, the bond is binding on the sureties, unless the obligee had notice of the condition on which they executed it; and the fact that there were other scrolls to the instrument, to which no name was signed, was not sufficient to put the obligee upon inquiry as to the authority of the obligor to deliver the bond to him. *Nash v. Fugate*, 32 Gratt. 595, 605.

D. AGENTS.

See generally, the title AGENCY, vol. 1, p. 240.

1. In General.

As a general rule, the delivery of an instrument to the known agent of the grantee or obligee is a delivery to the principal, and can not create an escrow. "But an agent of the grantee is not necessarily incapacitated by force of his agency from acting as custodian of an escrow, and he may become such custodian where, under the circumstances of the case, to do so involves no violation of duty as agent of the grantee." *Blair v. Security Bank*, 103 Va. 762, 50 S. E. 262.

It is not an inevitable conclusion that the mere delivery of manual possession is a valid delivery of the deed. If the acceptance of an agency from both parties will involve no violation of duty to either, the releasor may make the agent of the releasee his own agent for the purpose of holding the deed as an escrow, and returning it to him in case

a stipulated condition is not performed. *Humphreys v. Richmond, etc.*, R. Co., 88 Va. 431, 453, 13 S. E. 985.

Where one as surety signs and delivers a bond to the obligee's agent, on a condition made known to such agent at the time of delivery, such delivery is notice to the obligee, and he is bound by it. *Newlin v. Beard*, 6 W. Va. 110, 111.

Deed Perfect on Its Face.—If the instrument is on its face complete and perfect, according to the intention of the parties, and delivery is made to the obligee, or his previously constituted agent, without notice that it is conditional, the obligee is not required to make inquiry whether it is the deed or bond of all the signers, or any of them, because it is presumed that all the obligors authorized its delivery, and he has the right to treat it as absolute and unconditional. *Newlin v. Beard*, 6 W. Va. 110, 123.

2 Officers and Agents of Corporations.

See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

A sealed instrument for the benefit of a corporation may be delivered in escrow to one of its officers. *Blair v. Security Bank*, 103 Va. 762, 50 S. E. 262.

"A delivery of a deed, with the intention of passing title, made to an officer of a corporation, is a delivery to the corporation itself, if it be done for the use and benefit of the corporation. But a deed may be delivered to an officer of a corporation, to take effect as an escrow, upon the performance of a condition, as there is no such personal identity between a corporation and its officers as will prevent delivery to the latter as an escrow." *Humphreys v. Richmond, etc.*, R. Co., 88 Va. 431, 452, 13 S. E. 985.

President.—An agreement is made to grant right of way for a railroad, which has been shown by parol evidence to have been delivered to the president of

the road, on condition that it should not take effect unless it was necessary to the building of the road, or unless the board of directors should make compensation therefor. After the road was completed, though no necessity had occurred for using the right of way, and though no compensation had been made therefor, the president turned the agreement over to the right-of-way agent, who was aware of said conditions. Held, the agreement was void. *Humphreys v. Richmond, etc.*, R. Co., 88 Va. 431, 13 S. E. 985.

E. REDELIVERY BY DEPOSITARY.

See post, "Redelivery to Depositor," III, C, 5.

A third person with whom a voluntary deed is left to deliver to the grantee at an indefinite time (after the death of the grantor) may afterwards decline to deliver, and return the deed to the grantor. *Davis v. Ellis*, 39 W. Va. 226, 19 S. E. 399.

And a voluntary deed may be returned by custodian to grantor and destroyed in the absence of preponderance of affirmative evidence of his intention to absolutely part with control and dominion over same. *Davis v. Ellis*, 39 W. Va. 226, 19 S. E. 399.

III. The Condition.

A. NECESSITY.

In order to constitute an escrow, the condition upon which the instrument is delivered must in some manner be made known. *American Button-Hole, etc., Co. v. Burlack*, 35 W. Va. 647, 14 S. E. 319; *Currie v. Donald*, 2 Wash. 58.

B. VARIOUS KINDS OF CONDITIONS CONSIDERED.

Execution of Instrument by Others.

—One of the commonest conditions is that the obligors of the instrument delivered as an escrow, shall not become bound, until others execute it. *King v. Smith*, 2 Leigh 157; *Hahn v. Roller*, 1 Va. Dec. 44; *Miller v. Fletcher*, 27

Gratt. 403; Hicks. *v.* Goode, 12 Leigh 479; Ward *v.* Churn, 18 Gratt. 801; Preston *v.* Hull, 23 Gratt. 600; American Button-Hole, etc., Co. *v.* Burlack, 35 W. Va. 647, 14 S. E. 319; Lyttle *v.* Cozad, 21 W. Va. 183, 200; Blair *v.* Security Bank, 103 Va. 762, 50 S. E. 262.

On Vendor's Order.—The condition on which delivery of a written contract to sell land is to be made, may be the order of the vendor. Booth *v.* Hartley, 3 W. Va. 478.

Acceptance of Option.—Where a written proposal for the sale of land, sometimes called an option, it is testified by three witnesses, is handed by the proposer to a third party to be given to the other party to the agreement, if he accepted within the time limited in it, and, if not accepted, to be destroyed; while the proposer says it was not to be delivered to the other party in any event, the court said: "This shows that no condition connected with its delivery to Willoughby made it an escrow in law in his hands, but that he was a mere custodian, holding it for safekeeping, there being no duplicate. Where an instrument is left with a third party to be delivered and become operative upon the happening of an event, it is an escrow; but, according to Watson himself, no such condition was imposed, and, according to Coast, Frinke, and Willoughby, it was to be handed to Coast upon his acceptance within the time. It really was not an escrow. It spoke its own condition; there was no condition to its operative effect that it did not itself contain; and, according to three witnesses, the only condition connected with its delivery by Willoughby to Coast is the same one expressed by the option, and that was filled by the telegram of acceptance." Watson *v.* Coast, 35 W. Va. 463, 14 S. E. 249.

Cash Payment of Purchase Money.—A sale and purchase of land may be made, and the deed delivered in escrow,

subject to the condition that cash payment should be made. Trout *v.* Warwick, 77 Va. 731.

Subject to Approval.—A contract for the sale of land by an executor, may be delivered to the grantee as an escrow, to be binding when approved of by the devisees. Wendlinger *v.* Smith, 75 Va. 309, 40 Am. Rep. 727.

Death.—It is essential to the validity of a bond that delivery shall be made by the obligor in his lifetime, but if he parts with all dominion over it, and makes an absolute and conditional delivery thereof to a third person, with direction to the latter to deliver it to the obligee on the death of the obligor, the delivery is good. Frank *v.* Frank, 100 Va. 627, 42 S. E. 666; Schreckhise *v.* Wiseman, 102 Va. 9, 12, 45 S. E. 745; Davis *v.* Ellis, 39 W. Va. 226, 19 S. E. 399; Lang *v.* Smith, 37 W. Va. 725, 17 S. E. 213.

Corporations.—Delivery of a deed to a corporation (not completely formed) by name, may be on condition that it be made after the charter has been received and the corporation organized. Spring Garden Bank *v.* Hulings Lumber Co., 32 W. Va. 357, 9 S. E. 243.

C. PERFORMANCE OF CONDITION.

1. In General.

The depository of an escrow is, in fact, the agent of both parties. As the agent of the grantor it is his business to withhold the deed until the condition is performed; as the agent of the grantee it is his business to hold it for him and to deliver it to him after the condition is performed. Humphreys *v.* Richmond, etc., R. Co., 88 Va. 431, 13 S. E. 985.

Condition May Be Made Known at a Time Previous to Deposit.—Where stockholders, in meeting, agree to give a contract of indemnity to a bank whose cashier is present, but it is distinctly agreed at the meeting that the contract of indemnity thereafter to be

reduced to writing is not to become operative and binding, nor be delivered to the bank, until signed by all the stockholders, such contract, when reduced to writing and signed by some of the stockholders, is affected with the limitations intended to be imposed upon it, and is not binding on stockholders who sign, unless the agreement is signed by all as previously stipulated. *Blair v. Security Bank*, 103 Va. 762, 50 S. E. 262.

2. Operation and Effect.

In General.—A deed committed to a third person to be by him delivered to the grantee upon the performance of a specified condition, does not take effect until such condition is performed, although such third person may have delivered it to the grantee without the performance of the condition. *White v. Core*, 20 W. Va. 272; *American Button-Hole, etc., Co. v. Burlack*, 35 W. Va. 647, 14 S. E. 319; *Humphreys v. Richmond, etc., R. Co.*, 88 Va. 431, 13 S. E. 985.

A deed or bond, signed, sealed and delivered to the obligee, or his previously constituted agent, upon condition, is not the deed of the party signing, until the condition is complied with. *Newlin v. Beard*, 6 W. Va. 110.

"Where a deed is delivered as an escrow, it is of no force till the condition is performed; and, though the party to whom it is made should get it into his possession before the performance of the condition, he can derive no benefit from it." *American Button-Hole, etc., Co. v. Burlack*, 35 W. Va. 647, 14 S. E. 319.

Payment of Purchase Money.—Circuit court of N. directs W., trustee for his wife, to buy, subject to its approval, at price not exceeding \$6,000, payable out of her funds in its hands, a home for her. In 1873, trustee contracts by writing with H. for 240 acres in A. at \$12,000, subject to court's approval. In March, 1874, trustee reports contract with H.; but court is told that only 100

acres thereof at \$6,000—cash, \$2,500, balance in three annual payments—is to be paid for out of her funds. H.'s conveyance of the 100 acres to trustee is filed as escrow until cash payment made. Court confirms report quoad the 100 acres, and "the deed as escrow, until cash payment made and recorded," and provides for paying not only the cash but the other payments. On November 6th, 1874, all the purchase money, except \$419.59, is paid, and during that year that balance is paid. Deed is recorded April 13, 1876. Written contract never was. T.'s administrator and others got judgments against H. March 15th, 1876, which were docketed two days later. In suit to subject the 100 acres to those judgments, held, that deed, so delivered as an escrow, could not have been placed on record until W. had become entitled to it by paying the cash payment on 6th November, 1874, when all the purchase money, except \$419.59, was paid. *Trout v. Warwick*, 77 Va. 731.

County Subscription to Railroad—Bonds Delivered in Escrow.

—If a proposal submitting to a vote of the people a subscription to aid the construction of a railroad, provides that it "shall not be available or paid to the said railroad company until the road-bed of the same shall have been completed ready for the ties and rails," it is a condition precedent, and of the essence of the proposal and contract under it, and there is no right in the company to payment prior to such completion. The county court has no power to issue bonds under such subscription, and place them in the hands of a third party, to be delivered to the company on such completion, in advance of such completion; and the deposit in escrow does not enlarge its rights, and it has no vested right under the deposit, because of such deposit, in advance of such completion of the road. *West Virginia, etc., R. Co. v. Harrison County Court*, 47 W. Va. 273, 34 S. E. 786.

Grantee as Freeholder and Juror.—

A lot of land being sold for a sum of money payable by installments, the vendee receives immediate possession, and the vendor signs, seals and acknowledges before magistrates, a conveyance of the land to the vendee in fee simple, which is thereupon, by consent of the parties, placed in the keeping of a third person to be retained by him until the whole purchase money is paid, and to be then delivered to the vendee. The vendee pays some of the installments as they become due; others are still unpaid, the time of payment not having arrived. Held, this vendee is a freeholder duly qualified to serve as a grand juror. *Com. v. Burcher*, 2 Rob. 826, followed in *State v. McAllister*, 32 W. Va. 485, 18 S. E. 779.

Execution of Forthcoming Bond.—

P. agrees to join H. W. as his surety in a forthcoming bond, and executes and delivers the bond, as an escrow, upon condition that K. shall also join in and execute the bond as cosurety; and K. agrees to join as surety in the bond, and executes and delivers the same, as an escrow, upon condition that O. W. also join in and execute the bond as cosurety; but O. W. never unites in the bond. Held, that upon this state of facts, neither P. nor K. are liable for any part of the debt in equity, any more than they would be liable for any part of it at law, where the facts would amount to proof of non est factum. *King v. Smith*, 2 Leigh 157.

Subsequent Performance of Condition.—Where a deed is delivered by the grantor to a third person, to be held in escrow until the grantee shall have paid a specified debt, and the deed is delivered before the debt is fully paid, but it is subsequently paid, held, the delivery will be operative, and the deed valid, at least from the time the debt is fully paid. *Connell v. Connell*, 32 W. Va. 319, 9 S. E. 252.

Discretion of Depository.—The person to whom the deed is delivered in

the first instance must be the judge as to when the condition is performed, in order to act. His judgment, however, is always subject to review by a court. *Humphreys v. Richmond, etc., R. Co.*, 88 Va. 431, 454, 13 S. E. 985.

3. Effect of Delivery before Performance.

See the title BONDS, vol. 2, p. 521.

In General.—If a sealed instrument, perfect on its face, is delivered in escrow to a third person who delivers to the obligee before the fulfillment of the condition, such delivery is ultra vires and void. The good or bad faith of the obligee is immaterial. *Blair v. Security Bank*, 103 Va. 762, 50 S. E. 262; *White v. Core*, 20 W. Va. 272.

Hicks v. Goode, 12 Leigh 479, is cited in *Humphreys v. Richmond, etc., R. Co.*, 88 Va. 431, 454, 13 S. E. 985, to the point that a delivery of the deed by the depository of the escrow, before the conditions are performed, is null and void.

If a bond is delivered to a third person, not a party to it, to take effect as a bond only upon the happening of some event, or the performance of some condition, and that person delivers it to the obligee before the event happens or the condition is performed on which he was to deliver it, it will not take effect. And it matters not that the obligee had no knowledge of the condition which the party attached to the delivery of the escrow. The condition is valid, whether known to the obligee or not. *Newlin v. Beard*, 6 W. Va. 110; *Ward v. Churn*, 18 Gratt. 801.

The obligee must look to the depository's authority, and he can not rely upon the principle that the obligor has put it in the power of the stranger to do the wrong, that the obligee has been injured without fault on his part, and therefore the obligor must bear the loss. *American Button-Hole, etc., Co. v. Burlack*, 35 W. Va. 647, 14 S. E. 319.

Railroad Aid Bonds.—Where under a county subscription vote in aid of a railroad, a county court has no power to issue bonds and place them in the hands of a third party, to be delivered to the railroad company when it has complied with certain conditions, and such court does so issue and place bonds; held, that the deposit in escrow does not enlarge the railroad company's rights; and it has no vested rights under the deposit, because of such deposit, in advance of its compliance with such conditions. *West Virginia, etc., R. Co. v. Harrison County Court*, 47 W. Va. 273, 34 S. E. 786.

An agreement to grant right of way for a railroad is shown by parol evidence to have been delivered to the president of the road, on condition that it should not take effect unless it was necessary to the building of the road, or unless the board of directors should make compensation therefor. After road was completed, though no necessity had occurred for using the right of way, and though no compensation had been made therefor, the president turned the agreement over to the right-of-way agent, who was aware of said conditions. Held, the agreement was void, and plaintiff entitled to an issue of quantum damnificatus to ascertain the damages to his land. *Humphreys v. Richmond, etc., R. Co.*, 88 Va. 431, 13 S. E. 985.

Condition Partly Performed.—Where a deed is delivered by the grantor to a third person to be held in escrow until the grantee shall have paid a specified debt, and the deed is delivered before the debt is fully paid, the delivery will be operative, and the deed valid, at least from the time the debt is fully paid. *Connell v. Connell*, 32 W. Va. 319, 9 S. E. 252.

Avoidance of Deed.—Where those to be affected by a deed deposited in escrow and afterwards improperly delivered and recorded, were fully acquainted with the facts, and acquiesced therein for an unreasonable time, and

until the rights of third parties intervened, they will not be permitted to avoid such deed. *Connell v. Connell*, 32 W. Va. 319, 9 S. E. 252.

4. Effect Where Instrument Fraudulently Obtained.

When a contract in writing for land, is delivered to a third party as an escrow, not to be delivered by the holder as a contract but upon the order of the vendor, and it is fraudulently obtained from the holder by the vendee upon false pretenses and withheld when demanded, he can not make it available for the purposes of a specific execution. *Booth v. Hartley*, 3 W. Va. 478.

5. Redelivery to Depositor.

See ante, "Redelivery by Depositary," II, E.

Where the grantee or obligee does not comply with the terms of the condition upon which the deed or bond is delivered in escrow, the depositary is justified in redelivering the instrument to the depositor, who may take them up and destroy it. *West Virginia, etc., R. Co. v. Harrison County Court*, 47 W. Va. 273, 34 S. E. 786, citing with approval, 11 Am. Eng. Ency. of Law, 2 Ed., p. 352.

In *Humphreys v. Richmond, etc., R. Co.*, 88 Va. 431, 453, 13 S. E. 985, it is said that a releasor may make the agent of the releasee his own agent for the purpose of holding the deed as an escrow, and returning it to him in case a stipulated condition is not performed.

May Recall after Lapse of Time Limit.—An order of the county court, under a vote of the people making a subscription to the construction of a railroad, directs bonds to issue in payment, and to be deposited with a bank, to be thereafter delivered to the railroad company upon the condition that it shall complete the road, ready for ties and rails, by a given day, with the proviso that if the road should not be completed by that day the subscription should be forfeited, and the bank should deliver back to the court

such bonds, and the road is not so completed by the day given. Held, that the subscription is forfeited, and the court may reclaim the bonds from the bank and cancel them. *West Virginia, etc., R. Co. v. Harrison County Court*, 47 W. Va. 273, 34 S. E. 786, citing *Satterlee v. Strider*, 31 W. Va. 781, 8 S. E. 552, as supporting the rule that a county court may revoke an escrow trusteeship. In *West Virginia, etc., R. Co. v. Harrison County Court*, 47 W. Va. 273, 34 S. E. 786, it is said: "The doctrine relied on by counsel, stated in 8 Am. & Eng. Ency. Law, 863, that one party to an escrow can not revoke it and destroy another's right, is sound; but this rule presupposes a valid, lawful, binding escrow. But we find in the improved second edition of that work (vol. 11, p. 352) that a depository may and should redeliver on failure to perform a condition of the deposit. Therefore, I can not see how the company can claim any vested right under this deposit in escrow. The county court had the naked power to make delivery to the company of the bonds in payment of the subscription when the road was ready for ties, not to deliver in escrow years ahead."

IV. Revocability of Deposit.

The doctrine that one party to an escrow can not revoke it and destroy another's right is sound. *West Virginia, etc., R. Co. v. Harrison County Court*, 47 W. Va. 273, 34 S. E. 786.

Where Delivery Is to Be after Death.—A grantor can not recall a deed delivered to a third person unconditionally and without reservation of any kind, with direction to deliver to the grantee after the death of the grantor. *Schreckhise v. Wiseman*, 102 Va. 9, 45 S. E. 745.

When May Be Revoked.—But a depository may and should redeliver on failure to perform a condition of the deposit. *West Virginia, etc., R. Co. v. Harrison County Court*, 47 W. Va. 273, 34 S. E. 786.

A grantor placed a voluntary deed in the hands of a third person, to be delivered at an indefinite time (after death of grantor) to the grantee, and before the delivery thereof such person returned such deed to the grantor, who destroyed it. Held, that the presumption of law is against the delivery of such deed, and in favor of grantor's right to destroy it, and can not be overcome unless the grantee shows, by a preponderance of affirmative evidence, that the grantor, at the time he placed such deed in the hands of such third person, intended absolutely to part with the control and dominion over the same. *Davis v. Ellis*, 39 W. Va. 226, 19 S. E. 399.

Effect of Improper Recall as to Grantee of Subsequent Deed.—Where a deed, delivered in escrow, is improperly recalled and destroyed by the grantor, a subsequent deed to another grantee who has full knowledge of the facts, will be null and void as to the first grantee. *Schreckhise v. Wiseman*, 102 Va. 9, 45 S. E. 745.

And notice thereof to agent or grantee in such subsequent deed is notice to grantee. *Schreckhise v. Wiseman*, 102 Va. 9, 45 S. E. 745.

V. From What Time Deed Operates.

Generally, an escrow takes effect from the second delivery, and is to be considered as the deed of the party from that time; but this general rule does not apply when justice requires a resort to fiction. It is the duty of courts to uphold rather than destroy deeds. *Spring Garden Bank v. Hulings Lumber Co.*, 32 W. Va. 357, 9 S. E. 243.

Deed to Corporation Not Completely Organized.—After the corporators had signed an agreement to become a corporation, and before the charter has been obtained, a deed conveying land to such corporation by name was signed and acknowledged by the grantor, and delivered to a third

party, with directions to retain it until the corporation obtained its charter and organized, and then to deliver it to the corporation; and, after the charter had been received, and the corporation organized under it, such third person delivered the deed to, and it was accepted by, the corporation. Held, the said deed operated as a valid conveyance of said land to the corporation from the date of the delivery of said deed to it. *Spring Garden Bank v. Hulings Lumber Co.*, 32 W. Va. 357, 9 S. E. 243.

Death of Grantor—Relation.—

"Where a deed is left with a third person, with instructions to hold it until the grantor's death, and then to deliver it to the grantee, the weight of authority seems to be in favor of the doctrine that if there is no reservation by the grantor of the privilege of recalling the deed before his death, but if he delivers it to the depository with the absolute and final determination that it shall take effect when the contingency of his death happens, it will become operative upon its delivery, after his death, to the grantee, and such delivery will relate back to the prior delivery for the purpose of passing the grantor's title." *Frank v. Frank*, 100 Va. 627, 42 S. E. 666, cited in *Schreckhise v. Wiseman*, 102 Va. 9, 45 S. E. 745.

In *Frank v. Frank*, 100 Va. 627, 42 S. E. 666, it was not decided whether the delivery of bonds to one to be held for obligee until after the death of obligor, was to be regarded as a delivery in escrow so that the bonds should become effectual only upon delivery by the holder to obligee, or whether they should be regarded as presently binding upon the obligor.

"A deed delivered by the grantor to a third person to be delivered to the grantee, and by such third person delivered to the grantee, will constitute a good delivery, though the grantor be dead at the date of the last delivery, for the delivery takes effect by relation

as of the date when first made to the third person." *Schreckhise v. Wiseman*, 102 Va. 9, 12, 45 S. E. 745.

VI. Pleading and Practice.

A. NON EST FACTUM.

See generally, the title PLEADING, and the various particular proceedings.

Nonperformance of Condition.—The defense that a deed or bond was delivered as an escrow, and that the condition has not been complied with, is made under the plea of non est factum. *American Button-Hole, etc., Co. v. Burlack*, 35 W. Va. 647, 14 S. E. 319; *Blair v. Security Bank*, 103 Va. 762, 50 S. E. 262.

A deed or bond signed, sealed, and delivered to the obligee or his previously constituted agent, upon condition, is not the deed of the party signing until the condition is complied with. The court also held the defense admissible under the general plea of non est factum. The court relied upon and cited 2 Greenl. Ev., § 297; *Ward v. Churn*, 18 Gratt. 801, 812; *American Button-Hole, etc., Co. v. Burlack*, 35 W. Va. 647, 14 S. E. 319.

There is a general plea of non est factum in the case, under which it was competent for the defendant to have relied on the defense that the contract was delivered as an escrow, notwithstanding the fact that it may have been signed by him on a day other than that named in the instruction. *Blair v. Security Bank*, 103 Va. 762, 50 S. E. 262.

Execution by Others.—In an action of debt on a bond purporting to be the bond of three obligors, two of the obligors under a plea of non est factum offer evidence of an understanding between themselves and the other obligor that the bond should not be binding on them until signed by two other designated parties, of which understanding the obligee in the bond had notice at the time of its delivery. Held, the evidence was admissible under the general plea of non est factum, and the

court erred in excluding it. *Stuart v. Livesay*, 4 W. Va. 45.

Delivery to Agent.—A party signing and delivering a bond upon condition to an agent of the obligee, can, under the plea of non est factum, prove by the agent or himself the agency and the condition upon which the delivery was made to the agent. *Newlin v. Beard*, 6 W. Va. 110.

Want of Execution.—In an action of debt founded on a bond or other deed, the defendant may put in issue the execution of the instrument by pleading non est factum generally and in the common form. *American Button-Hole, etc., Co. v. Burlack*, 35 W. Va. 647, 14 S. E. 319. See *Newlin v. Beard*, 6 W. Va. 110.

Want of Delivery.—Under the plea of non est factum, evidence may be given that the instrument was never delivered, or that it was delivered as an escrow, although signed and sealed and stamped. *Stuart v. Livesay*, 4 W. Va. 45.

The defense of delivery in escrow must be made under the plea of non est factum in the court in which action is begun for recovery on the instrument. Judgment in such court can not be allowed to go by default and then afterward proceedings be had in equity on the ground that the defense is an equitable one. *Shields v. McClung*, 6 W. Va. 79, commenting on *King v. Smith*, 2 Leigh 157.

Fraud.—In an action of debt on a bond where delivery was on condition, held, that in a court of common law, fraud may be given in evidence to vacate a deed on the plea of non est factum, if such fraud relates to the execution of the instrument, as, for example, the essential element of delivery. *American Button-Hole, etc., Co. v. Burlack*, 35 W. Va. 647, 14 S. E. 319.

Verification of Plea.—In debt on a bond, defendant pleads that bond was delivered as an escrow upon conditions which were not performed, et sic non

est factum; the plea is not verified by affidavit of the party according to statute, 1 Va. Rev. Code, ch. 128, § 33, but plaintiff makes no objection for want of such affidavit, and the plea is received by the court, issue joined upon it, trial, verdict and judgment for defendant; the want of the affidavit to the plea, is not a good objection to the judgment in an appellate court. *Hicks v. Goode*, 12 Leigh 479.

Special Pleading.—In an action of debt on a bond where delivery was on condition, the plea non est factum is held good; but if defendant wishes to separate the law from the facts, so that the court may pass upon the sufficiency of any special ground why it is not his deed, then he must allege such facts specially, concluding with an "et sic non factum," "and so is not his act," (or deed). *American Button-Holt, etc., Co. v. Burlack*, 35 W. Va. 647, 14 S. E. 319.

B. COMPELLING DEPOSITARY TO DELIVER.

See the title SPECIFIC PERFORMANCE.

Where a party holds an instrument or writing as the mutual friend of both parties, or a deed as an escrow, and refuses to deliver the same, he is a proper party to a bill for a specific performance of the instrument, or the terms of the deed. *Davis v. Henry*, 4 W. Va. 571.

C. PARTIES.

Where an instrument in writing is held as an escrow by a mutual friend of both parties, if such friend thus holding a quasi trusteeship, does not demur because of his being made a party, it is not for the party against whom the specific performance is sought, to demur. *Davis v. Henry*, 4 W. Va. 571.

VII. Recordation.

See the title RECORDING ACTS.

A deed delivered as an escrow, in the proceedings of a court of equity, ad-

ministering a trust fund, is not within the intendment of the statute of registry; therefore, it was held, that a judgment recovered against a grantor in a deed delivered as an escrow, which was not recorded, was not a lien on the

land included in the deed. *Trout v. Warwick*, 77 Va. 731, citing *Briscoe v. Ashby*, 24 Gratt. 454, 469.

And that such deed could not be recorded while undelivered. *Trout v. Warwick*, 77 Va. 731.

ESSENCE.—In *State v. Muncey*, 28 W. Va. 495, it is said: "Without deciding whether or not we can take judicial notice of the ingredients or constituents which compose the 'essence of cinnamon,' we certainly can take such notice of the meaning of the words used in the English language, and therefore we judicially know the meaning and definitions of the words *essence* and 'cinnamon.' The latter is a bark, and Webster defines the former to be (1) 'That which constitutes the particular nature of a being or substance and distinguished it from all others; (2) Formal existence; * * * (6) Constituent substance, as, the pure *essence* of a spirit; (7) The predominant qualities or virtues of any plant or drug, extracted, refined or rectified from grosser matter; or more strictly, a volatile essential oil, as the *essence* of mint.' Take whichever of these definitions we may of the words *essence* and connect it with the word 'cinnamon,' and the necessary conclusion is that the '*essence of cinnamon*' is a 'preparation or mixture.'"

ESTABLISH.—In *Kerr v. Dixon*, 2 Call 383, it is said: "It is necessary to consider in what sense the word *established* is used in the bill of exceptions, as relative to the corner trees in question. If the effect, of the witness's testimony would be, so to *establish* it as to shut up the point, in all future inquiries, on the subject; so to *establish* it, as that the verdict could hereafter be given in evidence, in favor of the witness, or his representatives, then clearly, he was an interested witness and ought to have been rejected; but if the word only purported an *establishment* of this fact, as between the then parties and in that suit, then I think a contrary conclusion will follow. The last is the only sense in which the word could be understood, without infringing the plainest principles of law."

A municipal government *establishes* a hospital by purchasing, according to the then existing law, a farm and the buildings on it specially for that purpose. The court said: "Webster defines the word *establish*, when used in the governmental exercise of power, as follows: 'To enact or decree by authority, and for permanence; to decree; to enact; to ordain; said of laws, regulations, and the like.'" *Richmond v. Supervisors*, 83 Va. 204, 2 S. E. 26.

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CROSS REFERENCES.

See the titles CURTESY, vol. 4, p. 148; DEEDS, vol. 4, p. 364; DOWER, vol. 4, p. 782; EJECTMENT, vol. 4, p. 871; HEIR, HEIRS AND THE LIKE; JOINT TENANTS AND TENANTS IN COMMON; LANDLORD AND TENANT; MERGER; PARTITION; REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS; RESTRAINT ON ALIENATION; SEPARATE ESTATE OF MARRIED WOMEN; SHELLEY'S CASE, RULE IN; WASTE; WILLS.

As to merger of the lesser estate in the greater, see the title MERGER. As to entailment of slaves, see the title SLAVES. As to recovery of estates by writ of formedon, see the title FORMEDON, WRIT OF.

I. Definitions.

Estate (status) signifies the condition, relation, or circumstance in which the owner stands with regard to his property. 2 Bl. Com. 103; 2 Minor's Inst., p. 79.

The word "estate" is used to signify sometimes the degree, quantity, nature and extent of interest which a person has in real property; but the word has several meanings. First. In its most extensive sense it is applied to signify everything of which riches or fortunes may consist, and includes personal and real property; hence we say "personal estate," "real estate." Second. In its more limited sense, the word "estate" is applied to lands. It is so applied in two senses. The first describes or points out the land itself, without ascertaining the extent or nature of the interest therein; as "my estate at A." *Godfrey v. Humphreys*, 18 Pick. 537. The second, which is the proper and technical meaning of "estate," is the degree, quantity, nature and extent of interest which one has in real property; as "an estate in fee," whether the same be a fee simple or a fee tail, or an estate for life or for years, etc. *Troth v. Robertson*, 78 Va. 46.

"The word 'estate' is genus generalissimum, and comprehends both the thing and the interest." *Kennon v. McRoberts*, 1 Wash. 96, 104.

The word estate in its vulgar and common meaning is descriptive only of the quality of things, as lands, etc.; not of the interest in them. *Goodrich v. Harding*, 3 Rand. 280; *Kennon v. McRoberts*, 1 Wash. 96, 104.

A mere right is not an estate; the word "estate" implies right and seizin conjoined. *Orndoff v. Turman*, 2 Leigh 200.

"Estate" Equivalent to "Interest."—The word "interest," often, is used to express or represent "estate." As for instance an "interest" in a tract of land is often used as meaning the same

thing as an "estate" in a tract of land. The two words are not unfrequently used as convertible terms. *Hurst v. Hurst*, 7 W. Va. 289, 296.

Under the Code of Virginia, 1860, ch. 116, §§ 2, 5, and in the Code of 1868, ch. 72, § 11, the word "interest" is employed to represent "estate" and as meaning the same thing. *Hurst v. Hurst*, 7 W. Va. 289, 296.

As to the use of the word "estate," in a devise, as creating a fee simple, see the title WILLS.

II. Feudal Tenures in England.

A. IN GENERAL.

Upon the introduction of the feudal law into England, all lands became holden, either by a free tenure, or in villenage. *Turner v. Dawson*, 80 Va. 841.

B. FREE TENURE.

See post, "Estates of Freehold," III, A.

Right of Enjoyment for Life.—The tenant who held by a free tenure had always a right to the enjoyment of the land for his life at least. *Turner v. Dawson*, 80 Va. 841.

Not Liable to Be Dispossessed.—The tenant who held by a free tenure could not be dispossessed, even for the nonpayment of his rent, or the nonperformance of his services. *Turner v. Dawson*, 80 Va. 841.

Origin of Term "Freeholder."—The person holding land by a free tenure, was called a "freeholder," because he might maintain his possession against his lord, and for this reason liberum tenementum or freeholder was opposed to villenage. *Turner v. Dawson*, 80 Va. 841.

Incidents.—The acquisition of an estate of freehold was attended with certain valuable rights and privileges. The freeholder became a member of the county court, one of the pares curiæ in the court baron, or lords' court, was entitled to be summoned on juries in the king's court and to vote at the

election of a knight of the shire. *Turner v. Dawson*, 80 Va. 841.

C. VILLENAGE.

Liable to Be Dispossessed.—A tenant who held in villenage, might be turned out at the pleasure of his lord, and his possession, being perfectly precarious, was considered to be the possession of his lord, to whom he was, in a great degree, a mere slave. *Turner v. Dawson*, 80 Va. 841.

All Lands Held of King.—With the full establishment of the feudal system in England, all lands were, by universal acknowledgment, held mediately or immediately of the king; and thus, not only privileges and dignities become incident to the ownership of land, but the great feudal lords, as well as their tenants and retainers, were erected into a powerful military system, founded upon the idea of permanent interest in and attachment to the soil. *Turner v. Dawson*, 80 Va. 841.

III. Classification of Estates.

A. ESTATES OF FREEHOLD.

1. Definitions.

Estates of freehold are either estates of inheritance or estates not of inheritance. *Turner v. Dawson*, 80 Va. 841.

An estate of freehold (*liberum tenementum*), or frank-tenement is an estate of indeterminate duration other than an estate at will or by sufferance. It derives its name from the fact that it was esteemed the only estate worthy of a free man's and a soldier's acceptance. 2 *Minor's Inst.*, p. 80.

"Freehold" and "Possession" Synonymous.—Originally, "possession" and "freehold" were synonymous terms, no person being considered to have the possession of lands, but he who had himself, or held for another, at least an estate of freehold in them, a conveyance which transferred the possession, must necessarily be considered as transferring estate of freehold, or, to speak more accurately,

the whole fee. *Orndoff v. Turman*, 2 Leigh 200.

The word "seisin" imports a freehold estate, either for life or in fee. *Clay v. St. Albans*, 43 W. Va. 539, 27 S. E. 368.

2. Estates of Inheritance.

a. In General.

Freehold estates of inheritance are divided into inheritances absolute or fee simple and inheritances limited. *Turner v. Dawson*, 80 Va. 841.

Before the statute *de donis*, all inheritances were estates in fee simple or fee conditional. Tenant of lands entailed had before this statute a fee simple conditional subsequent. *Bells v. Gillespie*, 5 Rand. 273.

b. Inheritance Absolute or Fee Simple.

(1) Definitions.

"'Fee simple' is a freehold estate of inheritance, free from conditions and of indefinite duration. It is the highest estate known to the law, and is absolute, so far as it is possible for one to possess an absolute right of property in lands." *Tied., Real Prop.*, § 36; *Yeager v. Fairmont*, 43 W. Va. 259, 27 S. E. 234.

A fee simple being the highest estate known to the law, it is the entire and absolute property, and it is impossible for one party to own the fee simple while another owns a life estate in the same property at one and the same time. *Yeager v. Fairmont*, 43 W. Va. 259, 27 S. E. 234.

A fee simple includes an entire dominion over the property, to sell, to give, or to transmit to heirs general; and when an instrument has disposed of that to one, nothing remains to be given to others, or to descend. *Carter v. Tyler*, 1 Call 165, 186.

(2) Creation.

(a) In General.

For general discussion as to what language is necessary to create a fee simple estate, see the titles *DEEDS*, vol. 4, p. 431; *HEIR, HEIRS AND THE LIKE*; *WILLS*.

(b) Necessity for Words of Inheritance.

aa. At Common Law.

Under the English law, and in Virginia, prior to the statute of 1785, words of inheritance were indispensable to pass an estate in fee simple by a deed or will. *Taylor v. Cleary*, 29 Gratt. 448, 454; *Wyatt v. Sadler*, 1 Munf. 537. See the titles DEEDS, vol. 4, p. 431; WILLS.

bb. Under Statutes.

In General.—The act passed in 1785 dispensed with the necessity of words of inheritance or perpetuity to create an estate of inheritance. *Doe v. Craigen*, 8 Leigh 449; *Seekright v. Billups*, 4 Leigh 90; *Jiggetts v. Davis*, 1 Leigh 368; *Ball v. Payne*, 6 Rand. 73; *Bells v. Gillespie*, 5 Rand. 273; *Goodrich v. Harding*, 3 Rand. 280; *Tinsley v. Jones*, 13 Gratt. 289.

As to the effect of a statute dispensing with the necessity of words of perpetuity and inheritance, in determining what is an estate tail on which the statute for abolishing entails shall operate, see the title WILLS.

Statutory Provisions.—"Every estate in lands which shall hereafter be granted, conveyed or devised to one, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law." Act of 1785, 1 Rev. Code, 1819, ch. 99, § 27; *Taylor v. Cleary*, 29 Gratt. 448, 454; *Ball v. Payne*, 6 Rand. 73; *Bells v. Gillespie*, 5 Rand. 273.

Section 8, ch. 71, of the West Virginia Code (1899) provides: "Where any real estate is conveyed, devised, or granted to any person without any words of limitation, such devise, conveyance, or grant shall be construed to pass the fee simple or the whole estate or interest which the testator or grantor had power to dispose of in such

real estate, unless a contrary intention shall appear by the will, conveyance, or grant." Va. Code (1873), ch. 111, § 8; *Bank v. Green*, 45 W. Va. 168, 31 S. E. 260; *Wine v. Markwood*, 31 Gratt. 43; *McDougal v. Musgrave*, 46 W. Va. 509, 33 S. E. 281; *Humphrey v. Foster*, 13 Gratt. 653; *Little v. Bowen*, 76 Va. 724; *Taylor v. Cleary*, 29 Gratt. 454; *Fairclaim v. Guthrie*, 1 Call 712; *Morrison v. Clarksburg Coal, etc., Co.*, 52 W. Va. 331, 43 S. E. 102.

Purpose and Effect of Statute.—"I have considered this law as meaning simply to dispense with words of inheritance, and transferring the fee, in those cases, where before, for want of such words, an estate for life only would pass. But, I have never supposed it was intended by it, to break up from their foundation, the ancient and general rules of construction, and convert those into words of purchase, which, for centuries, had been settled as words of limitation. So far from disturbing ancient rules, the framers of that law seem to have taken especial care to preserve them." *Ball v. Payne*, 6 Rand. 73, 77.

The act of 1785 can only apply to cases in which an estate is given either without words restricting it to a life estate, or words of inheritance, and in which, by its application, the rules of construction "as the law aforetime was," in respect to estates tail and executory devises, applied to the words in the deed or will, will not be affected. *Doe v. Craigen*, 8 Leigh 449; *Seekright v. Billups*, 4 Leigh 90, 98.

(c) Life Estate with Power to Dispose of Corpus.

In *Brown v. Strother*, 102 Va. 147, 47 S. E. 236, *Harrison, J.*, in delivering the opinion of the court said: "This case is controlled by a long line of decisions of this court, running from an early day to the present time, which hold that whenever in any devise or conveyance a life estate is given, and there is afterwards given the life ten-

ant, or first taker, power to dispose of or consume the corpus of the estate, the first taker is vested with a fee simple estate, and all limitations over are void on the ground of repugnancy and uncertainty. Among the numerous cases in support of this doctrine may be cited *May v. Joynes*, 20 Gratt. 692; *Missionary Society v. Calvert*, 32 Gratt. 357; *Carr v. Effinger*, 78 Va. 197; *Cole v. Cole*, 79 Va. 251; *Hall v. Palmer*, 87 Va. 354, 12 S. E. 618, 11 L. R. A. 610, 24 Am. St. Rep. 653; *Bowen v. Bowen*, 87 Va. 438, 12 S. E. 885, 24 Am. St. 664; *Farsh v. Wayman*, 91 Va. 430, 21 S. E. 810; *Davis v. Heppert*, 96 Va. 775, 32 S. E. 467; *Wilmoth v. Wilmoth*, 34 W. Va. 426, 12 S. E. 731; *Riddick v. Cohoon*, 4 Rand. 547; *Milhollen v. Rice*, 13 W. Va. 510; *Burwell v. Anderson*, 3 Leigh 348; *Fairclaim v. Guthrie*, 1 Call 7; *Brown v. George*, 6 Gratt. 424; *Shermer v. Shermer*, 1 Wash. 266; *Melson v. Cooper*, 4 Leigh 409; *Madden v. Madden*, 2 Leigh 377; *Elcan v. Lancasterian School*, 2 Pat. & H. 53; *Cresap v. Cresap*, 34 W. Va. 310, 12 S. E. 527; *University v. Tucker*, 31 W. Va. 621, 8 S. E. 410; *Smythe v. Smythe*, 90 Va. 638, 19 S. E. 175; *John v. Barnes*, 21 W. Va. 498; *Wright v. Cohoon*, 12 Leigh 370; *Miller v. Potterfield*, 86 Va. 876, 11 S. E. 486; *Johns v. Johns*, 86 Va. 333, 10 S. E. 2; *Bank v. Green*, 45 W. Va. 168, 31 S. E. 260.

From the earliest time, it has been among the received doctrines of the common law, that an absolute and unqualified power of disposing, conferred by will, and not controlled or excluded by any other provision, should be construed as a gift of the absolute property. In this the law but corresponds with the dictates of common reason. Every man of ordinary capacity would understand a power to dispose of a thing, as he pleased, as a gift of the thing itself; and hence, every one who uses the phrase without qualification, is understood by the law as intending a gift. The power of ab-

solute disposition, is, indeed, the eminent quality of absolute property. He who has the absolute property, has, inseparably, the absolute power over it; and he to whom is given the absolute power over an estate, acquires thereby the absolute property; unless there is something in the gift which negatives and overthrows this otherwise irresistible implication. *Burwell v. Anderson*, 3 Leigh 348.

As to what language will be construed as giving the first taker or life tenant the power to alien or dispose of the corpus of the estate, see the titles DEEDS, vol. 4, p. 432; WILLS.

(d) Creation by Operation of Rule in Shelley's Case.

See the title SHELLEY'S CASE, RULE IN.

(3) Incidents.

The power of disposal or alienation, is absolute and unlimited, as an essential incident to an estate in fee simple. *Hall v. Palmer*, 87 Va. 354, 12 S. E. 618; *Blair v. Muse*, 83 Va. 238, 2 S. E. 31. See the title RESTRAINT ON ALIENATION.

c. Inheritances Limited.

(1) Estates in Fee Qualified.

(a) Definition.

An estate in fee qualified is one which may, by its limitation, continue forever, but has a qualification annexed, in pursuance of which it may be determined at any moment. An estate in fee qualified is often called a base fee. Following are examples of estates in fee qualified: "To A and his heirs tenants of the manor of Dale;" "to A and his heirs, citizens of Virginia;" "to A and his heirs as long as Z has heirs of his body." 2 Minor's Inst. 87. See also, *Orndoff v. Turman*, 2 Leigh 208.

(b) Alienation by Tenant in Tail by Grant, Bargain and Sale, etc.

aa. In General.

The alienation of a tenant in tail (before the act docking entails) by conveyances, by grant, by bargain and

sale, lease and release, covenant to stand seized, and by release and confirmation in enlargement of an estate, only operate on the right of the parties conveying, and passes to the grantee, bargainee, etc., and estate of inheritance, a base fee simple. *Orndoff v. Turman*, 2 Leigh 200; *Gleeson v. Scott*, 3 Hen. & M. 278.

bb. Unimpeachable during Life of Tenant.

Such base fee simple is unimpeachable during the life of the tenant in tail. *Orndoff v. Turman*, 2 Leigh 200.

cc. Lasts as Long as Estate Tail Continues.

The estate will, moreover, last as long as the estate tail shall continue, unless it shall be avoided by those who have a right to avoid the same. *Orndoff v. Turman*, 2 Leigh 200.

dd. Incidents.

Such estate, until it shall be avoided by those who have a right to avoid the same, has all the incidents of a fee simple. *Orndoff v. Turman*, 2 Leigh 200.

ee. Termination.

Entry of Issue.—The estate of the grantee, although it be unimpeachable during the life of the tenant in tail, and may last as long as the estate tail shall continue, may, nevertheless, be avoided at any time after the death of the tenant in tail, by the mere entry of the issue. *Orndoff v. Turman*, 2 Leigh 200; *Gleeson v. Scott*, 3 Hen. & M. 278.

Although a base fee, created by a conveyance by a tenant in tail by grant, bargain and sale, etc., may be avoided by the issue in tail, yet such estate can not be avoided by the tenant in tail himself. *Gleeson v. Scott*, 3 Hen. & M. 278.

Failure of Issue.—Such estate determines absolutely and ipso facto, by the failure of the issue in tail, under the rule *cessante statu primitivo, cessat derivativus*. 1 Pres. on Estates, 436, 7, 2 Id. 462, 3. *Orndoff v. Turman*, 2 Leigh 200.

ff. Power to Sue Out Writ of Ad Quod Damnum.

As to the power of a tenant in tail, having conveyed by bargain and sale, etc., to sue out a writ of ad quod damnum, see post, "Writ of Ad Quod Damnum," III, A, 2, c, (4), (f), bb, (ee).

(c) Alienation of Tenant in Tail by Feoffment.

aa. In General

The estate transferred by the feoffment of a tenant in tail, is something more than that which was transferred by his mere bargain and sale, lease and release, etc. It is not a base fee that may be defeated, at any time after the death of the tenant in tail, by the mere entry of the issue, and must necessarily be determined on the failure of issue, but it is a fee simple defeasible. *Orndoff v. Turman*, 2 Leigh 200.

As to the effect of feoffment of an estate in tail, upon the estate tail, turning it into a right of action, and thus working a discontinuance, see post, "Discontinuances," III, A, 2, c, (4) (f), aa.

bb. How Estate Defeated.

Such fee simple defeasible could only be defeated by the action of the issue, or of those in remainder or reversion. For the estate of the tenant in tail, and of those in remainder and reversion, is turned by the feoffment, into a right of action. *Orndoff v. Turman*, 2 Leigh 200.

(2) Estates in Fee Simple Defeasible.

See ante, "Alienation of Tenant in Tail by Feoffment," III, A, 2, c, (1), (c).

(3) Estates in Fee Conditional.

(a) Definition.

The terms proper to convey a fee conditional at common law are "to the grantee and the heirs of his body." It is not every condition that constituted a fee conditional, which must not be confounded with the more comprehensive phrase of an estate on condition. For a fee conditional there is but one condition, viz; that the grantee shall

have issue, or heirs of his body. It is created by a conveyance to the "grantee and the heirs of his body," or "to the grantee and the heirs male of his body." 2 Minor's Inst. 88, 2 Bl. Com. 110.

Fees conditional were so called because of the condition expressed or implied in the gift, that the land should revert to the donor, if the donee had no heirs of his body, but if he had, that it should then remain to the donee. *Orndoff v. Turman*, 2 Leigh 200.

At common law, when lands were given to a man and the heirs of his body, he was considered as having a fee simple conditional. *Orndoff v. Turman*, 2 Leigh 200.

(b) Estates Tail under Statute.

Conditional fees at common law are estates tail under the statute. *Carter v. Tyler*, 1 Call 165.

(c) Effect Where No Heirs of Body Born.

If the donee had no heirs of his body, the estate would revert to the donor. *Orndoff v. Turman*, 2 Leigh 200.

(d) Effect of Birth of Heirs of Body.

Estate Rendered Absolute.—If the donee had heirs of his body, this was such a performance of the condition, as rendered his estate absolute. *Orndoff v. Turman*, 2 Leigh 200.

But see *Bells v. Gillespie*, 5 Rand. 273, where it is said: "Tenants of land entailed had before the said statute (statute de bonis) a fee simple conditional subsequent; and although he had issue, he had not thereby a fee simple conditional absolute; for, if he afterwards died without issue, the donor could enter in his reverter." 1 Minor's Inst. 13.

Power to Alien.—If the donee had heirs of his body, he had power to alien the estate. *Orndoff v. Turman*, 2 Leigh 200; *Bells v. Gillespie*, 5 Rand. 273.

After issue, the tenant in fee simple conditional, could alien, so as to bar

the donor of his right of entry in reverter. *Bells v. Gillespie*, 5 Rand. 273.

The tenant in fee simple conditional could, as well before as after the issue, alien, so as to bar his own issue. *Bells v. Gillespie*, 5 Rand. 273.

As to the practice of the donee of aliening and repurchasing the land in fee, giving rise to the passage of the statute de donis conditionalibus, which in turn created estates tail, see post, "Origin," III, A, 2, c, (4), (b).

Forfeiture.—Also, the donee might forfeit the estate, upon birth of heirs of the body. *Orndoff v. Turman*, 2 Leigh 200.

Power to Charge Land with the Rents or Incumbrances.—If the donee had heirs of his body, he might charge the lands with the rents or other incumbrances, which would bind the issue. *Orndoff v. Turman*, 2 Leigh 200.

(e) Effect of Failure to Alien, etc.

But if the donee did not alien, forfeit or charge the land with the rents or other incumbrances, the course of descent was regulated by the form of the gift; the land would go to the heirs of his body, and in default of such, would revert to the donor. *Orndoff v. Turman*, 2 Leigh 200.

(4) Estates Tail.

(a) Definition and Nature.

An estate tail is an estate limited to the issue of the donee. *Jiggetts v. Davis*, 1 Leigh 368.

The precise idea of an estate in tail general, is "an estate that shall go, upon the death of the donee or tenant, to his heirs being at the same time the issue of his body;" arg. in Shelley's case, 1 Rep. 103, b. It is a mutilated or truncated inheritance from which the heirs in general are cut off; 2 Black. Comm. 112, note m. Blackstone (Id. 201), says; All the rules relating to purchase whereby the legal course of descents is broken or altered, perpetually refer to the settled law of inheritance, as a datum of first principle universally known, and upon which

their subsequent limitations are to work. Thus, a gift in tail, or to a man and the heirs of his body, is a limitation that can not be perfectly understood, without a previous knowledge of descents in fee simple. One may well perceive that this is an estate confined in its descent, to such heirs alone of the donee, as have sprung or shall spring from his body; but who those heirs are, whether all his children, both male and female, or the male only, and among the males, whether the eldest, youngest or other son alone, or all the sons together, shall be his heirs; this is a point that we must result back to the standing law of descents in fee simple to be informed of. *Orndoff v. Turman*, 2 Leigh 200.

Estate of Inheritance.—A tenant in tail had an estate of inheritance (although a particular estate) even after the statute de donis. *Orndoff v. Turman*, 2 Leigh 200.

Unknown at Common Law.—Estates tail were unknown to the common law. They were created by the statute de donis conditionalibus, which provided, "voluntas donationis secundum forum in charta doni sui manifeste expressam de catero observetur." *Bells v. Gillespie*, 5 Rand. 273.

Origin of Name.—The name fee tail, or foedum talliatum, was borrowed from the feudist, amongst whom it signified any mutilated or truncated inheritance, from which the heirs general were cut off; or, as some say, because ownership of the subject was cut into two parts, one going to the donee and the heirs of his body, and the other remaining as a reversion in the donor. 2 Min. Inst. 89; 2 Blackstone Comm. 112. See also, *Orndoff v. Turman*, 2 Leigh 200.

(b) Origin.

aa. Circumstances Leading to Passage of Statute De Donis.

At the common law, when lands were given to a man and the heirs of his body, he was considered as having a

fee simple conditional, which would revert to the donor, if the donee had no heirs of his body; but if he had, this was such a performance of the condition, as rendered his estate absolute; at least, he could alien; he might forfeit; he might charge the land with rents or other incumbrances, which would bind the issue. But if he did none of these things, the course of descent was regulated by the form of the gift; the land would go to the heirs of his body, and in default of such, would revert to the donor. To prevent this, it was usual for such tenants, so soon as they had performed the condition by having issue, to alien the land, and afterwards repurchase, taking an absolute estate which would descend to their heirs general. To put a stop to this practice, the nobles and great barons, anxious to perpetrate their possession in their own families, procured the passage of the statute of Westminster 2d, 13 Ed. 1, ch. 1, de donis conditionalibus; which gave birth to estates tail. *Orndoff v. Turman*, 2 Leigh 200.

bb. Provisions of Statute De Donis.

The statute de donis conditionalibus, Westm. II, 13 Edward I (1285) provided that the will of the donor, according to the form in the deed of gift, plainly expressed, should be observed, so that they to whom any tenement was given on such condition, should have no power to alien the same, but that it should remain to their issue after their death, or if there were no issue, should revert to the donor or his heirs. 2 Bl. Co., 112, 2 Minor's Inst. 89. *Orndoff v. Turman*, 2 Leigh 200.

cc. Object of Statute.

The statute de donis was made for the purpose of taking away the power of alienation incident to the estate in fee conditional. *Orndoff v. Turman*, 2 Leigh 200.

The object of the statute de donis was to restrain this right of alienation

which operated to the dishersion of the issue of the donee and to the exclusion of the donor from the reversion; both of which was contrary to the will of the donor, and against the form of the gift. In carrying this law into effect, the courts decided that the donee should not have a fee simple conditional as aforesaid; but, they divided the estate in the donee, and a reversion in the donor, so that the donee could not, by alienation, bar his issue or the donor as aforesaid. Thus, it is, that tenant in tail is said to be by virtue of this statute. The power of alienation, however, was afterwards given by statute, if made by fine and recovery. *Bells v. Gillespie*, 5 Rand. 273.

dd. Construction and Operation of Statute.

Blackstone remarks, that "upon the construction of this act of parliament, the judges determined that the donee had no longer a conditional fee simple, which became absolute and at his own disposal, the instant any issue was born; but they divided the estate into two parts, leaving in the donee a new kind of particular estate, which they denominated a fee tail; and investing in the donor, the ultimate fee simple of the land, expectant on the failure of issue; which expectant estate is what we now call a reversion. And hence it is that Littleton tells us, that tenant in fee tail is by virtue of the statute of Westminster the second." *Orndoff v. Turman*, 2 Leigh 200.

The statute de donis secured entailed estates to the issue and remainderman by declaring that the will of the donor in that respect should be observed, and that all conveyances made by tenants in tail, should be ipso facto void. *Carter v. Tyler*, 1 Call 165.

ee. Duration of Statute as Law in Virginia.

The statute de donis was in force in Virginia, from the first settlement of the country, until the revolution; was adopted by the ordinance of the con-

vention of May, 1776, with all other British statutes in aid of the common law prior to the 4th year of James I, as the law of Virginia; and continued in force until December, 1792, when it was repealed with all other British statutes. *Bells v. Gillespie*, 5 Rand. 273.

(c) Abolition by Statute.

aa. In General.

The acts of 1776 and 1785 abolished entails and converted estates tail into fee simple estates. *Smith v. Chapman*, 1 Hen. & M. 240, 302; *Walker v. Lewis*, 90 Va. 578, 19 S. E. 258; *Hawthorne v. Beckwith*, 89 Va. 786, 17 S. E. 241; *Orndoff v. Turman*, 2 Leigh 200; *Jiggetts v. Davis*, 1 Leigh 368; *Carter v. Tyler*, 1 Call 165; *Graham v. Graham*, 4 W. Va. 320; *Nowlin v. Winfree*, 8 Gratt. 346; *Doe v. Craigen*, 8 Leigh 449; *Seekright v. Billups*, 4 Leigh 90; *Doe v. Anderson*, 4 Leigh 118; *Bells v. Gillespie*, 5 Rand. 273; *Broadbuss v. Turner*, 5 Rand. 308; *Kendall v. Eyre*, 1 Rand. 288; *McClintic v. Manns*, 4 Munf. 328; *Snydor v. Snydor*, 2 Munf. 263; *Gleeson v. Scott*, 3 Hen. & M. 278; *Eldridge v. Fisher*, 1 Hen. & M. 559; *Hill v. Burrow*, 3 Call 342; *Tate v. Talley*, 3 Call 354; *Ball v. Payne*, 6 Rand. 73; *East v. Garrett*, 84 Va. 523, 9 S. E. 1112.

bb. Act of 1776.

(aa) Provisions of Act.

The statute of 1776 provides, that any person who now hath, or hereafter may have, any estate in fee tail in lands in possession, or who now is, or hereafter may be, entitled to any such estate tail, in reversion or remainder, expectant on any estate for life or lives, howsoever created, shall from henceforth, or from the commencement of such estate tail, stand seized in fee simple, etc. Acts of October 1776, ch. 26, § 2; 9 Hen. Stat. at large, p. 226. *Orndoff v. Turman*, 2 Leigh 200; *Bells v. Gillespie*, 5 Rand. 273.

The act of 1776 declares, "that any person who now hath or hereafter may

have any estate in fee tail general or special in any land, etc., in possession, etc., or who now is, or hereafter may be entitled to any such estate tail, in reversion or remainder, etc., whether such estate tail hath been or shall be created by deed, will, act of assembly, or by any other ways or means, shall, from henceforth, or from the commencement of such estate tail, stands seised, etc., to such lands, etc., so held or to be held, etc., in full and absolute fee simple, in like manner as if such fee, will, etc., had conveyed the same to him in fee simple; any words, limitations or conditions in the said deed, will, etc., to the contrary notwithstanding." *Tate v. Tally*, 3 Call 354; *Jiggetts v. Davis*, 1 Leigh 368.

(bb) Conditions before Legislature at Time of Passage of Act.

The revolution having produced a new order of things, this great subject (docking entails) came before the legislature, in October, 1776, under a view of all its legal circumstances, from the common law and the statute *de donis*, down to that period. The subject of discussion was, whether they should restore the fine and recovery, which was objected to on account of its fictitious nature, and the trouble and expense attending it; but the principal objection was, that it would permit the tenants to continue what was considered as a mischief; and that those who possessed the large estates, would have an inclination to continue them in their families. They, therefore, resolved to cut the gordian knot at once, and ipso facto to vest the fee simple in those who then had, or should in the future have, an immediate beneficial interest; that is to say, an estate in fee tail in possession, or a remainder or reversion in tail, after estates for life or lesser estates, unfettering the estates of all future interests, depending in creation, upon these estates tail. *Orndoff v. Turman*, 2 Leigh 200; *Carter v. Tyler*, 1 Call 165, 182.

(cc) Remedial Statute.

It is a law founded on great principles of national policy. It is a highly remedial statute, intended to remove great political and moral mischief. *Orndoff v. Turman*, 2 Leigh 200.

(dd) Statute Liberally Construed.

So far from being restricted to a rigid technical construction, according to the letter, it must be construed according to its spirit, and thus to bring within the scope of its operation all cases that come within the mischief intended to be provided against. The division of estates, into estates in possession, remainder and reversion, comprehends every estate whatever; so far at least as relates to the time at which they confer the right of enjoyment. 1 Prest. est. 23. When, therefore, the legislature declared that all persons having any of these descriptions of estates tail, should from thenceforth be seized thereof in fee simple, it thought not of technicality; it thought not of the particular situation in which persons, having right to estates tail, might be accidentally placed, in relation to those estates; it was contemplating, in all their extent, the various mischiefs which it was its object to remove; it intended that all estates tail should be thenceforth converted into fee simple. *Orndoff v. Turman*, 2 Leigh 200.

(ee) Purpose of Act.

In General.—The act of 1776 was meant to cut up estates tail, root and branch; to make them all ipso facto estates in fee; to destroy "all rights, title, interest and estates, claim and demand of the issue, remainderman, and reversioner; "unfettering the estates (as Mr. Pendleton strongly expresses it) or all future interests depending in creation upon those estates tail." And this view is much strengthened when we look at the nature of the subject, and the state of things at the passage of the law. We had just cut ourselves loose from a monarchy and

established a republican form of government. This was the first assembly which met under the new constitution, and it became its duty to remodel the laws, and adapt them to the genius of our infant republic. In this labor, it was natural that the law of entails should attract the earliest attention; a law, mischievous in its effects upon the general interests of society, and peculiarly hostile to the experiment we were then making. *Orndoff v. Turman*, 2 Leigh 200.

The object and policy of the statute was to abolish all estates tail; to prevent perpetuities of property, and to that end, to cut off the issue in tail. The statute abolished all estates tail without exception, or it stopped short of its purpose. *Orndoff v. Turman*, 2 Leigh 200.

The title of the statute of October, 1776, docking entails, is "an act declaring tenants of lands or slaves in tail, to hold the same in fee simple;" and its preamble shows, that it was enacted in lieu of the former methods of docking such estates tail. *Orndoff v. Turman*, 2 Leigh 200.

In the language of Roane, J., in *Tate v. Tally*, 3 Call 354, the act "refers to and reserves all laws then in force for the decision of the question. Whether, in future as well as in past cases, an estate tail would (but for the interposition of the act) have passed or not?" And in the language of Fleming, J., in the same case, "the whole effect of the statute is to convert estates tail in fee simple, and not to alter the meaning of words or destroy the established rules of construction." The doctrine of that case, which seems indeed to be nothing more than the necessary construction of the act according to its terms, has been recognized and acted on in all the subsequent cases. *Tinsley v. Jones*, 13 Gratt. 289.

"There can be but one possible construction of this act, and that is, that it converts estates tail into fee simple, but refers to and reserves all laws then

in force, for the decision of the question, whether in future as well as in past cases, an estate tail would (but for the interposition of the act), have passed or not? If such reference is not made to the laws, what could the legislature mean, after annihilating estates tail, by pointing the act also against estates tail, which persons might hereafter have, and which they might hereafter be entitled to? Why else direct it against estates tail, which shall be created by deed, will, etc.? why else refer to the commencement of a future estate tail? why else use the expression relative thereto, to be held, etc.?" *Tate v. Tally*, 3 Call 354.

The act operates upon all estates tail in possession, and those in reversion or remainder, after the determination of an estate for life, or lives, or of any lesser estate. *Roy v. Garnett*, 2 Wash. 9.

An estate tail in remainder, after the determination of a preceding estate tail, is not affected by the act. Such estate is a greater estate than for life or lives, consequently not within the operation of the act. *Roy v. Garnett*, 2 Wash. 9.

(ff) Operates as Great Universal Recovery.

In General.—The statute was intended to operate as one great universal recovery, and to dock all estates tail whatever; those created before the enactment, instantan and ipso facto, those to be thereafter created, from the moment of their commencement. Such was the construction given to the first statute of 1776 by the legislature, in the Revised Statutes of 1785 and 1792. For, in these, they drop all the expressions of the act of 1776, which gave rise to any doubt on the subject, and adopt the broadest term known to our language: "Every estate in lands or slaves which on the 7th of October, 1776, was an estate tail, shall be deemed from that time to have been, and from thenceforward to continue

an estate in fee simple." *Orndoff v. Turman*, 2 Leigh 200.

Estates Barred Ipso Facto by Statute.—All estates tail and all remainders thereon, are, in all cases, bared ipso facto by our statute. *Jiggetts v. Davis*, 1 Leigh 368; *Bells v. Gillespie*, 5 Rand. 273.

(gg) Embraces Estates Tail Discontinued.

The statute of 1776, embraces the case of an estate tail that has been discontinued, and also while the discontinuance remains in force. The words of the statute "hath, or hereafter may have an estate tail in any lands or slaves in possession," and the subsequent words "shall from thenceforth, or from the commencement of such estate tail, stands ipso facto seized," etc., do not require that the tenant in tail, in whose favor the statute is to operate, should at the time, be seized of an estate tail in possession, etc. Any other construction of the statute, would not only exclude the case of a tenant in tail who had discontinued the entail, and the case of an estate tail abated by the entry of a stranger, on the death of the tenant in tail, but would also exclude the case of a tenant in tail who was disseized. For, a tenant in tail disseized is certainly not seized of the estate tail. Strictly and technically speaking, even his estate is turned to a right; a right of entry. *Orndoff v. Turman*, 2 Leigh 200.

It is not necessary that the estate tail must be restored by the entry of the tenant in tail, in case of seizin, or by the formedon of the tenant or remainderman, in the case of a discontinuance, in order for it to be restored as a fee simple, which the statute would instantly act upon and convert into a fee simple. There is nothing in the statute to justify a contrary conclusion. It alludes to two periods only for its operation, viz, the time of the passage of the act, and the commencement of the estate tail. *Orndoff v. Turman*, 2 Leigh 200.

(hh) Effect upon Estate Tail in Abeyance.

The act of 1776 abolishing estates tail, abolished such an estate, although at the time of the passage of the act the tenant in fee tail had by conveyance aliened the estate, which worked a continuance, and put the estate in abeyance, that is, there was no person who could claim title, but the estate still existed, "in the intelligence, remembrance, and expectation of the law." *Orndoff v. Turman*, 2 Leigh 200.

Tenant in fee tail general aliens in fee, by deed of lease and release with general warranty, in 1769; and tenant in tail lives till 1816, and then dies leaving issue. Held, that the statute of 1776 and 1785 abolishing entails, barred the issue, and converted the estate tail; even though it were in abeyance, into pure and absolute fee, and confirmed the fee simple to the tenant in tail's alienee in fee. *Orndoff v. Turman*, 2 Leigh 200.

"But according to the construction contended for, it did not operate, at the time of its passage, upon an estate tail that was, at that time, turned into a right of entry or a right of action. And if it did not operate on it at that time, it can not operate on it at the time the fee tail is restored by entry or action; for that is not the commencement of the estate tail. It had commenced long before, and was never annihilated. The most that can be contended for it is, that it was suspended or in abeyance, by the discontinuance. The removal of the discontinuance is the restoration, or reanimation of the estate tail, not its commencement." It certainly is not the commencement of the estate tail, according to a strict construction of the statute; and the advocates of a strict construction, have no right to insist upon it as to one clause, and upon a liberal construction as to another. Here then, would be two clauses of estates tail, those restored by entry, and those restored by action.

on which the statute would never operate; to which we might add those cases where the estate tail was under a mortgage at the date of the act. *Orndoff v. Turman*, 2 Leigh 200.

(ii) Effect as Repealing Statute De Donis.

The act of 1776, then, did not repeal the statute de donis, but only provided that any person who now hath, or hereafter may have, an estate in fee tail general or special, etc., shall, from henceforth, etc., stand seized, possessed, etc., in full and absolute fee simple, etc., as if the conveyance had been in fee, etc. The party was not thereby thrown back on his fee conditional at common law, although the statute de donis might be said to be virtually or substantially repealed. It was permitted, as it were, to remain in force, merely for the purpose of enabling tenant in tail to hold the fee absolute and unconditional. *Bells v. Gillespie*, 5 Rand. 273.

(jj) Effect as Restoring Conditional Fee.

See ante, "Estate in Fee Conditional," III, A, 2, c, (3).

"It is plain to be seen by this latter part of the clause concerning estates tail, that if it had either been suggested, or there was some fear entertained, that the act of 1776, having virtually abrogated the statute de donis, it might be supposed that the common-law conditional fee was revived, and stood as before that statute; and the case of *Carter v. Tyler*, 1 Call 165, is perhaps sufficient to show that this idea is not without foundation. The words, therefore, 'as, the law aforesaid was,' I humbly conceive, had reference to the fee tail as created by that statute, to be adjudged of as if that statute was in force." *Bells v. Gillespie*, 5 Rand. 273.

"This idea is fortified by the words of this second member of the clause, which declares, that all estates which, before 1776, 'by the law if it remained

unaltered, would have been an estate in fee tail,' etc. What law is supposed here to have been altered? Surely the statute de donis, and possibly the common law as to conditional fees. But if they both had not been virtually repealed by the act of 1776, the legislature, by this very act of 1785, did expressly alter or abrogate them both by this second clause, so as to make estates which, by the law aforesaid, were either fee tail or fee conditional at the common law, absolute fees. For these reasons, then, those expressions were deemed necessary and proper, and not for the purpose of laying down rules for the interpretation of wills or deeds, or to bind the court down, in its search after the intention, to decisions and reasons, which, by the very act, were rendered inapplicable." *Bells v. Gillespie*, 5 Rand. 273.

cc. Act of 1785.

Provisions of Act.—The act of 1785, ch. 62, declares, that "every estate in lands, etc., which on the 7th of October, 1776, was an estate in fee tail, shall be deemed from that time to have been and thenceforward to continue to be, an estate in fee simple and every estate in land which since hath been limited, or hereafter shall be limited, so that, as the law aforesaid was, such estate would have been an estate tail shall also be deemed to have been, and to continue an estate in fee simple; and all estates which, before the 7th day of October, 1776, by the law if it remained unaltered, would have been estates in fee tail, and which, now by virtue of this act, are and will be estates in fee simple, shall from that time and henceforth be discharged of the conditions annexed thereto by the common law restraining alienations before the donee shall have issue; so that the donees, or persons in whom the conditional fees vested or shall vest, had and shall have the same power over the same estates, as if they were pure and absolute fees." *Bells v. Gillespie*, 5

Rand. 273; *Carter v. Taylor*, 1 Call 165; *Tinsley v. Jones*, 13 Gratt. 289; *Orndoff v. Turman*, 2 Leigh 200.

"This, it was said, proved that the words of discharge are necessary; which, being omitted in the act of 1776, are here supplied, and the act so far amendatory; and in that view, must be prospective only, and not retrospective, according to the former judgments of this court; so, at least, I understood the application of those acts. I am of opinion, these acts make no alteration, but only express in other words, and those not so strong, what is in the former law." *Carter v. Tyler*, 1 Call 165.

The expression "as the law aforetime was," refers to the law as it was before the 7th of October, 1776, when the act converting estates tail into fee simple estates, passed. This is the literal import of the words; and so they were understood by the legislature at the revival of 1819, in which the revised act refers expressly to the law as it was before the 7th of October, 1776. *Bells v. Gillespie*, 5 Rand. 273.

The statute of 1785 abolishing entails, was re-enacted from the statute of 1776 passed for the same purpose. *Seekright v. Billups*, 4 Leigh 90; *Orndoff v. Turman*, 2 Leigh 200; *Bells v. Gillespie*, 5 Rand. 273.

(d) Creation.

In General.—For full discussion, as to what language is sufficient to create an estate in fee tail, see the titles DEEDS, vol. 4, p. 431; HEIR, HEIRS AND THE LIKE; WILLS.

Creation by Operation of Rule in Shelley's Case.—See the title SHELLEY'S CASE, RULE IN.

(e) Mischiefs of Estates Tail.

In General.—That family law (statute de donis), as Pigot calls it, produced many and serious mischiefs, as is told by many writers on the subject, and also by some of the most eminent judges of the English bench. Thus Blackstone (2 Comm. 216) says:

"These statutes were justly branded, as the source of new contentions, and mischiefs unknown to the common law and almost universally considered as the common grievance of the realm." *Orndoff v. Turman*, 2 Leigh 200.

Children Rendered Insubordinate.—

As a result of the passage of the statute de donis the children grew disobedient, when they could not be set aside. 2 Blackstone Comm. 216; *Orndoff v. Turman*, 2 Leigh 200.

Farmers Ousted of Lease.—

Farmers were ousted of their lease, made by the tenant in tail. 2 Blackstone Comm. 216; *Orndoff v. Turman*, 2 Leigh 200.

Creditors Defrauded.—

Creditors were defrauded of their debts, the land being limited by the statute to the issue. 2 Blackstone Comm. 216; *Orndoff v. Turman*, 2 Leigh 200.

Purchasers Deprived of Purchases.—

Innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought. 2 Blackstone Comm. 216; *Orndoff v. Turman*, 2 Leigh 200.

Treason Encouraged.—

Treasons were encouraged, estates tail being not liable to forfeiture longer than for the tenant's life. 2 Bl. Comm. 216; *Orndoff v. Turman*, 2 Leigh 200.

(f) Devices for Defeating Estates Tail. aa. Discontinuances.

(aa) In General.

The sense of wise men, and the general bent of the people, has ever been against making lands perpetually unalienable. The utility of the end, was thought to justify any means to attain it. Nothing could be more agreeable to the law of tenures, than a male fee unalienable. But this bent, to set property free, allowed the donee, after a son was born, to destroy the limitation, and break the condition of his investiture. No sooner had the statute de donis repeated, what the law of the tenures said before, that the tenor of the grant should be observed, than the same bent permitted tenant in tail of

the freehold and inheritance, to make an alienation voidable only, under the name of a discontinuance. *Orndoff v. Turman*, 2 Leigh 200.

(bb) Manner of Working Discontinuance.

aaa. Feoffment of Tenant in Tail.

The effect of a feoffment of tenant in tail, upon the estate tail, turning it into a right of action by the issue, or by those in remainder or reversion, so that it can not be regained by mere entry, is what is called a discontinuance. *Orndoff v. Turman*, 2 Leigh 200.

bbb. Bargain and Sale or Lease and Re-lease.

Without Warranty.—A bargain and sale or lease and re-lease of tenant in tail without warranty, does not affect the interest of the issue, etc., and can not, therefore, work a discontinuance. *Orndoff v. Turman*, 2 Leigh 200.

With Warranty.—Although a bargain and sale, or lease and re-lease of tenant in tail, without warranty, does not affect the interest of the issue, etc., and can not, therefore, work a discontinuance, yet a warranty annexed to such a conveyance, will, in general, work a discontinuance as effectually as feoffment. *Co. Litt.* 328a, 329b. *Orndoff v. Turman*, 2 Leigh 200.

ccc. Necessity of Descent to Work Discontinuance.

The expression of Coke (*Co. Litt.* 329a) "it is not a warranty only that maketh a discontinuance, but the warranty and descent upon him that right hath together," induced the belief at one time that the discontinuance did not take place until the actual descent of the warranty, and of course, until the death of the tenant in tail. But further examination caused such belief to be changed, and it is now the better opinion that warranty operates as an immediate discontinuance in all cases, where, if the tenant in tail were to die at the moment of making the conveyance, the obligation of the warranty,

and the right to the estate tail, would devolve upon the same person. This is so, because, in all such cases, the warranty operates as wrongfully in relation to the issue, as the mere feoffment of the tenant in tail, and indeed more so, for while the feoffment only drives the issue to his action, the warranty goes further, and will rebut him, if he have assets by descent. This opinion derives strength from the consideration, that all the cases put by *Litt.*, to show that warranty alone would not effect a discontinuance, are cases where, at the time of the conveyance, the heir to the warranty, and the heir to the estate tail, were not the same persons. Where at the time of the execution of a deed from a tenant in tail, she had issue, the same person would unquestionably have been heir to the warranty, and to the estate tail. In such case, therefore, the deed operated a discontinuance, or in other words, turned it to a right, or to speak more accurately to a right of action. *Orndoff v. Turman*, 2 Leigh 200.

ddd. Fines and Recoveries Operating as Discontinuances.

Fines and recoveries, when they operate as mere assurances, without barring the entail, effect a discontinuance. *Orndoff v. Turman*, 2 Leigh 200.

(cc) Effect of Discontinuance.

In General.—While the discontinuance remains in force, the new estate, the fee simple which passed to the feoffee, will subsist until avoided by the action of the issue, etc., or until the remitter of the issue in tail, etc., or the determination of the discontinuance. 1 *Prest. on Estates* 436, 7, 2 *Id.* 462, 3. *Orndoff v. Turman*, 2 Leigh 200.

Effect of Discontinuance as Putting Right to Estate Tail in Abeyance.—*Quære*, whether the right to the estate tail is, after a discontinuance, and during the life of the tenant in tail, placed in abeyance? Touching this point.

Cabell, J., in *Orndoff v. Turman*, 2 Leigh 200, says: "How far the right to the estate tail is, after a discontinuance, and during the life of tenant in tail, placed in abeyance, I feel myself unable to decide. The books are very contradictory on this point. Littleton, §§ 649, 650, and Coke's commentary on them, seem to me to indicate, that it is in abeyance. But there are strong opinions to the contrary. In *Sheffield v. Ratcliffe*, Hob. 335, it is said, that 'the feoffment of tenant in tail, gives away all the estates the tenant in tail feoffer had, as concerning himself, or any benefit that he may receive. But, as concerning his issue inheritable to the entail, and for their good, there remains in him a right of that entail, by force of the statute of Westm. 2, for the good of those that are saved by that statute against his alienation.' Again (Ibid. 336), 'a tenant in tail hath the whole estate tail and all the right of it in himself, and may finally and totally bar it, as well against the issue, as against himself, by a common recovery, notwithstanding this statute; but by a feoffment he could not, by reason of this statute. And, therefore that chief and mere right (which, though it be discontinued, is not barred by the feoffment) remains where it was not aliened; for it is not in his power by that kind of conveyance.' Again (Ibid. 338), 'that there is still a right in the tenant in tail against this feoffment, appears in that he hath still power to bind it more finally and totally, by his fine or recovery, if he pursue them rightly.' And (Ibid. 339), 'Littleton was confounded in himself that made an abeyance of a tenant of totum statum suum, and yet made it but an estate for life.' And in the case of *Stone v. Newman*, in the exchequer chamber, Cro. Car. 427, six of the judges of England said, that 'although a feoffment by tenant in fee simple gives all estates, interests and rights, yet it is not so in case of a feoffment made tenant in tail; because the estate

tail is an incident inseparable to his person and blood, and can not be transferred to any other.'"

But whether the right to the estate tail, after a discontinuance, and during the life of the tenant in tail, be in abeyance, or lie dormant in the tenant in tail, it is absolutely certain, that the tenant in tail, after such discontinuance, has the right and the power, with the assistance and co-operation of his alienee, to suffer a common recovery, which will enure to corroborate and confirm the estate of his alienee, and will bar the issue, etc. *Orndoff v. Turman*, 2 Leigh 200; *Sheffield v. Ratcliffe*, Hob. 334; *Lincoln College case*, 3 Rep. 58, b; *Chudleigh's case*, 1 Rep. 135, 136; per Gawdy justice; 1 Prest. Con. 138.

(dd) Effect of Removal of Discontinuance.

The removal of a discontinuance is the restoration, or reanimation, of the estate tail, not its commencement. *Orndoff v. Turman*, 2 Leigh 200.

bb. Barring the Entail.

(aa) Fines and Recoveries.

aaa. In General.

Estates tail, and all remainders thereon, may be barred in England and might have been barred formerly in Virginia by fine and recovery. *Jiggetts v. Davis*, 1 Leigh 368; *Bells v. Gillespie*, 5 Rand. 273; *Carter v. Tyler*, 1 Call 165.

bbb. Definition of Common Recovery.

A common recovery is a conveyance on record, invented to give a tenant in tail an absolute power to dispose of his estate in fee simple. *Orndoff v. Turman*, 2 Leigh 200.

A common recovery is a fictitious proceeding founded on no statute law, but growing out of public convenience, and the decisions of the courts. It is a proceeding to which the issue, the remainderman, or the reversioner, are not parties, and which gives them no recompense. *Orndoff v. Turman*, 2 Leigh 200.

ccc. Origin and Nature of Common Recoveries.

Entailed estates, by the statute *de donis*, were made unalienable, and neither the issue, nor the remaindermen could be barred, and this was at first considered as a very wise provision, and great encomiums were made upon this statute. But it was found by experience in a very little time, that this statute had produced very great inconveniences; inconveniences to the crown; inconveniences to the public; and to many private persons; to the crown, as it prevented forfeitures, and greatly increased the power of the barons; to the public, as it was prejudicial to trade and commerce, to have estates always continue in the same families, without even a power of raising money upon them; and to private persons, to have their estates so fettered, that they could not make provision for younger children, nor raise money on their estates, though their necessity were never so great. *Orndoff v. Turman*, 2 Leigh 200.

Although the mischiefs incident to estates tail were so great, as to be almost universally considered, as the common grievance of the realm (see ante, "Mischiefs of Estates Tail," III, A, 2, c, (4), (e), still the power of the nobles prevented the repeal of the statute *de donis*, and after suffering under it long, common recoveries first, and then fines, were brought to bear upon it, and these, together with some other causes, so weakened its form, and narrowed its range, as almost to bring back the subject to the ground occupied under the conditional fees at common law. *Orndoff v. Turman*, 2 Leigh 200.

At an early period, the mischiefs of the statute had been felt, and remedies found to mitigate them, which had become settled rules of law, long before the establishment of the colony of Virginia; so much so, that the right to suffer a recovery or levy a fine, was

considered one of the inseparable incidents of an estate tail; and an attempt to create such estate, divested of that power, would have been as impotent, as the effort to divest tenant in fee of the power of alienation. *Orndoff v. Turman*, 2 Leigh 200.

In *Carter v. Tyler*, 1 Call 165, 182, Mr. Pendleton says, the fine and recovery at an early period was sanctioned by the courts of England, "and so became as much a law of that country, as the statute itself. Our ancestors (he continues) brought hither with them, both laws as a rule of property, and the fine and recovery might have been used here, if the forms could be preserved, until the legislature should interpose to prohibit them." *Orndoff v. Turman*, 2 Leigh 200.

The statute *de donis*, however, was eluded by the effect which the courts, in the reign of Edward IV, gave to the fictitious proceedings in common recoveries, which when suffered by tenants in tail, were held to be an effectual destruction of estates tail. "And these recoveries, however clandestinely reduced, are now," says Blackstone (*Ibid.*, 117), "become a most common assurance of lands; and are looked upon as the legal means by which tenant in tail may dispose of his lands and tenements." And the effect of such conveyance is to bar, not only the issue, but the remainderman and reversioner. And, in the reign of Henry VIII, it was enacted, that a fine, duly levied by tenant in tail, should bar the issue and all claiming under such entail. *Orndoff v. Turman*, 2 Leigh 200.

It was in the power of the donee in tail who had discontinued the estate tail, to suffer a common recovery with the assistance and co-operation of the person who had the freehold, and such recovery would operate to corroborate and confirm the estate of his alienee, and to bar the issue in tail, and the reversioner and remainderman. *Orndoff v. Turman*, 2 Leigh 200.

ddd. Fiction in Taltarum's Case.

The remedy afforded by a discontinuance was a small relief. At last the people having groaned for about 200 years, under the inconveniences of so much property being unalienable; and the great men to raise the pride of their families and (in those turbulent times) to prevent their estates from forfeitures, preventing any alteration by the legislature; the same bent threw out a fiction in Taltarum's case, by which tenant in tail of the freehold and inheritance, or with consent of the freeholder, might alien absolutely. Public utility, adopted and gave a sanction to the doctrine, for the real political reason to break entails; but the ostensible reason, from the fictitious recompense, hampered succeeding times, how to distinguish cases, which were within the false reason given, but not within the real policy of the invention. *Orndoff v. Turman*, 2 Leigh 200.

eee. Estates Barred Though in Abeyance.

It is clear, that in England, an estate tail, though in abeyance, might be barred and destroyed by a common recovery. *Orndoff v. Turman*, 2 Leigh 200.

fff. Abolition of Fines and Recoveries.

The legislature by the acts of 1705, 1710, prohibited the barring of estates tail by fines and recoveries, and they were never afterwards tolerated. *Orndoff v. Turman*, 2 Leigh 200.

In *Carter v. Tyler*, 1 Call 165, 182, Mr. Pendleton says: "In the revised law of 1748, the prohibition of fines and recoveries, and the permission of writs of *ad quod damnum* were continued till the revolution." *Orndoff v. Turman*, 2 Leigh 200.

(bb) Conveyances by Grant, Bargain and Sale, etc.

But there are other conveyances by tenants in tail, which do not bar the issue. Conveyances by grant, by bargain and sale, lease and release, covenant to stand seized, and by release

and confirmation in enlargement of an estate, only operate on the right of the party conveying. They, therefore, transfer only the right, that is, the estate which the party has a right to convey. Hence they are called rightful conveyances (*Harg. Co. Litt.* note 1, § 1), and sometimes innocent conveyances, because, in the language of Littleton (§ 600), "they do no hurt or damage to other persons who have right therein." It was formerly doubted, whether the alienation of tenant in tail, by any of these conveyances, passed any thing more than an estate during his life. But it is not definitely settled, by the authorities cited in the argument for the appellees, that such alienation by tenant in tail, passes to the grantee, bargainee, etc., an estate of inheritance, a base fee simple, which is unimpeachable during the life of the tenant in tail, and which will moreover last as long as the estate tail shall continue, unless it shall be avoided by those who have right to avoid the same; and that until it shall be so avoided, such estate has all the incidents of a fee simple. *Orndoff v. Turman*, 2 Leigh 200.

(cc) Conveyances by Feoffment.

But a conveyance by feoffment is attended with livery of seizin. It therefore operated on the possession, and effected a transmutation thereof; and as possession and freehold were synonymous terms, no person being considered to have the possession of lands but he who had himself, or held for another, at least an estate of freehold in them, a conveyance which transferred the possession, must necessarily be considered as transferring an estate of freehold, or, to speak more accurately, the whole fee. A feoffment, therefore, conveying the whole fee, and not merely the right or estate which a party had a right to convey, was called a tortious conveyance. *Harg. Co. Litt.* 271, b. note 1, § 1. But tenant in tail had an estate of inheritance (although

a particular estate) even after the statute de donis. "Hence (says Butler), if he made a feoffment, it did not, during his life, effect or prejudice the issue. Thus his alienation was primarily, a lawful transfer; the alienee came in by right, and his estate could not be impeached during the life of the donee. *Orndoff v. Turman*, 2 Leigh 200.

The estate transferred by the feoffment of the tenant in tail, is therefore, something more than that which was transferred by his mere bargain and sale, lease and release, etc. It is not a base fee that may be defeated, at any time after the death of the tenant in tail, by the mere entry of the issue, and must necessarily determine on the failure of issue; but it is a fee simple defeasible only by the action of the issue, or of those in remainder or reversion. For the estate of the tenant in tail, and of those in remainder and reversion, is turned, by the feoffment, into a right of action. *Orndoff v. Turman*, 2 Leigh 200.

(dd) Private Acts of Legislature.

aaa. In General.

The legislature by an act passed in October, 1705, and again in 1710 prohibited the barring of estates tail by fines and recoveries, reserving to the legislature the sole power of docking entails. This power was exercised by acts passed on each particular occasion; these acts gave a real recompense, instead of the fictitious one by fine and recovery; and were rather a change of the land on which the estate tail was to operate, than a destruction of that estate. *Orndoff v. Turman*, 2 Leigh 200.

There are several other acts of the colonial assembly showing the spirit of that body for preserving entails; of these, Mr. Pendleton, in the case of *Carter v. Tyler*, 1 Call 165, 182, gives a succinct but clear account. It may seem a little strange, at first sight, that our assembly should be inclined to cherish what had been found so mis-

chievous in the mother country; but we must recollect, that we were then a recent people, forming a distant province of the empire; that the spirit of commerce had never visited our shores; nor was that loftier spirit yet awakened which afterwards gave birth to our revolution. In the case already referred to Mr. Pendleton says, "In the revised law of 1748 the prohibition of fines and recoveries, and permission of writs of ad quod damnum, were continued till the revolution." *Orndoff v. Turman*, 2 Leigh 200.

After the abolition of fines and recoveries, the estates tail could be barred by private acts of the assembly, in each particular case where the estates was of greater value than £200 sterling. *Orndoff v. Turman*, 2 Leigh 200.

It is formerly the practice of the legislature to dock estates tail, by private acts, in favor of the persons to whom the tenants in tail had sold with warranty, and the effect of such docking was to vest the fee simple in the alienee. *Orndoff v. Turman*, 2 Leigh 200.

bbb. Application as Substitute for Common Recovery.

These private acts of the assembly were applied to docking estates tail, in every variety of circumstance or situation, in which a common recovery could be resorted to in England, for that purpose. *Orndoff v. Turman*, 2 Leigh 200.

ccc. Particular Examples.

Sometimes the entail was docked in favor of the tenant in tail himself, by vesting the entailed lands in him in fee simple; November, 1776. ch. 73, 8 Hen. Stat. at Large 448. Sometimes it was docked in favor of a person to whom the tenant in tail had previously contracted to sell it. February, 1772, ch. 77, 78, Id. 641, 643. *Orndoff v. Turman*, 2 Leigh 200.

The act of November, 1769, ch. 77, Id. 455, presents a very striking case.

It is as follows: Richard Johnson, being seized of lands in tail, with divers remainders over, conveyed the same by indenture bearing date June 7, 1744, to John Robinson, who, with others claiming under him, remained in possession until November, 1769. It being then discovered that Johnson had only an estate tail in the lands, and that the purchasers were likely to be disturbed in their title, and the said Johnson and his family involved in law suits on that account (from which it is manifest that he sold with warranty) an application was made to the legislature, in the year 1769 (twenty-five years after the sale, and while the discontinuance worked by the warranty was still in force); whereupon an act was passed docking the estate tail, and vesting the entailed lands in the purchasers under Johnson. *Orndoff v. Turman*, 2 Leigh 200.

(ee) Writ of Ad Quod Damnum.

Although estates tail were not permitted, after the acts of 1705, 1710, to be barred by fines and recoveries, yet this could be accomplished by a writ of ad quod damnum, where the estate was of less value than £200 sterling. *Orndoff v. Turman*, 2 Leigh 200.

In 1734 (Aug. c. 6, § 6, 4 Stat. Larg. 400), the legislature, judging that a small tract of land would not support and perpetuate a family, introduced the writ of ad quod damnum, for docking entails. *Carter v. Tyler*, 1 Call 165.

In the revised law of 1748, the permission of the writ of ad quod damnum, was continued till the revolution. *Orndoff v. Turman*, 2 Leigh 200; *Carter v. Tyler*, 1 Call 165, 182.

Tenant in tail (before our act of assembly for docking entails) might by a deed of bargain and sale, convey a base fee (a defeasible estate) voidable by the issue in tail, but not by himself. Therefore, a tenant in tail, having bargained and sold to his own heir at law in fee, could not afterwards sue out a writ of ad quod damnum to bar the en-

tail; being no longer seised of an estate tail, which was absolutely necessary to authorize him to sue out such a writ. *Gleeson v. Scott*, 3 Hen. & M. 278.

(ff) Barring Ipso Facto by Acts of 1776, 1785.

See ante, "Abolition by Statute," III, A, 2, c, (4), (c).

(g) Incidents.

Inalienable.—Estates tail, by the statute de donis were made inalienable and neither the issue nor the remainderman could be barred. *Orndoff v. Turman*, 2 Leigh 200. See ante, "Provisions of Statute De Donis," III, A, 2, c, (4), (b), bb; "Barring the Entail," III, A, 2, c, (4), (f), bb.

Barrable.—See ante, "Barring the Entail," III, A, 2, c, (4), (f), bb.

3. Estates Not of Inheritance—Life Estates.

a. Definition.

An estate for life is a freehold estate, not of inheritance, but which is held by the tenant for his own life or the life or lives, of one or more other persons, or for an indefinite period, which may endure for the life or lives of persons in being and not beyond a period of life. 1 Washb. Real Prop.; Co. Litt. 42a; 1 Bouv. L. Dict.

b. Nature of Life Tenant's Estate.

Seised of Immediate Freehold in Possession.—The tenant for life is seized of the immediate freehold estate in possession. *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664.

Possession Extends to Subsurface as Well as Surface.—The possession extends from top to bottom, to the subsurface as much as to the surface—in other words, to the land as a whole—or the tenant for life has a freehold as well as the tenant in fee. Co. Litt. 43b, 4 Com. Dig. 62; *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664.

Mines of oil and of gas in place are land, and, as such, go with the inheritance. A life tenant is vested with the ownership thereof as land, as being

seised of the immediate freehold in his possession. *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664.

Present Ownership May Not Be in Life Tenant.—The owner of the fee in expectancy may be vested in right of present ownership, but not have the right of present possession and enjoyment, as where a grantor conveys an estate in fee, with a reservation of a life estate in himself. *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664. See also, *Hurst v. Hurst*, 7 W. Va. 289.

It is well settled that a fee may be granted with reservation of the usufruct for life. *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664.

c. Kinds.

(1) Conventional Life Estates.

A conventional life estate is one created by the express act of the parties, by deed or will. 2 *Minor's Inst.* 97; *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664.

Thus, a conventional life estate is created, where a grantor conveys by deed an estate in fee simple, but retains full control of the land granted in all respects and for all purposes during his lifetime. *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664.

An estate for the tenant's own life is, in the estimation of the law, a better one and of a higher nature to him, than one for the life or lives, of another or others. *Hurst v. Hurst*, 7 W. Va. 289, 296.

It has been held, that in construing grants when the language is equivocal, that construction is given which is most favorable to the grantee; where a grant is made to one with no other words of limitation, he will be entitled to an estate during his own life, if the estate of the grantor will allow him to convey such an estate. *Hurst v. Hurst*, 7 W. Va. 289, 296.

So when the owner of land in fee simple, conveys the land in fee simple, reserving therein a "life estate," it should be construed as meaning an es-

tate for the life of the grantor is reserved. *Hurst v. Hurst*, 7 W. Va. 289, 296.

(2) Legal Life Estates.

(a) Estates by the Curtesy.

See the title CURTESY, vol. 4, p. 148.

(b) Estates in Dower.

See the title DOWER, vol. 4, p. 782.

d. Creation.

In General.—As to what words are sufficient in a deed or will to create a life estate, see the titles DEEDS, vol. 4, p. 431; WILLS.

Estate Created by Reservation.

Kerr, in his valuable work on Real Property (vol. 1, § 588) says: "A life estate may be created by reservation as well as grant. Thus, where land is granted reserving to the grantor the use and control of the lands during his natural life, the reservation creates a life estate in the land granted," citing several authorities. *McDougal v. Musgrave*, 46 W. Va. 509, 33 S. E. 281. See the title DEEDS, vol. 4, p. 437.

e. Incidents.

(1) Alienation.

Burks, J., in delivering the opinion in *Camp v. Cleary*, 76 Va. 140, says: "There is respectable authority, however, for the proposition that a condition not to alien may be annexed to estates for life * * *. 'Freedom of alienation,' says Professor Minor, 'is not one of the incidents of an estate for life, * * * nor could it be, without sometimes endangering the interests of him in reversion or remainder. There is, therefore, no repugnancy in a condition prohibiting it and such conditions are good and valid.'" 2 *Minor's Inst.* 252. See the title RESTRAINT ON ALIENATION.

(2) Tenant's Right to Use and Enjoyment.

(a) In General.

A tenant for life has the right of use and enjoyment, "the immediate freehold, and therefore the sole right to

hold, use, and enjoy." *Jarvis v. Grafton*, 44 W. Va. 453, 30 S. E. 178; *Koen v. Bartlett*, 41 W. Va. 559, 566, 23 S. E. 664, 666.

(b) Right to Profits.

aa. In General.

A life tenant is entitled to profits issuing from the land, during the time his freehold estate continues. *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664, 666.

The tenant of an estate for life, unless restrained by covenant or agreement, has a right to the full enjoyment and use of the land and all its profits during his estate therein, including mines of oil or gas open when his life estate begins, or lawfully opened and worked during the existence of such estate. *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664.

An owner in fee simple makes an oil and gas lease for a term of five years, and as much longer as the premises are operated for oil and gas, or the rent for failure to commence operating is paid for, among other things, one-eighth part of all oil produced and saved, to be delivered in the pipe lines to the credit of the lessor. The lessor then sells and conveys one undivided moiety or the one-sixteenth part of all the oil produced and saved. Afterwards, but before any oil is bored for or produced, the lessor sells, grants, and conveys the land in fee simple to his six children, to each one a part, by metes and bounds, in consideration of natural love and affection, by deed of general warranty, "except that the party of the second part takes the same subject to any lease for oil or gas made by the party of the first part or any sale of royalty for oil or gas made by him;" and, by the same deed, he retains full control of said land in all respects, and for all purposes, during his lifetime. Soon thereafter oil wells are bored, and oil produced, saved, and put in the pipe lines in large quantities. Held, the one-eighth

royalty goes of right to the tenant for life, and his grantees during the continuance of the estate for life, and not to the owners in fee of the estate expectant thereon. *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664.

bb. Meaning of Term "Profit."

The term "profit," in law, comprehends the produce of the soil, whether it arise above or below the surface, including the produce of mines as well as herbage growing on the surface. *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664.

cc. Entitled to Usufruct of Land.

The life tenant has the usufruct of the land. *University v. Tucker*, 31 W. Va. 621, 8 S. E. 410.

dd. Entitled to Annual Produce.

The life tenant can enjoy the annual produce of the land during life. *University v. Tucker*, 31 W. Va. 621, 8 S. E. 410.

ee. Right to Work "Open Mines."

See the title MINES AND MINERALS.

In General.—The rule is well settled that a tenant for life, when not precluded by restraining words, may not only work "open mines," but may work them to exhaustion. *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664.

It is settled law that the rents of an "open mine" are income and go to the tenant for life. *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664.

Lawfulness of severance and conversion into personalty seems to be the reason of the doctrine of the life tenant's right to rents and profits produced from "open mines." *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664.

What Constitutes "Open Mine."—A mine lawfully leased to be opened is an "open mine," within the reason of the rule. *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664.

A mine lawfully leased to be opened, being an "open mine" within the reason of the rule, when lawfully opened and worked, during the time that the

freehold estate of the life tenant continues, the profits issuing therefrom, thus being lawfully severed and produced, belong of right to him. *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664.

(3) Duty to Preserve Corpus of Inheritance.

It is the duty of the life tenant to spare and preserve the corpus of the inheritance. *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664.

(4) Liability for Waste.

See the title WASTE.

(a) In General.

It is well settled that a life tenant is liable for committing waste, causing injury to the estate of inheritance. *University v. Tucker*, 31 W. Va. 621, 8 S. E. 410.

While the tenant can enjoy the annual produce of the land during life, yet he must not do any damage to the absolute property in the remainderman. *University v. Tucker*, 31 W. Va. 621, 8 S. E. 410.

(b) What Constitutes Waste by Tenant.

In General.—Any act on the part of a tenant, by which the substance of the inheritance is taken, constitutes waste. *University v. Tucker*, 31 W. Va. 621, 8 S. E. 410.

A life tenant can not dig for gravel or lime, clay, brick, earth, stone, or the like, unless for repair of the buildings, or the manuring of the lands. *University v. Tucker*, 31 W. Va. 621, 8 S. E. 410.

Cutting Turf on Bog Lands.—The life tenant can not cut turf on bog lands for sale. 1 Co. Litt., 54 b. *University v. Tucker*, 31 W. Va. 621, 8 S. E. 410.

Taking Rock for Paving Streets.—It is held, to be waste for the life tenant to take rock from the land for the purpose of paving the streets of a city. *University v. Tucker*, 31 W. Va. 621, 8 S. E. 410.

Taking Clay for Manufacture of Brick.—The taking of clay from the

soil by a life tenant, and manufacturing the same into brick, and selling the same, is waste. It is taking the very substance of the inheritance. *University v. Tucker*, 31 W. Va. 621, 8 S. E. 410.

(c) Action to Enjoin Waste by Life Tenant.

A contingent remainderman may maintain an injunction to restrain waste by a life tenant. *University v. Tucker*, 31 W. Va. 621, 8 S. E. 410. See the titles INJUNCTIONS; REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS.

(5) Duty of Remainderman or Reversioner to Refrain from Injuring Life Estate.

See the title REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS.

While it is the duty of the life tenant to spare and preserve the corpus of the inheritance, it is the duty of the owner of the fee in expectancy to wait, for they have no present right of use and enjoyment, and can not exercise any right by anticipation. Their respective duties point out their respective rights. *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664.

The owners of the inheritance have no more right to approach by a tunnel, and break and enter the superficial close of a life tenant, than they have to break and enter his close on the surface. Their estate of inheritance is vested in right of interest, but not in right of enjoyment. Their estate is expectant on the determination of the life estate. *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664.

(6) Action to Recover Damages for Injury to Estate.

In General.—A tenant for life in actual possession, may sue for any trespass affecting his immediate residential interest. *Jordan v. Benwood*, 42 W. Va. 312, 26 S. E. 266; *Yeager v. Fairmont*, 43 W. Va. 259, 27 S. E. 234. See the title TRESPASS.

A life tenant in possession is entitled to sue for damages done the property, by which the rental value thereof is diminished or destroyed. *Johnson v. Chapman*, 43 W. Va. 639, 28 S. E. 744.

Where Injury Affects Both Life Estate and Remainder.—Where a tort upon realty affects both the estates of a tenant for life and that of a remainderman or reversioner, each may sue separately, and, as the damages are apportionable, each recovers damages to cover the injury done to his estate. Neither can recover damages covering the entire injury to both estates. *Jordan v. Benwood*, 42 W. Va. 312, 26 S. E. 266; *Yeager v. Fairmont*, 43 W. Va. 259, 27 S. E. 234.

Where an adjoining lot injured by raising the grade of a street, and casting surface water thereon, is held by M. E. as a tenant for life, and G. G. is entitled to the remainder in fee, and said M. E. and G. G. are engaged in a mercantile business as partners in a storeroom upon said lot, which storeroom is permanently injured by said surface water, said M. E. and G. G. can not recover in the same action for damages done to the life estate, and the remainder, and the joint mercantile business by raising the grade of said street, and causing the surface water to flow on said lot. *Yeager v. Fairmont*, 43 W. Va. 259, 27 S. E. 234; *Jordan v. Benwood*, 42 W. Va. 312, 26 S. E. 266. See the title **ABUTTING OWNERS**, vol. 1, p. 60.

Measure of Damages.—The tenant for life recovers for damages only for present injury, covering his entire term. *Jordan v. Benwood*, 42 W. Va. 312, 26 S. E. 266; *Yeager v. Fairmont*, 43 W. Va. 259, 27 S. E. 234.

Where a life tenant in possession sues for damages to property, by which the rental value thereof is diminished or destroyed, the measure of damages, as in other cases, is the amount necessary to make good the loss, which must be determined by the jury from

the facts and circumstances, shown in the evidence. *Johnson v. Chapman*, 43 W. Va. 639, 28 S. E. 744.

(7) Action to Enjoin Unlawful Taking of Premises.

A tenant for life having the immediate freehold, and therefore the sole right to hold, use, and enjoy, may sue out an injunction to restrain a town from opening streets and alleys through his premises, against his consent, without first having the same lawfully taken and condemned, and compensation of such person, ascertained in the manner prescribed by law. *Jarvis v. Grafton*, 44 W. Va. 453, 30 S. E. 178. See the titles **EMINENT DOMAIN**, ante, p. 66; **INJUNCTIONS**.

(8) Liability for Taxes.

A life tenant must himself pay the taxes upon the property. *Irwin v. Zane*, 15 W. Va. 646. See the title **TAXATION**.

Where a life tenant and the remainderman are in possession of real estate, which is assessed in the name of the remainderman, and the taxes are paid, by him, the estate of said life tenant will not be forfeited to the state by reason of his failure to have said life estate assessed on the land books, or to pay the taxes thereon. *McDougal v. Musgrave*, 46 W. Va. 509, 33 S. E. 281.

(9) Forfeiture.

See the title **PENALTIES AND FORFEITURES**.

Mere words can never work a forfeiture of an estate for life. *Gale v. Oil Run Petroleum Co.*, 6 W. Va. 200.

The denial orally, by a tenant for life, of his landlord's title, and the assertion that he owns the land in fee, owes no rent for them, does not work a forfeiture of the term, or authorize the landlord to maintain ejectment for the land demised. *Gale v. Oil Run Petroleum Co.*, 6 W. Va. 200.

If a tenant for life by deeds of lease and release, under the statute of uses, conveys the fee, it creates no forfeiture,

because the conveyance has its operation under the statute of uses, and therefore the grantor could pass no greater estate than he could lawfully part with. *Pendleton v. Vandevier*, 1 Wash. 381.

Forfeiture of Life Estate in Slaves.

—As to forfeiture of a life estate in slaves by removal of such slaves from the state by the life tenant, see the titles **PENALTIES AND FORFEITURES; SLAVES.**

(10) Merger in Fee.

As to merger of a life estate in a fee simple, see the title **MERGER.**

(11) Effect of Rule in Shelley's Case.

As to the effect of the operation of the rule in Shelley's case, enlarging a life estate into a fee simple or a fee tail, see the title **SHELLEY'S CASE, RULE IN.**

B. ESTATES LESS THAN FREEHOLD.

1. Estates for Years.

See the title **LANDLORD AND TENANT.**

Power of Alienation.—Burks, J., in delivering the opinion in *Camp v. Cleary*, 76 Va. 140, says: "There is respectable authority, however, for the proposition, that a condition not alien may be annexed to estates for years * * *. 'Freedom of alienation,' says Professor Minor, 'is not one of the incidents of an estate for years, * * * nor could it be, without sometimes endangering the interests of him in reversion or remainder. There is, therefore, no repugnancy in a condition prohibiting it and such conditions are good and valid.'" 2 Minor's Inst. 252. See the title **RESTRAINT ON ALIENATION.**

Action for Injury to Estate.—A tenant for years in actual possession may sue for any trespass affecting his immediate residential interest. *Jordan v. Benwood*, 42 W. Va. 312, 26 S. E. 266; *Yeager v. Fairmont*, 43 W. Va. 259, 27 S. E. 234.

Measure of Damages.—The tenant

for years recovers for damages only for present injury, covering his entire term, if it affects the entire term. *Jordan v. Benwood*, 42 W. Va. 212, 26 S. E. 266; *Yeager v. Fairmont*, 43 W. Va. 259, 27 S. E. 234.

Forfeiture.—Mere words can never work a forfeiture of an estate for years. *Gale v. Oil Run Petroleum Co.*, 6 W. Va. 200.

The denial orally, by a tenant for years, of his landlord's title, and the assertion that he owes the land in fee, and owes no rent for them, does not work a forfeiture of the term, or authorize the landlord to maintain ejectment for the land demised. *Gale v. Oil Run Petroleum Co.*, 6 W. Va. 200.

2. Estates at Will.

See the title **LANDLORD AND TENANT.**

a. Definition.

A tenancy at will is created when lands or tenements are let by the one man to another to have and to hold to him at the will of the lessor by force of which lease lessee is in possession. In such case, the lessee is called a tenant at will, because he has no certain or sure estate, for the lessor may put him out at any time it may please him. *Jones v. Temple*, 87 Va. 210, 12 S. E. 404.

b. At Will of Both Parties.

In General.—Lord Coke says, every lease at will must, at law, be at the will of both parties. *Jones v. Temple*, 87 Va. 210, 12 S. E. 404. See also, *Cowan v. Radford Iron Co.*, 83 Va. 547, 3 S. E. 120; *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923; *Trees v. Eclipse Oil Co.*, 47 W. Va. 107, 34 S. E. 933.

Blackstone says (Book 2, 135): "But every estate at will is at the will of both parties, landlord and tenant; so that either of them may determine his will, and quit his connection with the other at his own pleasure." *Cowan v. Radford Iron Co.*, 83 Va. 547, 3 S. E. 120.

Kent says (vol. 4, p. 111): "It was determined very anciently by the common law, and upon principles of justice and policy, that estates at will were equally at the will of both parties, and neither of them was permitted to exercise his pleasure in a wanton manner, and contrary to equity and good faith." *Cowan v. Radford Iron Co.*, 83 Va. 547, 3 S. E. 120.

As was said by Downey, C. J., in *Knight v. Indiana Coal and Iron Co.*, 47 Ind. 105: "It is a well-settled and well-known rule of law that a lease or estate, which is at the will of one of the parties, is equally at the will of the other party. One of them is no more and no further bound than the other. As the lessee in this case had the clear right, at his will, to terminate the tenancy at any time, so also had the lessor. It can not be otherwise." *Cowan v. Radford Iron Co.*, 83 Va. 547, 3 S. E. 120.

Presumption as to Will of Lessee.—Therefore, when a lease is made to have and to hold at the will of the lessor the law requires it to be at the will of the lessee also. *Jones v. Temple*, 87 Va. 210, 12 S. E. 404.

Presumption as to Will of Lessor.—So it is, when the lease is made to have and to hold at the will of the lessee; this must be also at the will of the lessor. *Jones v. Temple*, 87 Va. 210, 12 S. E. 404.

c. Kinds of Estates.

(1) Estates Created by Express Words.

Estates at will may be and usually are created by express words. *Jones v. Temple*, 87 Va. 210, 12 S. E. 404.

(2) Estates Arising by Implication.

In General.—Estates at will may arise by implication as well as by express words. *Jones v. Temple*, 87 Va. 210, 12 S. E. 404.

Tenants for Years Holding Over and Continuing to Pay Rent.—Thus, where a tenant for years holds over his lease and continues to pay rent as before,

such payment and an acceptance of rent will amount to a lease at will. *Jones v. Temple*, 87 Va. 210, 12 S. E. 404.

Entry under Contract of Purchase Not Complied with.—Upon principles similar to those by which a tenant for years holding over and continuing to pay rent is deemed a tenant at will, so where a person enters under a contract of purchase, which he has not complied with, this would be a tenancy at will, for the possession of the tenant is by virtue of and determined by the consent of the vendor; it is not adverse, but, as the only other alternative, it is a tenancy at the will of the vendor. *Jones v. Temple*, 87 Va. 210, 12 S. E. 404.

Where a tenancy at will is created by a person entering under a contract of purchase which he has not complied with, it is immaterial whether the contract was in writing or by parol, as in either case the possession of the tenant is with the consent of the owner of the land and lawful. *Jones v. Temple*, 87 Va. 210, 12 S. E. 404.

Occupancy of Land without Prescribed Lease or Reservation of Rent.

—A person occupying land when no lease is prescribed and without any reservation of payment of rent, is a tenant at will. *Jones v. Temple*, 87 Va. 210, 12 S. E. 404.

Executory Gas and Oil Lease Providing for Surrender without Payment of Rent, etc.

—An executory gas and oil lease, which provides for its surrender at any time, without payment of rent or fulfillment of any of its covenants on the part of the lessee, creates a mere right of entry at will, which may be terminated by the lessor at any time before it is executed by the lessee. *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923; *Trees v. Eclipse Oil Co.*, 47 W. Va. 107, 34 S. E. 933. See the titles LANDLORD AND TENANT; MINES AND MINERALS.

d. Termination of Estate.**(1) In General.**

From the very nature of an estate at will, the lessee has no certain or sure estate, it follows that the lessor may put him out and end his estate at any time it may please him. *Jones v. Temple*, 87 Va. 210, 12 S. E. 404.

Of the acts which amount to a determination of an estate at will on either side, the first and most obvious mode of determining it by the lessor is an express declaration that the lease shall hold no longer which must either be made on the land or else notice of it be given to the lessee. *Jones v. Temple*, 87 Va. 210, 12 S. E. 404.

An executory gas and oil lease, which provides for its surrender at any time, without payment of rent or fulfillment of any of its covenants on the part of the lessee, creates a mere right of entry at will, which may be terminated by the lessor at any time before it is executed by the lessee. *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923; *Trees v. Eclipse Oil Co.*, 47 W. Va. 107, 34 S. E. 933.

"Under the provisions of the lease in controversy, there was no obligation upon the lessee to explore or pay rent; but he reserved the voluntary option to surrender it at any time, without legal obligation to do anything or pay anything. Hence the lessor had the right to vacate it at any time while in an executory state. The lessee had the right at any time to say, 'This lease is at an end,' and thus put a complete end to the rights of both parties under it. It therefore created a mere state at their will and, being at their will, it was at the will of the lessor also. There is no escape from this conclusion, and it has been the law, undisputed, from time immemorial. 2 Bl. Comm. 145; 4 Kent, Comm. 111; Washb. Real Prop. 505; Co. Inst. 55a." *Eclipse Oil Co. v. South Penn Co.*, 47 W. Va. 84, 34 S. E. 923.

(2) Right to Terminate Mutual.

If one party may terminate an estate

at his will, so may the other. The right to terminate is mutual. *Cowan v. Radford Iron Co.*, 83 Va. 547, 3 S. E. 120; *Jones v. Temple*, 87 Va. 210, 12 S. E. 404; *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923; *Trees v. Eclipse Oil Co.*, 47 W. Va. 107, 34 S. E. 933.

Where the minerals in certain land are sold with the usual mining rights to begin at any time after date of the agreement, with no time fixed for their ending, whilst the compensation is to be paid quarterly, as the iron ore is mined; but lessee to have the privilege of removing from the land at any time any machinery, etc., erected by him; and lessee has abandoned and failed to mine, and pay anything quarterly, he must be held to have terminated the estate, as he had the right to do, and lessor is no more and no further bound thereby. *Cowan v. Radford Iron Co.*, 83 Va. 547, 3 S. E. 120. See the titles MINES AND MINERALS; LANDLORD AND TENANT.

(3) Death of Party.

The death of one of the parties to a tenancy at will, terminates the estate. *Trees v. Eclipse Oil Co.*, 47 W. Va. 107, 34 S. E. 933.

(4) Notice of Determination to End Estate.**(a) In General.**

A tenant at will is entitled to notice of the determination of the lessor to end the lease. *Jones v. Temple*, 87 Va. 210, 12 S. E. 404; *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923.

(b) Demand of Possession or Notice to Quit.

Notice being necessary for the protection of a tenant about to be disposed, this may be by demand of possession or notice to quit. 4 Kent. Comm. 112; Bl. Comm. 146; *Eclipse Oil Co. v. Smith Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923.

(c) Re-Leasing of Premises.

Where there is no possession, and no injury can result to the lessee, such as the loss of crops, and re-leasing of the same premises, is a sufficient notice. *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923.

(d) Re-Entry.

Re-entry is always sufficient notice, but there can be no re-entry, where the lessee has never been in possession. *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923.

(e) Tenant Entitled to Reasonable Notice.**aa. In General.**

A tenant at will is entitled to reasonable notice of the determination of the lessor's will before he is obliged to quit. *Jones v. Temple*, 87 Va. 210, 12 S. E. 404.

bb. What Constitutes Reasonable Notice.

Question of Law.—What is reasonable notice of such determination of the lessor to end the lease is a question of law to be determined by the particular circumstances of each case. *Jones v. Temple*, 87 Va. 210, 12 S. E. 404.

Must Be Sufficient Time to Take Emblements and Remove Family and Property.—The time must be sufficient to enable the lessee to take the emblements, and remove his family, his furniture, and other property. *Jones v. Temple*, 87 Va. 210, 12 S. E. 404.

(f) Previous Demand of Possession Essential to Ejectment.

See the title *EJECTMENT*, vol. 4, p. 871.

Purchaser of land by parol holding possession is a tenant at will, and can not be ejected by a grantee of the vendor without a previous demand of possession and a refusal to surrender, or other wrongful act by him. *Jones v. Temple*, 87 Va. 210, 12 S. E. 404.

"In the case of *Right v. Beard*, decided in the court of King's bench in

1810, 13 East 219, it was held, that "one who is put into possession, upon an agreement to purchase the land, can not be ousted by ejectment before his lawful possession is determined by demand of possession or otherwise. *Birch v. Wright*, 1 Term Rep. 383, opinion of Buller, J." *Jones v. Temple*, 87 Va. 210, 12 S. E. 404.

To the same effect is *Goodtitle v. Herbert*, 4 Term Rep. 680, opinion of Lord Kenyon, Ch. J., where it was held, upon a parol agreement to lease land for four years, that such only creates a tenancy at will, and if that tenancy be not determined before the day of the demise laid in the declaration, that the plaintiff could not recover in ejectment. *Deane v. Rawlins*, 10 East 201; *Doe v. Jackson*, 1 Barn. & Cress. 448; 1 Inst. 57; Lit., § 68; Lom. Dig. 1., 192. This rule of the English common law is the law of this state. *Jones v. Temple*, 87 Va. 210, 12 S. E. 404. See the case of *Williamson v. Paxton*, 18 Gratt. 475, 505, where it is stated, but in a case where it did not arise.

In *Twyman v. Hawley*, 24 Gratt. 512, however, the question came squarely up for decision, when Staples, J., is reported as saying: "This record presents but a single question for adjudication, and that is, whether a person placed in possession of land under an agreement for a purchase, but who is in default in the payment of the purchase money, is liable to be turned out of possession by ejectment without previous demand or notice by the vendor." In which case it was said, that this doctrine we have set forth above had long been established, and that then it had been uniformly held, that the vendor, having placed the vendee in possession, he can not, without a demand of the possession and a refusal by the vendee, or some wrongful act by him to determine such possession, treat the vendee as a wrongdoer and a trespasser, as he must assume him to be in instituting an ac-

tion of ejectment. Citing *Right, etc., v. Beard*, 13 East 219, and other cases. Asserting that the doctrine had received the sanction of this court, and was sound and just, and should be adhered to by our courts. *Jones v. Temple*, 87 Va. 210, 12 S. E. 404.

e. When Tenant Entitled to Emblements.

Where an estate at will is determined by the lessor, the tenant is entitled to the corn sown and other emblements. *Jones v. Temple*, 87 Va. 210, 12 S. E. 404.

Estates for Life.

See the title **ESTATES**, ante, p. 160.

Estates Tail.

See the title **ESTATES**, ante, p. 160.

ESTIMATE.—Where a testator, who devised his real estate to his children, and also a sum of money to one of them, so that his estate, both real and personal, not specifically given, shall be brought into **estimate**, and divided in such manner as to make their portions equal; the sum of money bequeathed as aforesaid, shall be taken into the general **estimate**, although the terms specifically given and **estimate**, do not strictly apply to money, it being the plain intention, inferred from the whole will, to make all his children equal. The court said: "That it was to be an equal portion, in relation to what he had specifically devised to them, and not in relation to his whole estate, including money, is not to be inferred from the use of the words **estimate** and 'specifically devised,' in the will, as was argued." *Calloway v. Langhorne*, 4 Rand. 184.

ESTIMATION.—See *Farrier v. Reynolds*, 88 Va. 141, 13 S. E. 393. And see the titles **MORE OR LESS**; **VENDOR AND PURCHASER**.

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CROSS REFERENCES.

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AND DECEIT; FRAUDS, STATUTE OF; GAS; GUARDIAN AND WARD; HUSBAND AND WIFE; INFANTS; INSURANCE; JUDGMENTS AND DECREES; JUDICIAL SALES; LACHES; LANDLORD AND TENANT; LIFE INSURANCE; MECHANICS' LIENS; MORTGAGES AND DEEDS OF TRUST; MUNICIPAL CORPORATIONS; MUTUAL INSURANCE; NOTICE; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; PARENT AND CHILD; PAROL EVIDENCE; PARTITION; PARTNERSHIP; POWERS; RECEIVERS; SCHOOLS; SEPARATE ESTATE OF MARRIED WOMEN; SET-OFF, RECOUPMENT AND COUNTERCLAIM; SHERIFFS' SALES; SPECIAL ASSESSMENTS; SPECIFIC PERFORMANCE; STOCK AND STOCKHOLDERS; STREET RAILROADS; STREETS AND HIGHWAYS; TAXATION; TRUSTS AND TRUSTEES; VENDOR AND PURCHASER; VENDOR'S LIEN; WAIVER; WATERS AND WATERCOURSES; WILLS.

I. Definition and General Considerations.

A. DEFINITION AND GENERAL NATURE.

"An estoppel is that which prevents one from showing the truth in defense of his rights; call it by what name we will, it is that which shuts out the evidence of the actual truth of the case. For this reason, estoppels have ever been held to be 'repugnant to reason, and odious in law.' They are tolerated in a very few cases, and only from absolute necessity. Even in these cases, judges have for ages been astute to unshackle the estoppel by every means in their power." White, J., in *Baker v. Preston*, Gilmer 235, 300. See also, *Bolling v. Petersburg*, 3 Rand. 563.

"The doctrine of estoppel, once tortured into a variety of absurd refinements, has, in a great measure, been reduced to controversy with common sense and justice." *Bower v. McCormick*, 23 Gratt. 310.

"Concluded." — The word "concluded" frequently has the same meaning as the term "estoppel." *Baker v. Preston*, Gilmer 235, opinion of White, J.

Estoppels and Rebutters Distinguished.—Estoppels and rebutters are essentially different in their nature, although frequently producing the same results. "A rebutter operates on the right of action to the estate. It oper-

ates as to strangers as well as between parties and privies, which is a consequence flowing from its operation on the right to the estate. An estoppel operates entirely as to facts; its effect is to conclude the parties from making, and of course, proving the facts to be otherwise than they are stated or acknowledged to be in a deed or other transaction out of which the estoppel arises." *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154.

B. UNDERLYING PRINCIPLES AND PURPOSE OF DOCTRINE.

Founded upon Morality and Public Policy.—All estoppels, whether estoppels at common law, or equitable estoppels, are founded upon the great principles of morality and public policy. *Bower v. McCormick*, 23 Gratt. 310. See post, "Underlying Principles and Purpose of Doctrine," V, A, 2.

Transaction Forbidden by Law.—On principle and authority, it would seem proper that a court should not allow a guilty party to effectuate his ends by pleading an estoppel to the truth of the case where the policy of the law forbids the transaction. *Calfee v. Burgess*, 3 W. Va. 274. See post, "Estoppel Not Created by Void Contract," V, D, 1.

Purpose.—The purpose of all estoppels, whether estoppels at common law or equitable estoppels, is to pre-

vent that which deals in duplicity and inconsistency, and to establish some evidence as so conclusive a test of truth that it shall not be gainsaid. *Bower v. McCormick*, 23 Gratt. 310.

Intended to Repress Litigation.—

"The doctrine of estoppel is founded upon principles of law which are intended to repress litigation, and to prevent a multiplicity of suits. *Adams v. Barnes*, 17 Mass. 368; *Freeman on Judgments*, § 327." *Cox v. Crockett*, 92 Va. 50, 22 S. E. 840. See post, "The Reason," IV, A, 2.

In order to avoid circuity of action a vendor of land can not set up an after-acquired title under certain circumstances. *Nye v. Lovitt*, 92 Va. 710, 717, 24 S. E. 345. See post, "On After-Acquired Title," IV, C, 1, c.

C. CERTAINTY ESSENTIAL TO ALL ESTOPPELS.

1. In General.

"Certainty is essential to all estoppels.' *Bigelow on Estop.* 578." Where that element is wanting, there can be no estoppel. *Hast v. Piedmont, etc., R. Co.*, 52 W. Va. 396, 44 S. E. 155; *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154; *Mason v. Harper's Ferry Bridge Co.*, 28 W. Va. 639, 650; *Taylor v. Cussen*, 90 Va. 40, 17 S. E. 721; *Bolling v. Petersburg*, 3 Rand. 563; *Newport News, etc., Co. v. Lake*, 101 Va. 334, 43 S. E. 566; *Wynn v. Harman*, 5 Gratt. 137.

Every estoppel, since it concludeth a man to allege the truth, must be certain to every extent, and not to be taken by argument or inference. (*Co. Litt.*, 352, b.) *Vanbibber v. Beirne*, 6 W. Va. 168, 178; *Lorentz v. Lorentz*, 14 W. Va. 809, 821; *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154; *Bolling v. Petersburg*, 3 Rand. 563; *Chrisman v. Harman*, 29 Gratt. 494; *Taylor v. Cussen*, 90 Va. 40, 17 S. E. 721.

"The doctrine of estoppel is never applied, in any of its branches, upon an uncertain and speculative state of

facts." *Bargamin v. Clarke*, 20 Gratt. 544; *Repass v. Richmond*, 99 Va. 508, 39 S. E. 160; *Water Co. v. Browning*, 53 W. Va. 436, 440, 44 S. E. 267. See post, "Evidence and Burden of Proof," VII.

Not to Be Extended by Construction.

"But as the effect of an estoppel may be to shut out the real truth by its artificial representative, estoppels, whether legal or equitable, are not to be extended by construction. No man is to be precluded from showing the truth of his claim or defense unless it be forbidden by a positive rule of law." *Bower v. McCormick*, 23 Gratt. 310.

2. Estoppel by Judicial Records.

"According to Coke, an estoppel must be 'certain to every intent;' and if, upon the face of the record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered in evidence.' *Russell v. Place*, 94 U. S. R. 4 Otto, 606." *Chrisman v. Harman*, 29 Gratt. 494. See also, the title *FORMER ADJUDICATION OR RES ADJUDICATA*.

3. Estoppels by Deeds.

"One of the essentials of a recital creating an estoppel is certainty and where that element is wanting, there can be no estoppel." *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154.

4. Estoppels in Pais.

"The authorities uniformly hold that estoppels in pais are not to be taken by argument or inference, but must be certain to every intent." *Newport News, etc., Co. v. Lake*, 101 Va. 334, 43 S. E. 566; *Bolling v. Petersburg*, 3 Rand. 563; *Taylor v. Cussen*, 90 Va. 40, 43, 17 S. E. 721; *Repass v. Richmond*, 99 Va. 508, 39 S. E. 160; *Hast v. Piedmont, etc., Co.*, 52 W. Va. 396, 44 S. E. 155; *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267; *Mason v. Harpers Ferry Bridge Co.*, 28 W. Va. 639, 650. See also, *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154;

National Bank v. Jarvis, 28 W. Va. 805, 813.

It is hardly necessary to add another cardinal rule as to estoppel in pais. "The estoppel must be certain; and by this is meant, not only that the facts upon which it is based should be clearly proven, but they should not be capable of bearing any other construction than that upon them. If susceptible of an interpretation which will not imply an estoppel, the latter effect will not be given them. In other words, the representation or act relied upon, and its effect, must be plain and definite, not ambiguous or equivocal." 4 Am. & Eng. Dec. in Eq. 263. "What

is the reason of this rule? It is accurately expounded in the same decision (foot-note, referring to *Sterrs v. Barker*, 6 John's 344)." *Walker Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267.

The representation must be plain, and not be a mere matter of inference or opinion. *Mason v. Harper's Ferry Bridge Co.*, 28 W. Va. 639, 650; *Hast v. Piedmont, etc., R. Co.*, 52 W. Va. 396, 44 S. E. 155.

Inferences do not operate as estoppels. *National Bank v. Jarvis*, 28 W. Va. 805, 813.

The doctrine of estoppel will not be applied, where it rests upon the ground of fraud, upon an uncertain or speculative state of facts. *Repass v. Richmond*, 99 Va. 508, 39 S. E. 160; *Bargamin v. Clarke*, 20 Gratt. 544. See also, *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267. See post, "Clear, Strong Case Essential," V, A, 3, b, (3); "Certainty and Definiteness," V, A, 6, b, (2), (f).

Pleading and Burden of Proof.—See post, "Necessity and Mode of Pleading," VI; "Evidence and Burden of Proof," VII.

D. EXTENT OF OPERATION.

Limited by Intention.—Estoppels are founded on and limited by intention, and extend not to un contemplated objects. *McCullough v. Dashiell*, 78 Va. 674.

"And so as estoppels are founded on intention, they will be limited by it, and will not extend to objects that the parties can not reasonably be supposed to have had in view." *McCullough v. Dashiell*, 78 Va. 634.

Estoppels by Record.—See the title FORMER ADJUDICATION OR RES ADJUDICATA.

Estoppels by Deed.—See post, "Limitation of Doctrine," IV, A, 6; "Operation of Covenants," IV, C; "Foundation and Limitation," IV, D, 4.

Estoppel in Pais.—See post, "Measure of Operation," V, A, 4.

E. ESTOPPEL RUNNING WITH LAND.

In the absence of some covenant in the chain of title to that effect estoppel can not be construed to run with the land. *Richmond v. Gallego Mills Co.*, 102 Va. 165, 45 S. E. 877.

"The Gallego Mills Company acquired the property in the year 1895, and it is not pretended that it ever took control of the sewer or changed its location, or construed any part of it. The contention that the acts of some former owner of the property can estop the present owner from claiming compensation for injuries to his property resulting from a failure of the city to maintain its sewer and keep it in a reasonably safe condition, or that such acts of a former owner as those contemplated in the instructions can be construed as contributory negligence of the present owner, is not sustained either by reason or authority. It is the duty of a city, from the time it acquires a sewer, to maintain it in a reasonably proper condition, without regard to what may have been the attitude of a former owner of the land through which it passes with respect to it." *Richmond v. Gallego Mills Co.*, 102 Va. 165, 45 S. E. 877.

F. ESTOPPEL AGAINST ESTOPPEL.

An estoppel against an estoppel setteth the matter at large. *Chesapeake*

etc., *R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320; *Dupuy v. Southgates*, 11 Leigh 92. See also, *Crumlish v. Shenadoah Valley R. Co.*, 45 W. Va. 567, 32 S. E. 234.

Admission of Record Inconsistent with Former Decree.—If a party who would be entitled to the benefit of a decree as *res judicata* to the prejudice of another, afterwards makes an admission of record in the case, inconsistent therewith, detracting from his right under said decree, and such admission is the truth, he can not rely on such decree as *res judicata*. *Crumlish v. Shenadoah Valley R. Co.*, 45 W. Va. 567, 32 S. E. 234. See also, the title FORMER ADJUDICATION OR RES ADJUDICATA.

II. Who Is Estopped and Who May Take Advantage of Estoppel.

A. PARTIES AND PRIVIES.

1. In General.

Parties and privies only are bound by an estoppel. *Nickell v. Tomlinson*, 27 W. Va. 697, 714; *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154; *Buford v. Adair*, 43 W. Va. 211, 27 S. E. 260. See also, *Norfolk, etc., R. Co. v. Supervisors*, 87 Va. 521, 12 S. E. 1009; *Hardy v. Norfolk Mfg. Co.*, 80 Va. 404. *Norfolk v. Nottingham*, 96 Va. 34, 30 S. E. 444; *Newport News, etc., Co. v. Lake*, 101 Va. 334, 43 S. E. 566; *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320; *Engle v. Burns*, 5 Call 463.

"An estoppel 'may be availed of by privies in blood, estate or law, as well as by all the parties to the transaction, and is equally binding upon them.' 4 Am. & Eng. Dec. in Eq. 356." *Weston v. Ralston*, 48 W. Va. 170, 36 S. E. 446. See post, "Privies," IV, A, 4, d.

Who Are Privies.—"Any person claiming under one who is bound by an estoppel, is himself bound by the same estoppel." *Herman on Est.* 720. 'Privies, or those who derive title

from or through the parties, ordinarily stand in the same position as the parties, and are bound by every estoppel that would be binding upon the parties.'" *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154. See also, *Nickell v. Tomlinson*, 27 W. Va. 697, 714; *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267.

"Where one succeeds to the same rights of property formerly enjoyed by another, there is often such privity that the rights of the owner in such property may be affected by the statements of the latter." *Jones on Ev.*, §§ 240, 241. See *Railroad Co. v. Ohio*, 117 U. S. 129; *Delaware Co. Commissioners v. Safe Lock Co.*, 133 U. S. 473; *Pope v. Allis*, 115 U. S. 370; *Bigelow, Estop.*, 526." *Weston v. Ralston*, 48 W. Va. 170, 36 S. E. 446.

A bill filed for the specific execution of a written contract between the plaintiff's testator and a railroad company avers, that pursuant to said contract the company took possession and occupied the land therein mentioned as a railroad track from prior to July 1, 1853, until it became wholly insolvent and its property was purchased by the W. P. & B. Co., another railroad company, and that it then passed out of existence; that the said W. P. & B. Co. had succeeded to its property and become responsible for its liabilities; that in an action brought to recover the land from the latter company it produced said written contract and thereby caused said action to be dismissed, and that said W. P. & B. Co. was in possession of and using the land as a railroad track; held, that the averments show such privity between said companies as entitles the plaintiff to a specific execution of the contract against the latter company and a decree for a sale of the land for the money due therefor, especially as the latter company, after relying upon said contract and causing the action at law to be dismissed, is estopped to deny such privity and its responsibility for the

obligations imposed by such contract. *Steenrod v. Wheeling, etc., R. Co.*, 27 W. Va. 1.

The maker of a note secured by a deed of trust on land left in the hands of a purchaser, to whom he had sold the land, sufficient funds to pay all the liens thereon. In an action by the assignee of the note against the maker thereof, it was held, that such assignee is not estopped to deny payments out of such funds by the fact that he was attorney for the purchaser, and examined the title to the land for him before the purchase was completed. *Flick v. Stauffer*, 97 Va. 649, 34 S. E. 476.

Persons Estopped by Records.—See post, "Persons Estopped," III, D.

Estopped by Deed.—See post, "Persons Estopped," IV, A, 4; "Who May Take Advantage of Estoppel by Deed," IV, A, 5; "Persons Estopped," IV, D, 8; "Who May Invoke," IV, D, 9.

Estoppel in Pais.—See post, "In Whose Favor Estoppel Operates," V, A, 7; "Persons Liable to Be Precluded by Estoppel," V, A, 9.

2. Estoppel Must Be Mutual and Reciprocal.

An estoppel to be binding must be reciprocal and mutual—that is, must bind both parties. *Bolling v. Petersburg*, 3 Rand. 563; *Montague v. Massey*, 76 Va. 307; *Nickell v. Tomlinson*, 27 W. Va. 697-714; *Bland v. Stewart*, 35 W. Va. 518, 14 S. E. 215; *Buford v. Adair*, 43 W. Va. 211, 27 S. E. 260; *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154. See also, *Baker v. Preston*, *Gilmer* 235. See also, *Bower v. McCormick*, 29 Gratt. 310.

"Estoppels, even in the sternest periods of the English law, were reciprocal; both parties were estopped, or neither." *Baker v. Preston*, *Gilmer* 235, opinion of White, J.

A party to a suit, who claims title adverse to a former adjudication of this court, by which he is not bound, can not rely on such adjudication as an

estoppel against parties to such former suit. An estoppel, to be binding, must be mutual. *Buford v. Adair*, 43 W. Va. 211, 27 S. E. 260. See the title FORMER ADJUDICATION OR RES ADJUDICATA.

Where the plaintiff, as mayor and as a member of the common council, assisted in securing the erection of wharves on land owned by him, he was not thereby estopped from asserting title to such land, since an estoppel must be mutual, and there was nothing in the plaintiff's acts to bind the city. *Bolling v. Petersburg*, 3 Rand. 563.

B. RULE AS TO STRANGERS.

"A stranger can not be bound by nor take advantage of an estoppel." *Nickell v. Tomlinson*, 27 W. Va. 697, 714. See also, *Newport News, etc., Co. v. Lake*, 101 Va. 334, 43 S. E. 566; *Norfolk v. Nottingham*, 96 Va. 34, 30 S. E. 444; *Cardwell v. Kelly*, 95 Va. 570, 28 S. E. 953.

C. INFANTS AND FEMES COVERT.

Herm. Estop., § 1099, says: "When an agreement is void for infancy or coverture, an estoppel founded solely on it must be equally void. The law throws its protection around infants and femes covert, and they can not be made liable to contract by their own representations." *Central Land Co. v. Laidley*, 32 W. Va. 134, 9 S. E. 61, 63. See also, *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411. *Lancaster v. Barton*, 92 Va. 615, 24 S. E. 251. See post, "Persons Not Sui Juris," IV, A, 6, b, (3), (b); "Infants," V, A, 9, b; "Married Women," V, A, 9, c.

D. STATE.

It would seem from the case of *Ralston v. Weston*, 46 W. Va. 544, 33 S. E. 326, that an equitable estoppel can no more than the statute of limitations, deprive a sovereign of his rights, and permit his subjects to destroy them by their wrongful conduct.

Asserting Title to Escheated Land.

—"An estoppel in pais against the

state from asserting a title to escheated land is not made out by assessment of taxes, and sale and conveyance for taxes, and the assessment and collection of taxes from the purchaser at the tax sale." *State v. Sponaugle*, 45 W. Va. 415, 32 S. E. 283.

Set Up Title, by Forfeiture, against Tax Purchaser.—If a sale for taxes is made, and the tax purchaser pays taxes thereafter, the receipt of such taxes will not operate, on the theory of estoppel in pais by conduct, to prevent the state from setting up against the tax purchaser a title to land, by forfeiture, for failure of the former owner to enter it for taxation subsequent to or before the tax sale. If the tax title be valid, it would prevent such forfeiture for taxes after the tax sale from its own force, not on the theory of estoppel. *State v. Sponaugle*, 45 W. Va. 415, 32 S. E. 283.

Citizen Claiming Money Due.—No question of estoppel can arise between the state and a citizen claiming money due for services rendered. *Montague v. Massey*, 76 Va. 307.

To Legalize a Public Nuisance.—The doctrine of estoppel can not be invoked to perpetuate nuisances or destroy the sovereignty and welfare of the people. The cases of *Wheeling v. Campbell*, 12 W. Va. 36; *Forsyth v. Wheeling*, 19 W. Va. 318, and *Teass v. St. Albans*, 36 W. Va. 1, 17 S. E. 400, in so far as they hold that public easements in the public highways can be destroyed by private individuals contrary to the sovereign will of the people, are hereby disapproved as erroneously propounding the law. "The statute of limitations is a mere legal estoppel, and, it not applying to legalize a public nuisance, neither does equitable estoppel; for equity follows the law, and will grant no relief to a law-breaker or wrongdoer. Clean hands and a clear title are always equitable requirements. *Bell v. City of Burlington*, 68 Iowa 296, 27 N. W. 245; *Cheek v. City of Aurora*, 92 Ind. 107." *Ralston v.*

Weston, 46 W. Va. 544, 33 S. E. 326. See post, "Counties and Municipalities," II, E.

In a Criminal Case.—The doctrine of estoppel is not applicable to the commonwealth in a criminal prosecution. The maxim, "No one shall be twice put in jeopardy for the same offense," rests upon technical notions of jeopardy, and not upon the principle of *res judicata*. But the doctrine of estoppel has been held applicable to the accused. *Justice v. Com.*, 81 Va. 209. See the title CRIMINAL LAW, vol. 4, p. 20.

E. COUNTIES AND MUNICIPALITIES.

See the titles MUNICIPAL CORPORATIONS; MUNICIPAL, STATE AND COUNTY SECURITIES.

Liability on Ultra Vires Contracts.—It is settled beyond controversy that counties and municipal corporations are not estopped from denying liability on contracts which are beyond the scope of their powers. The agents, officers and governing bodies of such corporations can not bind them by contracts beyond the scope of their power; they are not estopped from denying the authority of the agents to make such contracts. Such contracts are *ultra vires* and void, and, in actions thereon, the want of power to execute is a complete defense. *Alleghany v. Parrish*, 93 Va. 615, 25 S. E. 882; *Norfolk v. Chamberlaine*, 29 Gratt. 534.

The doctrine of estoppel can never arise in a case where the act is *ultra vires*; where the municipality has no power to act, and its action was outside of its chartered authority. *Norfolk v. Chamberlaine*, 29 Gratt. 534.

Matter within General Powers of Municipalities.—There is a class of cases where a municipal corporation will be estopped to avail itself of certain irregularities or improper conduct of its own agents or officers. The doctrine of estoppel applies only to a case where the act of the corporation is within the exercise of the general pow-

ers conferred, but never to a case where the act done is beyond the power conferred by charter or by statute. Wherever the act is one arising out of matters of transactions within the general powers of the corporation, the corporation will be estopped from pleading any irregularities of its agents or officers in the exercise of those general powers. *Norfolk v. Chamberlaine*, 29 Gratt. 534. See also, *Ralston v. Weston*, 46 W. Va. 544, 33 S. E. 326.

Divesting Title to Street.—The doctrine of equitable estoppel can not defeat the right of a city to maintain a suit in equity to remove obstruction from its streets. A city has no alienable interest in the streets thereof. The public easement in the public highways, including roads, streets, alleys, and other public thoroughfares, dedicated to the use of the general public by individuals, or under the right of eminent domain, can not be lost to the people by the negligence of public officials or the unlawful acts of the individuals. An individual can not destroy such easement by setting up a claim by equitable estoppel, as the people can not be deprived of their sovereign rights in this way. *Ralston v. Weston*, 46 W. Va. 544, 33 S. E. 326. See the titles **NUISANCES; STREETS AND HIGHWAYS**.

The common and select councils of the city of N., having granted leave to C., who was then erecting a building on a lot owned by him, to extend the steps of said building out upon the public street, afterwards ordered the removal of said steps. Upon a bill filed by C. to enjoin such removal, held, inasmuch as the original permission to C. to place the steps of his building on the public street was beyond the powers of the municipal authorities of N., they are not estopped to order their removal. *Norfolk v. Chamberlaine*, 29 Gratt. 534.

Violations of Ordinances.—The fact that other citizens of a city had built

houses in violation of a city ordinance, against whom no complaint had been made, or proceedings had, will not estop the city authorities from punishing the violation of the ordinance, whenever complaint is made. *Charleston v. Reed*, 27 W. Va. 681. See also, the titles **MUNICIPAL CORPORATIONS; ORDINANCES**.

F. CORPORATIONS.

See the title **CORPORATIONS**, vol. 3, p. 542.

G. STOCKHOLDERS.

A corporation may contract with one of its stockholders as with a stranger. There is nothing in the mere relation of stockholder to a corporation which will estop the stockholder from asserting any claim against the corporation which he might, under similar circumstances, assert against an individual. *Biggs v. Elliston Development Co.*, 93 Va. 404, 25 S. E. 113. See the title **STOCK AND STOCKHOLDERS**.

III. Estoppel by Record.

A. IN GENERAL.

In *State v. Vest*, 21 W. Va. 796, 800, the court said: "It is certainly a rule invariably recognized by the courts, that a record imports such absolute verity, that no person against whom it is pronounced will be permitted to aver or prove anything against it. This rule is well established, and we now here refer to but a few of many cases, in which this doctrine has been held. See *Rex v. Carlile*, 2 Barns. Ad. 971; 23 Eng. Ch. 226; *Braden v. Reitzenberger*, 18 W. Va. 286; *Carper v. McDowell*, 5 Gratt. 212, 226; *Harkins v. Forsyth*, 11 Leigh 294; *Taliaferro v. Pryor*, 12 Gratt. 277; *Vaughn v. Com.*, 17 Gratt. 386; *Quinn v. Com.*, 20 Gratt. 138." See the title **RECORDS**.

The record of the county court states that F. a sheriff who had been required to give a new bond, "this day appeared in court and executed and acknowledged such new bond, and the security thereto being considered suffi-

cient by the court, the same is ordered to be certified." In the absence of fraud, this record is conclusive that the bond was properly executed; and evidence will not be admitted to contradict it. *Vaughn v. Com.*, 17 Gratt. 386. See also, *Caldwell v. Com.*, 17 Gratt. 391.

Insufficient Evidence.—Upon issue on the plea of non est factum, by C., one of the parties to such bond, proof that his name is not in his handwriting, but in that of H., another party; that C. was not at the courthouse the day the bond was taken, but was at his home ten miles off; that on the day before the bond was taken he asked H. who would sign it, and being told that D. with others would sign it, he told H. if D. signed it, H. must sign it for him, but D. did not sign it, is not sufficient to outweigh the record, and sustain the defense. *Caldwell v. Com.*, 17 Gratt. 391.

Contractual Estoppel Evidenced by Record.—See post, "Contractual Estoppel by Conduct in Pais Evidenced by Record," V, D, 2.

B. JUDICIAL ADMISSIONS.

See post, "Inconsistent Positions and Admissions in Judicial Proceedings," V, C, 2.

Where the maker of a note given for purchase money, in a defense of a bill filed by the assignee thereof, claims that the assignor, being the original holder, has not parted with his property therein, but the assignment was made for collection alone, and such assignor, being a party defendant, answers denying any interest in such note, such answer will be regarded as a solemn admission of record conclusively barring any right the assignor may have in such note in so far as such maker is concerned. *Briggs v. Enslow*, 44 W. Va. 499, 29 S. E. 1008.

C. JUDGMENTS.

See the title FORMER ADJUDICATION OR RES ADJUDICATA.

D. PERSONS ESTOPPED.

No one can be estopped by any rec-

ord unless it be shown that he was a party to it, and this should be shown by the record itself. *Randolph v. Longdale Iron Co.*, 84 Va. 457, 5 S. E. 30; *Chrisman v. Harman*, 29 Gratt. 494. See ante, "Who Is Estopped and Who May Take Advantage of Estoppel," II.

IV. Estoppel by Deed.

A. IN GENERAL.

1. Doctrine Stated.

It is a general rule that no man shall be permitted to gainsay that he has solemnly averred by his deed. Every man is bound to speak and act according to the truth and fact of the case; and the law not only presumes that he has done so, but denies him the right to contradict such reasonable presumption. *Wheelock v. Henshaw*, 19 Pick. R. 341; *Wynn v. Harman*, 5 Gratt. 157; *Nash v. Fugate*, 24 Gratt. 202; *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154; *Shaw v. Clements*, 1 Call 429.

"There seems no exception to the rule that the fair and voluntary execution of a sealed instrument is conclusive against all who seal it of everything admitted in it. *Shaw v. McCullough*, 3 W. Va. 260; *Allen v. Tucker*, 3 J. J. Marshall, 164; 1 Greenl. Ev., § 22; *Cox v. Thomas*, 9 Gratt. 312; *Cordle v. Burch*, 10 Gratt. 480; *Cecil v. Early*, 10 Gratt. 198." *Hoke v. Hoke*, 3 W. Va. 561, 563.

McMillan v. Hickman, 35 W. Va. 705, 14 S. E. 227, says: "In the case of *Hoke v. Hoke*, 3 W. Va. 561, it is held, 'that there is no exception to the rule that the fair and voluntary execution of a sealed instrument is conclusive against all who seal it of everything admitted in it.' Citing *Shaw v. McCullough*, 3 W. Va. 260; *Cox v. Thomas*, 9 Gratt. 312; *Cordle v. Burch*, 10 Gratt. 480; *Cecil v. Early*, 10 Gratt. 198."

The grantor by his deed under his hand and seal is estopped from disputing the deed itself. *Anderson v.*

Phlegar, 93 Va. 415, 25 S. E. 107; Franklin v. Depriest, 13 Gratt. 257. See also, Greer v. Mitchell, 42 W. Va. 494, 26 S. E. 302; Flanary v. Kane, 102 Va. 347, 46 S. E. 312, 681.

The doctrine of estoppel by deed is that a grantor in any deed can not deny his title thereby conveyed and set up any other to the injury of his grantee. Dewing v. Hutton, 48 W. Va. 576, 37 S. E. 670; Martin v. Kester, 45 W. Va. 438, 33 S. E. 238; Turk v. Skiles, 45 W. Va. 82, 30 S. E. 234.

Bond Complete and Valid When Delivered.—Parties executing a bond which is a complete and valid instrument at the time of its delivery to the obligee is estopped to deny its validity. Nash v. Fugate, 24 Gratt. 202; Downman v. Downman, 2 Call 507; Carper v. McDowell, 5 Gratt. 212; Cox v. Thomas, 9 Gratt. 312; Cecil v. Early, 10 Gratt. 198; Shaw v. McCullough, 3 W. Va. 260.

Estoppel Arises Out of Affirmation.—The estoppel arises entirely out of the affirmation of the deed. Summerfield v. White, 54 W. Va. 311, 46 S. E. 154.

Where Deed Not Acknowledged—Validity as between Parties.—A person who signs, seals, and delivers an instrument as his deed, will never be heard to question its validity, upon the ground that it was not acknowledged by him, nor proved at the time of the delivery. It is the sealing and delivery that gives efficacy to the deed; not proof of its execution. And this principle applies to all bonds, whether executed by public officers or private persons, unless there is a statute making the acknowledgment, or proof in court essential to the validity of the instrument. Board of Supervisors v. Dunn, 27 Gratt. 608. See also, State v. Proudfoot, 38 W. Va. 736, 18 S. E. Rep. 949.

2. The Reason.

The reason why a deed or other specialty works an estoppel, usually

given, is that the estoppel prevents circuity of action. Reynolds v. Cook, 83 Va. 817, 821, 3 S. E. 710; Doswell v. Buchanan, 3 Leigh 365; Gregory v. Peoples, 80 Va. 355; Burtner v. Keran, 24 Gratt. 42; Nye v. Lovitt, 92 Va. 710, 24 S. E. 345. See ante, "Underlying Principles and Purpose of Doctrine," I, B; post, "Foundation and Object," IV, C, 1, c, (2).

3. Doctrine Illustrated.

Conveyance of Land by Deed.—A man is estopped to set up his own possession for twenty years against his own deed given within that time. Duvall v. Bibb, 3 Call 362.

Agreement under Seal Acknowledging Title of Another.—Certain persons claimed title to a large body of land under a grant from commonwealth to T. R., bearing date December 11, 1795. P. claimed title under a grant from the commonwealth bearing date of January 10, 1856, to the 109 acres in dispute in this suit. R. claimed that this parcel of land was within his grant, and brought a suit in ejectment against P. on February 10, 1859. On March 1, 1859, an agreement in writing, under seal, was entered into and duly executed by P. and a certain S., styled "trustee," as agent and manager of the owners under the R. grant, by which the respective rights of the parties to the said parcel of land were compromised and adjusted, and the suit dismissed. By that agreement P. acknowledged the title of the claimants under the grant to T. R. It was held, that P. was thereby estopped from testing or disputing thereafter the title of the claimants under the grant to T. R. to the land in question. Rakes v. Rustin Land, etc., Co., 2 Va. Dec. 156.

Appellant Enjoying Benefits under Supersedeas Bond.—"In the case of Baltimore, etc., R. Co. v. Vanderwarker, 19 W. Va. 265, a bond was given signed by D., the attorney of appellant, which recited that a supersedeas had been allowed to the decree,

the appeal was subsequently dismissed, and execution was issued on the decree, and it was held, that B. was estopped from denying that a supersedeas issued. It was also held, that 'if a party has enjoyed the benefit of a supersedeas bond, though it was executed by his attorney at law alone, when the law required it to be executed with security, in a proceeding to enforce the debt after the appeal has been dismissed, he is estopped from alleging the supersedeas bond was invalid.' *Hall v. Wadsworth*, 35 W. Va. 375, 14 S. E. 4, 6.

4 Persons Estopped.

See ante, "Who Is Estopped and Who May Take Advantage of Estoppel," II.

a. In General.

The fair and voluntary execution of a sealed instrument is conclusive against all who seal it. *Shaw v. McCullough*, 3 W. Va. 260; *Allen v. Tucker*, 3 J. J. Marshall 164; 1 Greenl. Ev., § 22; *Cox v. Thomas*, 9 Gratt. 312; *Cordle v. Burch*, 10 Gratt. 480; *Cecil v. Early*, 10 Gratt. 198; *Hoke v. Hoke*, 2 W. Va. 561; *McMillan v. Hickman*, 35 W. Va. 705, 713, 14 S. E. 227; *Board of Supervisors v. Dunn*, 27 Gratt. 608.

A man shall not defeat his own act or deny its validity to the prejudice of another. *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154; *Nash v. Fugate*, 24 Gratt. 202; *Wynn v. Harman*, 5 Gratt. 157; *Reynolds v. Cook*, 83 Va. 817, 821, 3 S. E. 710; *Doswell v. Buchanan*, 3 Leigh 365; *Gregory v. Peoples*, 80 Va. 355; *Burtners v. Keran*, 24 Gratt. 42; *Nye v. Lovitt*, 92 Va. 710, 24 S. E. 345.

b. Maker or Grantor.

In general it may be said the maker or grantor of a deed or other instrument under seal is estopped to deny the validity of such instrument or the truth of any statement therein. *Hall v. Wadsworth*, 35 W. Va. 375, 14 S. E. 4; *Shaw v. McCullough*, 3 W. Va. 260;

Baltimore, etc., R. Co. v. Vanderwarker, 19 W. Va. 265; *Martin v. Kester*, 46 W. Va. 438, 33 S. E. 238, 239.

Obligors In Injunction Bond—Denial of Conformity to Direction of Judge.—Where an injunction bond has been signed, sealed and acknowledged by the obligors in the presence of the court, and has been accepted and acted on as their bond, the obligors are estopped to deny that the penalty of the bond conforms to the direction of the judge who awarded the injunction. *Harman v. Howe*, 27 Gratt. 676. See *Wray v. Davenport*, 79 Va. 19.

"A grantor in any deed can not deny his title thereby conveyed, and set up any other title, to the injury of the grantee." *Dewing v. Hutton*, 48 W. Va. 576, 37 S. E. 670. See also, *Flanary v. Kane*, 102 Va. 547, 46 S. E. 312, 681.

"The grantor will not be heard to say that he did not read his deed, or that he did not understand it, nor that he was ignorant of the real facts when he made the deed." *Anderson v. Phlegar*, 93 Va. 415, 25 S. E. 107.

A grantor in a deed of trust can not impeach or disparage his own title to prevent a sale under such trust. *Martin v. Kester*, 46 W. Va. 438, 33 S. E. 238; *Turk v. Skiles*, 45 W. Va. 82, 30 S. E. 234.

A person executing a deed of trust is estopped to disparage his own title to prevent a sale under such deed, but the same conveys all his right, title, and interest, both legal and equitable, in and to said property, and this the trust creditor would have the right to have sold. *Turk v. Skiles*, 45 W. Va. 82, 30 S. E. 234. *Martin v. Kester*, 46 W. Va. 438, 33 S. E. 238.

Where a testator empowers his executors to make conveyances of lands, which he sold but did not convey in his lifetime—until the power is executed, the lands descend to the heir; but a conveyance from him as one of the executors, would operate as an es-

toppel against him, should he claim as heir. *Shaw v. Clements*, 1 Call 429.

The obligors having voluntarily executed the bond, are precluded and estopped from all inquiry as to the regularity and validity of the levy of the execution upon which it was taken. *Downman v. Downman*, 2 Call 507; *Carper v. McDowell*, 5 Gratt. 212; *Cox v. Thomas*, 9 Gratt. 312; *Cecil v. Early*, 10 Gratt 198; 1 Greenl. Ev. sections 22, 26; 4 Kent. 261. *Shaw v. McCullough*, 3 W. Va. 260.

Where Surety in Bond Estopped to Set Up Defence.—Where the official bond of an executor was made payable to four justices, one of whom was not a member of the court at the time, the surety having executed the bond is estopped from pleading that it is not his bond because so executed. *Franklin v. Depriest*, 13 Gratt. 257.

c. Grantee.

Purchaser from Grantor.—A purchaser from a person who has previously conveyed the estate to a trustee by deed duly recorded is estopped at law, though not in equity, from impugning, on the ground of fraud, a deed regularly executed by the trustee to a purchaser from such trustee. *Taylor v. King*, 6 Munf. 358, 8 Am. Dec. 746.

"If Mrs. Pennybacker would not herself be estopped, neither would Laidley. In purchasing, he did no wrong in the eye of the law. He but purchased from her an estate which it was lawful for her to convey, and stands in her shoes, invested with all her rights. *Rogers v. Higgins*, 48 Ill. 211." *Central Land Co. v. Laidley*, 32 W. Va. 134, 9 S. E. 61, 64.

A grantee in a deed who has released all interest in the property conveyed, in consideration of the conveyance to her of other property by the grantor, which last mentioned conveyance was made on condition that she should execute such release, can not thereafter assert any title or interest

under the first mentioned deed. *Townsend v. Outten*, 95 Va. 536, 28 S. E. 958.

In an action for breach of warranty of title to land, where the deed recites that "immediate possession is delivered" and the declaration avers no eviction, the covenantee is not thereby estopped to deny that he got possession. *Sheffey v. Gardiner*, 79 Va. 313.

Party Claiming under Deed and Plat by Which the Land Was Dedicated to Public.—The question of dedication and acceptance is hardly worthy of consideration, from the fact that the plaintiff is not the original owner of the land, but claims under a deed and plat by which such street was dedicated to the public, and, it being inconsistent with his title papers, he is estopped from denying such dedication. *Jarvis v. Grafton*, 44 W. Va. 453, 30 S. E. 178; *Taylor v. Philippi*, 35 W. Va. 554, 14 S. E. 130, before cited; *Riddle v. Charleston*, 43 W. Va. 796, 28 S. E. 831; *Taylor v. Com.*, 29 Gratt. 780; *Depriest v. Jones*, 2 Va. Dec. 109; *Buntin v. Danville*, 93 Va. 200, 24 S. E. 830; 9 Am. & Eng. Ency. Law (2d Ed.) 46. *Ralston v. Weston*, 46 W. Va. 544, 35 S. E. 326, 327.

d. Privies.

In General.—Any person claiming under one who is bound by an estoppel is himself bound by the same estoppel. *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154; *Reynolds v. Cook*, 83 Va. 817, 3 S. E. 710. See ante, "Parties and Privies," II, A.

Privies, or those who derive title from or through the parties, ordinarily stand in the same position as the parties and are bound by every estoppel that could have been binding on the parties. *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154.

All persons in privity with a party estopped by deed are estopped also. *Reynolds v. Cook*, 83 Va. 817, 3 S. E. 710.

Heirs.—If a deed made by a married

woman was binding on her so as to constitute an estoppel, so, also, would the heirs be estopped, as it would be binding on them. *Buford v. Adair*, 43 W. Va. 211, 27 S. E. 260, citing *Coffman v. Coffman*, 41 W. Va. 8, 23 S. E. 523.

Where a husband conveys the property of his wife with warranty against the claims of himself and his heirs, his children, deriving title from their mother, will not be affected by the warranty. *Urquhart v. Clarke*, 2 Rand. 540.

c. Strangers.

A stranger can not be bound by an estoppel. *Nickell v. Tomlinson*, 27 W. Va. 697.

A person will not be affected by a deed when he was not a party to it. *Davis v. Tebbs*, 81 Va. 600.

f. Persons Not Sui Juris.

See post, "Persons Not Sui Juris," IV, A, 6, b, (3), (b).

g. State—Auditor's Deed.

An auditor's deed made in consummation of a sale for taxes can not bar the assertion by the state of any claim of right to the land. *State v. Spon-angle*, 45 W. Va. 415, 32 S. E. 283, citing *Reid v. State*, 74 Ind. 252, 260.

5. Who May Take Advantage of Estoppel by Deed.

See ante, "Who Is Estopped and Who May Take Advantage of Estoppel," II.

a In General—Strangers.

A relinquishment by the wife of her contingent right of dower will only operate against her in favor of the grantee or those claiming title under him; and it will never operate in favor of a stranger not claiming under such grantee; and as against such stranger she may claim her dower, though she has united in such a deed with her husband. *Nickell v. Tomlinson*, 27 W. Va. 697.

"The deed relied on to bar the demandant shows no privity of estate, or connection of any kind between her

and the tenant. It can not avail the tenant in this action." *Nickell v. Tomlinson*, 27 W. Va. 697, 712.

B., mother of plaintiff, under her father's will as construed by this court in 1867 (see 17 Gratt. 349), owned a life estate in the land in dispute, with remainder in fee to such of her children as might survive her. She died in 1852, and out of her seven children, only three survived her, of whom plaintiff was one. By deed in 1817, she relinquished her life estate to her seven children then living, and suit was brought for partition. Pending it, in 1818, a deed was made between the adults (to which plaintiff, being then a minor, was no party), agreeing to abide the partition to be made. The record has been destroyed, but the partition was made between the seven. In 1827 a deed was executed by plaintiff and others, ratifying the partition, but not so far as T. was concerned, neither he nor his wife being party to the deed. She was one of the three survivors, and her interests and the interests of her sister, the remaining one of the three, had passed to T. In 1852, after the death of B., the life tenant, T., conveyed the whole of the land in dispute to D., the defendant. The suit to construe the will was brought within two years after the death of the life tenant, and decided in 1867; and plaintiff brought his suit within three months after that decision for partition of the land held by D. Held, plaintiff is not estopped by the deed of 1827 from asserting against T. and those claiming under him his rights under the will to the land in dispute. "By that deed, it is true, he did assent to and ratify the partition that had been made, but not so far as Triplett, the grantor of the defendant, was concerned. Neither Triplett nor his wife were parties to that deed, and it would seem they were intentionally excluded from the benefit thereof, and consequently the plaintiff is not estopped by the deed from asserting his claim as against

Triplett, or those claiming under him." *Davis v. Tebbs*, 81 Va. 600.

b. Party Procuring Deed by Fraud or Misrepresentation.

"If the deed was procured by a fraud or willful misrepresentation, or by misrepresentation upon an honest mistake of fact as to the payment of the purchase money, the appellant could not rely upon it as an estoppel. Every difficulty with respect to the remedy by rule is removed so soon as it is made to appear that the execution of the deed was due to a misrepresentation of the facts produced by the appellant himself. The court will place the parties in the same situation that they were before the deed was executed. Any other rule would give to the appellant an undue advantage, derived from his own misconduct." *Williams v. Blakey*, 76 Va. 254.

W., in 1883, at sale made by B., as commissioner under decree of court, purchased a house and lot in F., and gave four bonds, each for \$720, payable in one, two, three, and four years thereafter. Payment of all but the second bond is admitted. As far back as 1869, W. insisted he had paid all, and was entitled to his deed. B. insisted that the second was unpaid; but finally, in 1872, executed deed acknowledging receipt of all the purchase money, and conveying the property to W. In 1874, the bond was found in possession of H., a lawyer to whom, in 1855, it had been intrusted for collection. In 1877, B. filed his petition in the suit wherein the decree of sale was rendered, praying for a rule against W. to show cause why he should not pay this bond, etc. W. filed his answer, insisting the bond had been paid. Much documentary evidence and many depositions of conflicting nature in the case. Held, notwithstanding the execution of the deed to W. by B., the latter is entitled, under the circumstances, to proceed against W. by rule for the vacation of the deed, and the sale of

the land to pay the bond, if unpaid. *Williams v. Blakey*, 76 Va. 254.

c. Purchaser for Value in Possession—General Warranty Deed by Heir Apparent.

"A general warranty deed made by an heir apparent for his expectancy, while void as a conveyance, as being for a mere possibility not coupled with an interest, would act as an estoppel in favor of a purchaser for value in possession. *Buford v. Adair*, 43 W. Va. 211, 27 S. E. 260.

6. Limitation of Doctrine.

a. Suits Based upon Deed—Does Not Extend to Collateral Actions.

"The estoppel of a deed will be limited to suits based upon it or growing out of the transaction in which it was executed, and will not extend to a collateral action, where the cause is different, although the subject matter may be the same. These propositions are abundantly sustained by the authorities cited by the appellant's counsel and by others that might be referred to. See on this subject generally, 2 Smith's L. C. p. 671, etc.; 7 Rob. Pr. 247." *McCullough v. Dasheill*, 78 Va. 634. See ante, "Extent of Operation," I, D.

b. In Regard to Character of Deed.

(1) Auditor's Deed.

"An auditor's deed made in consummation of a sale for taxes can not bar the assertion by the state of any claim or right to the land. The court says the deed is without warranty, and has not, as an estoppel, the force which a quitclaim has to pass title in the grantor at its date. *Reid v. State*, 74 Ind. 252, 260." *State v. Sponaugle*, 45 W. Va. 415, 32 S. E. 283. See post, "Quitclaim Deed or Release," IV, A, 6, b, (2)

(2) Quitclaim Deed or Release.

If a person holding a mere contingent right therein executes a deed for personal property in favor of the real owner of such property, such deed will not estop the grantor from show-

ing that the grantee was the true owner of such property prior to the execution of such deed, and that he was induced to make the same by such owner, who was fully acquainted with the condition of the property at the time of the execution of the deed. He will, however, be estopped from denying that whatever interest he might have had in such property passed by such deed. *Dewing v. Hutton*, 48 W. Va. 576, 37 S. E. 670. See ante, "Auditor's Deed," IV, A, 6, b, (1).

It does not prevent a grantor from showing that the title was already in his grantee, and the object of the deed was merely to confirm the grantee's title, for thereby no injury can occur to such grantee. *Dewing v. Hutton*, 48 W. Va. 576, 37 S. E. 670.

"This must then be regarded as only a quitclaim deed; and Hermann on Estoppel (vol. 2, p. 804), says: 'A grantor conveying by deed of bargain and sale, by way of release of quitclaim of all his right, and title to a tract of land, if made in good faith, and without any fraudulent representations, is not responsible for the goodness of the title beyond the covenants in his deed. A deed of this character purports to convey, and is understood to convey, nothing more than the interest or estate of which the grantor is seised or possessed at the time, and does not operate to pass or bind an interest not then in existence.'" *Fleming v. Kerns*, 37 W. Va. 494, 16 S. E. 600, 602.

(3) Deed Must Be Valid.

(a) In General.

See post, "When Specialty Void," IV, D, 2, b; "Estoppel Not Created by Void Contract," V, D, 1.

Acknowledging and Certifying.—A deed not acknowledged or not certified according to law, though actually admitted to record, can not be read in evidence as a recorded deed, but as between the parties it is valid. *Raines v. Walker*, 77 Va. 92.

As to acknowledging, signing, sealing, certifying, etc., see ante, "Doctrine Stated," IV, A, 1.

Deed Affected with Fraud.—Where a commissioner has been induced to execute a deed of conveyance by the purchaser's fraud or willful misrepresentation, or by misrepresentation upon an honest mistake of fact as to the payment of the purchase money, the purchaser can not rely on the deed as an estoppel, but may be proceeded against to have the deed annulled and the property subjected to sale. *Williams v. Blakey*, 76 Va. 254.

A married woman is not estopped from claiming as against her husband's creditors, a resulting trust in land paid for by her father and intended to be hers, but deeded to the husband by his collusion with the grantor, by reason of the failure of her father and herself to take positive action during his lifetime, if she did not then know how the title stood, nor what her father's intentions were, and did assert her title before it was assailed. *Steagall v. Steagall*, 90 Va. 73, 17 S. E. 756.

Deed in Fraud of Creditors—Estoppel to Claim Homestead.—"In *Shipe v. Repass*, 28 Gratt. 716, 734, this court held, that where a conveyance is set aside for fraud, at the suit of the grantor's creditors, he is not estopped as against them to assert his claim of homestead in the property embraced in the deed. That decision has been affirmed and reaffirmed by the cases of *Boynton v. McNeal*, 31 Gratt. 456, 459, and *Marshall v. Sears*, 79 Va. 49." *Hatcher v. Crews*, 83 Va. 371, 5 S. E. 221.

Where there is a fraudulent conveyance of property, which is subsequently annulled at the suit of the creditor, the grantor is not estopped as against the creditor to assert his right of homestead in the premises. Approved. *Shipe v. Repass*, 28 Gratt. 716, and *Boynton v. McNeal*, 31 Gratt. 456, examined and approved. *Marshall v. Sears*, 79 Va. 49.

Estopped to Deny Validity of Deed Defrauding Creditors.—One who has conveyed land to another to defraud his creditors is estopped from denying the validity of the conveyance. *Ratcliff v. Ratcliff*, 102 Va. 881, 47 S. E. 1007. See the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

Estoppel Of Married Woman to Show No Consideration.—The debts of a married woman, for which her separate estate is liable, are such as arise out of any transaction, out of which a debt would have arisen, if she were a feme sole, except that her separate estate is not bound by a bond or covenant based on no consideration, such bond or covenant being void at law, and she not being estopped in a court of equity from showing that it was based on no consideration. *Hughes v. Hamilton*, 19 W. Va. 366; *Radford v. Carwell*, 13 W. Va. 572.

(b) Persons Not Sui Juris.

In General.—"When an agreement is void for infancy or coverture, an estoppel founded solely on it must be equally void. The law throws its protection around infants and femes covert, and they can not be made liable to contract by their own representations." *Central Land Co. v. Laidley*, 32 W. Va. 134, 9 S. E. 61, 63. See ante, "Infants and Femes Covert," II, C.

Married Woman.—"In *Herman on Estoppel*, at § 581, the law is thus stated: 'In order to give rise to an estoppel by deed, the parties must ordinarily be sui juris, competent to make it effectual as a contract, and the instrument so executed as to be binding in law. The deed of a married woman will not operate as an estoppel where it fails as a grant, or estop her from setting up an estate obtained subsequently or by purchase, against the grantee. This, like the grant, is limited to the estate the wife has at the time, and does not extend to an interest acquired after the execution of the deed,

for she can not bind herself subsequently by any covenant. Where the deed of a married woman fails as a conveyance from the nonconcurrence of her husband, it is ineffectual for all purposes, and can not be relied upon as an estoppel or ground of recovery in a subsequent controversy. By common law, the warranty deed of a married woman, though executed in such form as to convey her title, did not operate against her by way of covenant or estoppel, because she was incapable of binding herself by covenants of warranty or by agreement to convey her real estate.'" *Lewis v. Apperson*, 103 Va. 624, 49 S. E. 978.

"A married woman's conveyance estops her as to the estate thereby granted. *Herman on Est.* 716. *Schaffner v. Grutzmacher*, 6 Ia. 137." *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154.

"In the case of a married woman's void conveyance (*Mattox v. Hightshue*, 39 Ind. 95), it was held that 'a right in equity can not grow out of an illegal and void transaction.' *Mustard v. Wohlford*, 15 Gratt. 329, was a case where an infant sold land by title bond to Mustard, and later, when of age, sold the same land by title bond to Wohlford, with notice of the sale to Mustard, and later conveyed it to Mustard pursuant to his sale to him; Mustard having notice of the sale to Wohlford. Wohlford sued Mustard and the vendor to cancel Mustard's deed, and get title to himself, and succeeded. The court held, that if an infant convey land, he may convey to another when of age, and his deed will avoid the first conveyance; and that the disaffirmance of the first sale by the second sale after the infant has become adult rendered the first sale void, and extinguishes any interest in law or equity which the first purchaser may have acquired under it, and entitles the vendor or second purchaser in his name to recover possession of the land at law, and hold it free from any equity

of the first purchaser. That case logically by analogy rules this case. An infant's conveyance is not void, but voidable, whereas a married woman's deed, without proper certificate, is void at the start. If a man may purchase the infant's land after he becomes of age, with notice of a prior sale to another during infancy, vesting the first purchaser with title until avoided, and the second purchaser takes a better title than the first, and call on equity to enforce his right by taking from the first purchaser his legal title, acquired after the infant obtained his majority pursuant to his sale in infancy, why can not much more a second purchaser from a married woman acquire a better title than one who took from her a deed not voidable, but void at the instant of its execution?" *Central Land Co. v. Laidley*, 32 W. Va. 134, 9 S. E. 61, 63.

If a deed from husband and wife conveying land of the wife be void as to her because of defective certificate of her examination and acknowledgment, and after the death of her husband she convey the land to another with notice of the former deed, yet the second purchaser will not be affected by such notice, the former deed being void and passing no right, legal or equitable, and the second purchaser does not hold the land as trustee for the first purchaser, and equity will not compel him to convey to the first purchaser, nor will it enjoin the second purchaser from prosecuting an action of ejectment to recover the land from the first purchaser's possession or that of his vendee. Though during coverture the wife bring suit against her husband and others to assert her right to land acquired by her husband in his name with the consideration paid by such first purchaser, reciting in her pleading that she had executed such deed to such first purchaser and received the consideration, and obtained a decree giving her such land, and declaring it her separate estate, that will

not estop her, or such second purchaser, from recovering the land from the first purchaser or his vendee. *Central Land Co. v. Laidley*, 32 W. Va. 134, 9 S. E. 61.

(c) Conveyance by Heir of Mere Possibility.

"A general warranty deed made by an heir apparent for his expectancy, while void as a conveyance, as being for a mere possibility not coupled with an interest, would act as an estoppel in favor of a purchaser for value in possession." *Buford v. Adair*, 43 W. Va. 211, 27 S. E. 260.

(d) Effect of Reception of Purchase Money.

"The case of *Shivers v. Simmons*, 54 Miss. 520, is greatly relied on by the appellant. The syllabus is: 'A married woman who, on exchanging land, received a perfect deed, but gave one, the certificate of acknowledgment to which was fatally defective, is estopped, when nine years thereafter the defect is discovered, to assert her title, if she has sold the lands received, and with the proceeds purchased others.' This was a case of exchange, it may be noted. The judge delivering the opinion says: 'We do not say that a mere reception of the purchase money would estop her where she has attempted to convey by an invalid deed, though it seems difficult to see how the purchaser's title is void in the one case, and not in the other. It is true, on the other hand, that a man who has made a conveyance wholly inoperative under the statute of frauds will not always be estopped by a reception of the purchase money, and that the remedy of the vendee ordinarily is by an action for its recovery.'" *Central Land Co. v. Laidley*, 32 W. Va. 134, 9 S. E. 61, 64.

c. By Language and Intention.

"An estoppel is never extended beyond what is called for by the plain import of the terms employed by the grantor in a conveyance of any kind." *Kent v. Watson*, 22 W. Va. 561, 568.

See ante, "Extent of Operation," I, D; post, "Necessity for Covenant of Warranty," IV, B; "Foundation and Limitation," IV, D, 4.

There is no rule requiring the estoppel to be extended beyond what is called for by the plain import of the terms employed by the grantor in the deed. In the absence of a general warranty, there is nothing in the nature of the instrument used, justifying the grantee in claiming under it anything further than the specific title or claim which it purports to convey. *Wynn v. Harman*, 5 Gratt. 157.

"The operation of deeds is a question of intention, and will not be carried further than the parties appear from the tenor of the whole instrument to have agreed; and the doctrine of estoppel is no exception to this general principle. Accordingly, the introduction of a statement into a sealed instrument will not render it conclusive, unless there is sufficient reason for believing that such was the design, or some injustice would result from allowing it to be contradicted." *McCullough v. Dashiell*, 78 Va. 634.

Where a party sells and conveys, without warranty, a particular claim or title to land, he is not thereby estopped from purchasing a superior adverse or outstanding title and holding the land under such superior title against the grantee of such particular claim or title where there was no fraud or concealment in the sale of said particular claim. An estoppel is never extended beyond what is called for by the plain import of the terms employed by the grantor in the conveyance. *Kent v. Watson*, 22 W. Va. 561, 562.

H. executes a deed to W. by which he sells all his claim in and to a certain piece of land, called the C. place, which was conveyed to C. by H., Sr. And the said H., for himself and his heirs, the said right, as it was vested in H., Sr., to the said W. and his heirs, against himself and his heirs, will warrant and defend. It is fully understood,

that if said title should prove insufficient in law or equity, the said W., and his heirs, are to have no recourse, he knowing the whole circumstances. H. is not estopped by deed from purchasing another adversary title to said land, and setting it up against his vendee. *Wynn v. Harman*, 5 Gratt. 157, 158.

D. and wife conveyed the wife's realty in N. city and N. county to L. in trust to secure two notes to M., to whom D. was also indebted in open account. Subsequently D. and wife conveyed the N. county realty to A., receiving in payment cash which was paid on the notes and certain notes which were applied on the open account, L. and M. releasing the N. county realty to A. by deed reciting that the two notes, to secure which said realty had been conveyed in trust, had been paid—D. and wife not being parties to the release. By M.'s order L. advertised N. city realty for sale to pay the balance of the trust debt. D. and wife enjoined. Held, that the intention being to recite that the two notes were paid quoad the N. county property and its purchaser A., the recital can be deemed an estoppel for that purpose only. *McCullough v. Dashiell*, 78 Va. 634.

Because deed recites that "intermediate possession is delivered," and declaration avers no conviction, covenantee is not thereby estoppel to deny that he got possession. *Sheffey v. Gardiner*, 79 Va. 313. The court in the above case say: "Now, upon a fair construction of that deed, it appears the possession spoken of is not actual possession, but only such possession as is conferred by the statute, and this possession, as we have before shown, is ousted eo instanti, there is an execution of the conveyance, and there is no necessity for alleging an actual ouster. Any other construction would allow the plaintiff in error to invoke certain recitals in his deed to defeat the obvious purpose of the instrument taken as a whole."

B. NECESSITY FOR COVENANT OF WARRANTY.

1. In General.

A deed without a covenant of warranty estops grantor from asserting, against the grantee, any title to the land he had or claimed, at the time of its execution. *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154.

But where conveyance recites or affirms, expressly or impliedly, that the grantor is seized of a particular estate which it purports to convey, he will be estopped to deny that such estate passed, although there be no warranty at all. *Van Rensselaar v. Kearney*, 11 Howard, 297. *Reynolds v. Cook*, 83 Va. 817, 3 S. E. 710.

As to effect of recitals in a deed, without warranty as an estoppel on grantor who subsequently acquired title, see post, "Recitals," IV, D.

Partition Deeds.—The heirs made partition, by deeds, of their ancestor's land. The deed to one of them and her husband grants 242 acres (her share) as follows: "The parties of the first part" (the other heirs) "do grant, relinquish, and release unto the parties of the second part, and to the heirs of the female party of the second part," etc. The deed contained no warranty. Similar deeds were made to the other heirs respectively. No other consideration passed. The wife died without having had children. The husband claimed an estate for his own life in one-half of the trust so conveyed to himself and his wife. Held, it conveyed no estate to the husband as against the heirs of his wife, who the not estopped by the deed from claiming title to said 242 acres. *Yancey v. Radford*, 86 Va. 538, 10 S. E. 972. The court in the above case said: "There is no estoppel growing out of this deed. There was no warranty therein, and its whole scope and object, and its only legal effect, was to set apart and effect a partition of the Radford lands—adjust the different rights of the parties to the

possession.' It was a grant by the Radford heirs only to this extent, and can operate no further, either by way of estoppel or otherwise." See ante, "By Language and Intention," IV, A, 6, c.

2. To Estop Grantor to Set Up After-Acquired Title.

The old law was, where one by a deed of bargain and sale, or lease and release, conveyed, that to which he had no title, he was estopped by his deed from claiming an after-acquired title in it. But this rule has been repeatedly set aside, and the law at the present time is, that where one conveys land to which he has no title by deed of bargain and sale, without a covenant of warranty, a subsequently acquired title will not inure to the benefit of the bargainee, even as against the bargainor and his heirs. *Herman on Est.*, § 653. *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154.

A conveyance without warranty by mere estoppel will not operate to pass to the grantee any title afterwards acquired by the grantor. *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154.

H., having only an equitable estate in land, conveyed the same without warranty to M. and F. in trust to secure a debt to B. This deed of trust was duly recorded. Afterwards, H. acquired the legal title and sold the land to D. with warranty. Held, that as H. did not have the legal title at the time he executed the deed of trust, and as it contained no warranty, the legal estate subsequently acquired by H. did not enure to the trustees to secure the debt to B. *Doswell v. Buchanan*, 3 Leigh 365, 23 Am. Dec. 280.

Where a party sells and conveys, without warranty, a particular claim or title to land, he is not thereby estopped from purchasing a superior adverse or outstanding title and holding the land under such superior title against the grantee of such particular

claim or title, where there was no fraud or concealment in the sale of said particular claim. An estoppel is never extended beyond what is called for by the plain import of the terms employed by the grantor in the conveyance. *Kent v. Watson*, 22 W. Va. 561.

A party verbally contracted to purchase land from a commissioner authorized to sell, subject to the approval of the court, and entered upon and improved the land; but the sale was never reported, and no part of the purchase price was paid. He afterwards, by a written contract without warranty, sold his improvements to a third person, stating that the title was outstanding, but not referring to his verbal purchase. More than 10 years afterwards, he purchased the land by a written contract from the commissioner. Held, that he was not estopped from asserting this latter claim against the assignee of the person to whom he sold his claim, there having been no covenant of warranty and no concealment on his part. *Kent v. Watson*, 22 W. Va. 561.

C. OPERATION OF COVENANTS.

1. Covenants of Warranty.

a. In General.

A covenant of warranty works an estoppel. *Doswell v. Buchanan*, 3 Leigh 365; *Gregory v. Peoples*, 80 Va. 355; *Reynolds v. Cook*, 83 Va. 817, 3 S. E. 710.

General Warranty.—As a general rule, a party is estopped by his general warranty. *Mitchell v. Petty*, 2 W. Va. 470, 472, 98 Am. Dec. 777.

M. died seized of two tracts of land, known respectively as Tanner and Walker tracts. He left nine heirs. Two of them sold their interest in the Tanner tract, with covenants of general warranty. Subsequently the two tracts were partitioned, and the whole of the interest of one of these grantors was set apart to her in the Tanner tract, and the whole share of the other in the Walker tract. The purchaser

took possession of the share of the one in the Tanner tract; whereupon she brought suit to recover out of that interest a parcel equal in value to her ninth interest in the Walker tract. Held, that she was estopped from any claim in the Tanner tract by her covenant of general warranty. *Mitchell v. Petty*, 2 W. Va. 470, 98 Am. Dec. 777.

b. Necessity That Estate Pass by Deed.

An assignee can only take advantage of the covenant of warranty when an estate passes by the deed, yet it is, in favor of the grantee, a covenant in gross, and binds the warrantor though no estate passes by the deed. *Burtner v. Keran*, 24 Gratt. 42.

c. On After-Acquired Title.

(1) In General.

Where Conveyance Contains No Covenant of Warranty.—The general rule is that where land is conveyed with warranty, the grantor is estopped from setting up an after-acquired title. *Doswell v. Buchanan*, 3 Leigh 365; *Reynolds v. Cook*, 83 Va. 817, 3 S. E. 710; *Nye v. Lovitt*, 92 Va. 710, 24 S. E. 345; *Flanary v. Kane*, 102 Va. 547, 46 S. E. 312, 681; *Gregory v. Peoples*, 80 Va. 355; *Kent v. Watson*, 22 W. Va. 561, citing *Wynn v. Harman*, 5 Gratt. 157; *Yancey v. Radford*, 86 Va. 638, 10 S. E. 972; *Burtner v. Keran*, 24 Gratt. 42; *Yock v. Mann* (W. Va.), 49 S. E. 1019.

A grantor is estopped to claim a title subsequently acquired where he has conveyed with warranty. *Nye v. Lovitt*, 92 Va. 710, 24 S. E. 345; *Townsend v. Outten*, 95 Va. 536, 28 S. E. 958. And it is not necessary that he should have a good title at the time of his conveyance. *Yock v. Mann* (W. Va.), 49 S. E. 1019. See ante, "To Estop Grantor to Set Up After-Acquired Title," IV, B, 2.

"It has long been the rule that a vendor of land was estopped from setting up an after-acquired title against his vendee, where there was a warranty or covenant for title, if the eviction of

his vendee would result in an action upon the covenants. *Doswell v. Buchanan*, 3 Leigh 365, 368; *Van Rennselear v. Kearney*, 11 How. 297; *French v. Spencer*, 21 How. 228; *Burtners v. Keran*, 24 Gratt. 42; *Reynolds v. Cook*, 83 Va. 817, 821, 3 S. E. 710; 2 Minor's Inst. (4th Ed.) 710, and cases cited; *Rawle, Cov.* (4th Ed.) 375-456." *Nye v. Lovitt*, 92 Va. 710, 24 S. E. 345. See ante, "Underlying Principles and Purpose of Doctrine," I, B.

"A warranty creates an estoppel which not only binds the grantor but takes effect upon every subsequent interest which he acquires and transfers it immediately to the grantee. *Herman on Est.*, § 654." *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154.

A deed of bargain and sale, like a release, passes no title which the bargainor had not at the time, yet if there be a warranty annexed, it will bar. Although the release can not bar the right, etc., yet the warranty may rebuke, and bar him and his heirs of a future right that was not in him at the time; and the reason wherefore a warranty, which is a covenant real, should bar a future right is, for avoiding a circuitry of action. *Doswell v. Buchanan*, 3 Leigh 365, 376, 377.

(2) Foundation and Object.

In General.—"The doctrine," he also added, 'is founded upon the highest principles of morality, and recommends itself to the common sense and justice of every one. And although it debars the truth in the particular case, and therefore is not unfrequently characterized as odious, and not to be favored, still it should be remembered that it debars it only in the case where its utterance would convict the party of a previous falsehood * * * and imposes silence only when in conscience and honesty he should not be allowed to speak.'" *Reynolds v. Cook*, 83 Va. 817, 3 S. E. 710.

To Prevent Circuitry.—In order to avoid circuitry of action a vendor of

land is estopped from setting up an after-acquired title where there is covenant for title or warranty. *Doswell v. Buchanan*, 3 Leigh 365; *Burtners v. Keran*, 24 Gratt. 42; *Reynolds v. Cook*, 83 Va. 817, 3 S. E. 710; *Nye v. Lovitt*, 92 Va. 710, 24 S. E. 345.

On the other hand, a covenant of warranty works an estoppel, and the reason usually given is that the estoppel prevents a circuitry of action. *Doswell v. Buchanan*, 3 Leigh 365; *Gregory v. Peoples*, 80 Va. 355. See ante, "The Reason," IV, A, 2.

(3) Operation of General Warranty.

Where a person conveys land with general warranty whereof he has not the title at the time, but afterwards acquires it, such acquisition enures to the benefit of the grantee, because the grantor is estopped to deny, against the terms of his own warranty, that he had the title. *Burtners v. Keran*, 24 Gratt. 42; *Raines v. Walker*, 77 Va. 92; *Baugh v. Walker*, 77 Va. 99; *Gregory v. Peoples*, 80 Va. 355; *Young v. Young*, 89 Va. 675, 17 S. E. 470. See also, *Doswell v. Buchanan*, 3 Leigh 365; *Mitchell v. Petty*, 2 W. Va. 470, 98 Am. Dec. 777.

A deed with covenant of general warranty estops the grantor from asserting, against the grantee, and passes to the grantee any title to the land that the grantor may acquire afterwards. *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154.

"In other words, the warranty creates an estoppel which takes effect on the subsequent interest, and passes it to the vendee. Now, this proposition may be correct when applied to fines, feoffments and other common-law recoveries. In this class of cases, it seems that the warranty not only concluded the grantor or feoffer, but it possessed the high function actually transferring the after-acquired estate of interest. But deeds of bargain and sale and other conveyances, operating under the statutes of uses, have never

had any such effect. They only pass such estate as the grantor has at the time; the warranty merely serving as a remedy, or operating to estop the party from denying the ownership of the estate at the time of the conveyance executed. In such cases the principle of the estoppel is, that if a person conveys land with general warranty, and does not own it at the time, but afterwards acquires the same land, such acquisitions enures to the benefit of the grantee; because the grantor is estopped to deny, against the terms of his warranty, that he had the title in question; but it does not operate actually to transfer the estate subsequently acquired." *Burtner v. Keran*, 24 Gratt. 42.

In *Burtner v. Keran*, 24 Gratt. 42, the court, citing 4 Kent. Com. 98, says: "If the conveyance be with general warranty, not only the subsequent title acquired by the grantor will enure by estoppel to the benefit of the grantee, but a subsequent purchase from the grantor, under his after-acquired title is equally estopped, and the estoppel runs with the land." *Raines v. Walker*, 77 Va. 92; *Clark v. Sayers*, 55 W. Va. 512, 47 S. E. 312.

If one conveys land with general warranty which, at the time, he does not own, or the title to which is defective, but he afterwards acquires good title to the same, such acquisition enures to the benefit of his grantee. *Clark v. Sayers*, 55 W. Va. 512, 47 S. E. 312.

"Where land in which the grantor has only an equitable estate is conveyed by deed with general warranty, the subsequent acquisition of the legal title by the grantor enures to the benefit of the grantee and those claiming under him. *Doswell v. Buchanan*, 3 Leigh 365; *Burtner v. Keran*, 24 Gratt. 42; *Raines v. Walker*, 77 Va. 92." *Gregory v. Peoples*, 80 Va. 355.

A bargain and sale of land intended under the statute to operate as a present conveyance or transfer is not an

assertion of title that will estop the bargainor, his heirs or assignees, from subsequent assertion of an after-acquired title, and does not imply a covenant of warranty. *Western Mining, etc., Co. v. Peytona Cannel Coal Co.*, 8 W. Va. 406.

Such Conveyance Does Not Operate as Actual Transfer—An estoppel by general warranty in a conveyance does not operate actually to transfer the estate subsequently acquired. *Burtner v. Keran*, 24 Gratt. 42.

Fines, Feoffments and Common-Law Recoveries—In fines, feoffments and other common-law recoveries, the warranty not only concluded the grantor or feoffer but actually transferred the after-acquired estate or interest to the grantee or feoffor. *Burtner v. Keran*, 24 Gratt. 42.

Conveyances under Statute of Uses.

—Conveyances under the statute of uses only pass such estate as the grantor had at the time, the warranty merely serving as a remedy, or operating to estop the grantor from denying the ownership of the estate at the time the conveyance was executed. *Burtner v. Keran*, 24 Gratt. 42.

Operation to Pass Contingent Re-

mainders—Under the Virginia statute (Code of 1887, § 2418), which provides that "any interest or claim to real estate may be disposed of by deed," a contingent remainder may be conveyed by deed; and a conveyance of a contingent remainder, where made with general warranty of title operates as an estoppel against the grantor subsequently claiming that he had no estate in the land at the time of the conveyance. *Young v. Young*, 89 Va. 675, 17 S. E. 470; *Burtner v. Keran*, 24 Gratt. 42; *Reynolds v. Cook*, 83 Va. 817, 3 S. E. 710. See also, *Townsend v. Outten*, 95 Va. 536, 28 S. E. 958. And by deed, with covenants of general warranty, an heir estops himself from afterwards claiming an inheritance. *Buford v. Adair*, 43 W. Va. 211, 27 S. E. 260.

A conveyance of a contingent remainder, if made with general warranty of title, would operate as an estoppel as against the grantor subsequently claiming that he had no estate in the real estate conveyed at the date of the conveyance. *Young v. Young*, 89 Va. 675, 17 S. E. 470, citing *Burtner v. Keran*, 24 Gratt. 42; *Raines v. Walker*, 77 Va. 92; *Gregory v. Peoples*, 80 Va. 355.

(4) Operations of Special Warranty.

H. executed a deed to W. by which he sold all his claim in and to a certain piece of land called the C. place, which was conveyed to C. by H., Sr.; which deed contained the following clause: "And the said H., for himself and his heirs, the said right, as it was vested in H., Sr., to the said W. and his heirs, against himself and his heirs, will warrant and defend. It is fully understood, that if said title should prove insufficient in law or equity, the said W., and his heirs, are to have no recourse, he knowing the whole circumstances." Held, that H. was not estopped from purchasing another adversary title to said land, and setting it up against his vendee. *Wynn v. Harman*, 5 Gratt. 157.

If at the time of the execution of a grant or bargain and sale of land, with covenant of special warranty, the title to the land be in a third person, not because of any act or default of the covenantor, and the covenantor himself afterwards acquires the title to the land, the title does not, by reason of the special warranty, vest in the covenantee, and the covenantor is not estopped to assert it or to grant it to another. *Western Mining, etc., Co. v. Peytona Cannel Coal Co.*, 8 W. Va. 406.

(5) Effect of Grantor's Discharge in Bankruptcy.

The discharge in bankruptcy releases the warrantor from liability for covenants broken, but does not affect the estoppel as to after acquired property,

because the covenant runs with the land. *Gregory v. Peoples*, 80 Va. 355. See post, "Effect of Covenant in Conveyance by One Who Afterwards Acquires Title as Trustee," IV, C, 1, c, (6).

While it is thus that where land in which the grantor has only an equitable estate is conveyed with general warranty, the subsequent acquisition of the legal title by the grantor enures to the benefit of the grantee and those claiming under him, by way of estoppel; yet, where the vendor is discharged in bankruptcy and afterwards, with another's money, buys the land at a resale for the unpaid purchase price and obtains a conveyance, such title does not enure to his grantee; and he is not estopped to deny the title, because a trust resulted in favor of him whose money bought the land. *Gregory v. Peoples*, 80 Va. 355.

(6) Effect of Covenant in Conveyance by One Who Afterwards Acquires Title as Trustee.

Where one having only the equitable title, conveys the land with general warranty; then is discharged in bankruptcy; and afterwards, with another's money buys the land, at a resale thereof for the unpaid purchase money, and obtains to himself a conveyance thereof, such title does not enure to his grantee, and he is not estopped to deny he had the title, because a trust resulted in favor of him whose money bought the land. *Gregory v. Peoples*, 80 Va. 355. In this case the court say: "The evidence is conclusive, and indeed, uncontradicted, that the purchase money for the land was wholly advanced by Norwood, and that in purchasing at the resale in 1869, Haskins acts as Norwood's agent, though the deed was made to Haskins. Under these circumstances a trust resulted in Norwood's favor, and consequently in equity Haskins must be regarded as holding the legal title as a mere trustee for Norwood. 2 Minor's Insts. 191; *Bank of the U. S. v. Carrington*,

7 Leigh 566; *Kane v. O'Connors*, 78 Va. 76, and cases cited. No title, therefore, was acquired by Haskins upon which any estoppel growing out of his deed to Peoples can operate in the appellant's favor." *Gregory v. Peoples*, 80 Va. 355.

(7) Persons Bound.

In General.—"The estoppel, * * * works upon the estate and binds an after-acquired title as between parties and privies. See, also, what is said by the court in *Wynn v. Harman*, 5 Gratt. 157, 164." *Reynolds v. Cook*, 83 Va. 817, 3 S. E. 710.

"And the reason, * * * is that such affirmation must necessarily have influenced the grantee in making the purchase, and, hence, the grantor and those in privity with him, in good faith and fair dealing, should be forever thereafter precluded from gainsaying it." *Reynolds v. Cook*, 83 Va. 817, 3 S. E. 710.

"Mr. Justice Story, in *Carter v. Jackson*, 4 Pet. 86, says: In the next place it shows that such estoppel binds all persons claiming the same land, not only under the same deed, but under any subsequent conveyance from the same party; that is to say, it binds not merely privies in blood but privies in estate, as subsequent grantee and alienees. In the next place, it shows that an estoppel which (as the phrase is) works on the interest of the land, runs with it into whosoever's hands the land comes. In *Myers v. Croft*, 13 Wall. (U. S.) 291, it is held, that a grantor not having perfect title, who conveys for full value, is estopped, both himself and others claiming by subsequent grant from him, against denying title; a perfect title afterwards coming to him. *Irvine v. Irvine*, 9 Wall. (U. S.) 618, 19 Am. & Eng. Ency. Law 1022, citing a long array of authorities in support thereof, says: In most states the covenant of general warranty is held not only to estop the grantor and his heirs from setting up an after-ac-

quired title, but also actually to transfer the estate subsequently acquired, as if it had passed by the deed in the first instance." *Clark v. Sayers*, 55 W. Va. 512, 47 S. E. 312.

Heirs Apparent.—By deed with covenants of general warranty, an heir apparent may estop herself from afterwards claiming her inheritance. Such estoppel extends to her heirs. *Buford v. Adair*, 43 W. Va. 211, 27 S. E. 260.

Married Woman.—"A mortgage deed given by a married woman with her husband's consent, with covenants of warranty, will enure, by way of estoppel, against her, in cases of title subsequently acquired. But with us there is no such statute. On the contrary, it is expressly provided, that even where the husband is a party to the deed in which the wife unites, it shall not operate any further upon her or her representatives 'by means of any covenant or warranty contained therein which is not made with reference to her separate estate as a source of credit, or which, if it relate to her said right of dower or to any estate or interest conveyed other than her own, is not made with reference to her separate estate as a source of credit.'" *Lewis v. Apperson*, 103 Va. 624, 49 S. E. 978.

Married Woman Uniting with Trustee to Convey Equitable Separate Estate.—A grantor of land, who has conveyed with a warranty or covenant of title is estopped from setting up an after-acquired title against his grantee, and, although there is no warranty, the grantor will be estopped from asserting an after-acquired title against his vendee where the deed of conveyance recites or affirms that the grantor is seised of a particular estate which the deed purports to convey and upon the faith of which the sale was made. But this doctrine does not apply to a married woman holding an equitable separate estate, who unites with her trustee merely for the purpose of showing that the trustee was making

the conveyance with her knowledge and by her direction, and who makes no warranty or other covenant of title, nor any averment or affirmation that she was seised of or entitled to a particular estate in the land which the deed purports to convey. *Nye v. Lovitt*, 92 Va. 710, 24 S. E. 345, 2 Va. Law Reg. 29.

2. Covenant by Grantee Assuming Payment of Debt.

Where the purchaser at a judicial sale of lands, who was a party to the administration proceedings, assumes the payment of a lien thereon and retains of the purchase price so much as "is equal to that debt, including interest to this time," covenanting to keep the first parties, the estate, and all persons claiming thereunder, harmless by reason of such debt, he is estopped from afterwards asserting that he did not retain enough. *Menefee v. Marge*, 1 Va. Dec. 644.

D. RECITALS.

1. Definition.

"A recital is a narration of such deeds, agreements, or facts as are necessary to explain the grantor's title and the motives and reasons upon which the deed is founded and entered into." *M'Cullough v. Dashiell*, 78 Va. 634.

2. Rule Stated.

a. In General.

As a general rule the parties to a bond or other sealed instrument are estopped to deny the recitals thereof. *Findley v. Findley*, 42 W. Va. 372, 381, 26 S. E. 433; *Baltimore, etc., R. Co. v. Vanderwarker*, 19 W. Va. 265; *Pannill v. Calloway*, 78 Va. 387; *Chapman v. Com.*, 25 Gratt. 721; *Gibson v. Beckham*, 16 Gratt. 321; *Cox v. Thomas*, 9 Gratt. 312; *Northwestern Bank v. Fleshman*, 22 W. Va. 317; *Cecil v. Early*, 10 Gratt. 198; *Franklin v. Depriest*, 13 Gratt. 257, and note; *Hoke v. Hoke*, 3 W. Va. 561; *Pratt v. Wright*, 13 Gratt. 175; *Wynn v. Harman*, 5 Gratt. 157; *Taylor v. King*, 6

Munf. 358; *Cordle v. Burch*, 10 Gratt. 480; *Board of Supervisors v. Dunn*, 27 Gratt. 608; *Shaw v. McCullough*, 3 W. Va. 260; *McMillian v. Hickman*, 35 W. Va. 705, 14 S. E. 227, 230; *Caskie v. Harrison*, 76 Va. 85; *Blankenship v. Ely*, 98 Va. 359, 36 S. E. 484; *Monteith v. Com.*, 15 Gratt. 172.

A party who has admitted a fact in his deed, is estopped not only from disputing the deed, but every fact which it recites. *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154; *Anderson v. Phlegar*, 93 Va. 415, 25 S. E. 107. See ante, "Persons Estopped," IV, A, 4.

While in *Griffin v. McCaulay*, 7 Gratt. 476, it is held, that a trust deed to secure creditors, reciting the amount of the debts due to the different creditors, is not conclusive, even as against the grantor and his administrator of the amount of the respective debts. *Monteith v. Com.*, 15 Gratt. 172.

Right to Correct Mistake.—As to right to correct recitals when there is a mistake therein, see post, "Correction of Recitals," IV, D, 6.

b. Where Specialty Void.

A solemn admission by deed clearly estops the parties from denying the fact unless the bond is void as being in contravention of the law. *Cecil v. Early*, 10 Gratt. 198. See ante, "Deed Must Be Valid," IV, A, 6, b, (3).

c. Where Recital in Specialty Contrary to Record.

The parties to a bond are estopped to deny the truth of recitals contained therein although it is in direct contradiction to the record. *Caskie v. Harrison*, 76 Va. 85, 95; *Blankenship v. Ely*, 98 Va. 359, 36 S. E. 484; *Monteith v. Com.*, 15 Gratt. 172; *Findley v. Findley*, 42 W. Va. 372, 381, 26 S. E. 433; *Baltimore, etc., R. Co. v. Vanderwarker*, 19 W. Va. 265, 270; *Gibson v. Beckham*, 16 Gratt. 321; *Chapman v. Com.*, 25 Gratt. 721; *Pannill v. Calloway*, 78 Va. 387; *Shelton v. Jones*, 26 Gratt. 898; *Andrews v. Ivory*, 14 Gratt.

229; *Lancaster v. Wilson*, 27 Gratt. 624; *Franklin v. Depriest*, 13 Gratt. 257.

"In *Cutler v. Dickinson*, 8 Pick. R. 386, a bond given by the administrator to a judge of probate with the usual condition, was offered in evidence. It was objected to because it appeared on examining the records of the probate office, that there was no decree or other evidence of the appointment of the administrator except what resulted from the bond; and according to a case referred to in the argument, the law required probate decrees to be recorded. The court held, that the obligors were estopped by the recital in the bond to deny the appointment of the administrator. So parties were estopped from denying that there was such injunction, or judgment or decree as their bond recites and describes. *Allen v. Lockett*, 3 J. J. Marsh, R. 165; *Stockton v. Turner*, 7 Id. 192; *Kellar v. Becler*, 4 Id. 655. In all those instances the matter recited, and which the parties were estopped by their bond from denying, ought regularly to appear of record." *Cox v. Thomas*, 9 Gratt. 312.

Where a bond is executed pursuant to an order made in a chancery suit requiring its execution, as a condition precedent to the enjoyment of certain rights, the parties executing it are estopped to deny its recital although they contradict the record. *Blankenship v. Ely*, 98 Va. 359, 36 S. E. 484, citing *Caskie v. Harrison*, 76 Va. 85.

3. Rule Illustrated.

Estoppel to Deny Notice of Judgment.—W. obtained a judgment against the C. R. N. Co. His judgment was never placed on the lien docket. More than two years afterwards the company gave a trust to secure its creditors, including the debt due to W., which was therein described as the balance due on the judgment to W., "rendered in the United States district court held at Charleston, Kanawha county, in the spring of 1856. The

balance being now about two thousand dollars." W. filed a bill to enforce his judgment, and the defendants alleged a want of notice by reason of its not being docketed, and also that they had no actual notice of it. Held, that the trustee and trust creditors claiming the benefit of the trust are estopped by the recital of the deed from averring a want of notice of the judgment, at the time of the execution of the deed. *Coal River Nav. Co. v. Webb*, 3 W. Va. 438.

Bond Reciting Oblige "As Executor."—Where a bond is executed to the obligee "as executor," the obligor is estopped to deny that the obligee is such executor. *Hoke v. Hoke*, 3 W. Va. 561.

A bond reciting one to be guardian estops its obligors from questioning that fact. *Findley v. Findley*, 42 W. Va. 372, 26 S. E. 433, citing *Monteith v. Com.*, 15 Gratt. 172.

Representations to Purchaser.—A grantor in a deed, releasing an existing lien on land in favor of a debt to be secured by a deed of trust thereon, who recites in his deed of release that his mother has become the purchaser of a life estate in the land, and that he has acquired a lien on such life estate by virtue of having paid a part of the purchase money therefor as surety for his mother, is estopped by the recitals of his deed from asserting, as against the trust creditor, that he, and not his mother, was the purchaser of said life estate. It is immaterial that the records would show who the purchaser was. Having represented that his mother was the purchaser, and his representations having been acted on by the trust creditor, it must be taken as true. *Anderson v. Phlegar*, 93 Va. 415, 25 S. E. 107.

Recital as to Division Line.—Where a husband owns, in its entirety, one of two adjoining tracts of land and his wife an undivided one-eighth of the other, which she conveys to one of her cotenants, by a deed, without warranty, in which her husband joins, reciting a

description of the division line and one of its termini, different from that given in the deeds by which the husband obtained his lands, and referring to said terminus as an agreed corner; and, afterwards, by partition, another of her cotenants obtains that portion of the land in which the wife owned a part, lying adjacent to said boundary line, and sues the husband and wife in ejectment for a small triangular piece of land the title of which depends upon the location of the division line, in the absence of title by adverse possession, the husband having conveyed his land to his wife in the meantime; the defendants are estopped by the recitals in their deed from relying upon the description of the division line contained in the deeds under which they claim, and can not use said deeds as evidence of the location of the disputed line, if objected to by the plaintiff. *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154.

Extrinsic Evidence to Locate Corner Ambiguously Described.—Where the description of the corner in controversy, contained in the deed executed by the defendants, reads as follows: "Beginning opposite Uriah White's house in the middle of Dry Fork at an agreed corner between Thomas S. White, decd. and Uriah White," and calls for no monument, which can be ascertained by mere inspection, and without measurement or calculation and, opposite Uriah White's house, Dry Fork is claimed to have two channels over thirteen poles distant from each other, in either of which, the point may be, as determined by the evidence, the description does not import such certainty of location as to estop the defendants from introducing evidence tending to show that the corner in question is not a certain rock in one channel of Dry Fork, as claimed by the plaintiff, and the court properly overruled plaintiff's motion to strike out such evidence. *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154.

Recognition of Judicial Proceedings.

—In an action of debt on an injunction bond, the obligors are estopped to deny that there is such a judgment as that which the bond describes, or that the injunction has been awarded. *Northwestern Bank v. Fleshman*, 22 W. Va. 317.

Where an appellant by attorney gives bond reciting that a supersedeas has been allowed, he is estopped to deny that the supersedeas issued. *Baltimore, etc., R. Co. v. Vanderwarker*, 19 W. Va. 265.

Office of Principal or of Oblige.

Where persons become the sureties of a deputy sheriff by executing his bond jointly with him, they are estopped to deny that he is the deputy and that the person named therein as such is the sheriff. *Cox v. Thomas*, 9 Gratt. 312.

M. was elected sheriff of S. in 1854 and gave bond as such. In July, 1856, he gave bond under the act of March 15, 1856, extending the time for which sheriffs should hold office to Jan. 1, 1857. In May, 1856, he was re-elected sheriff for a regular term of two years commencing Jan. 1, 1857, but he did not give his official bond, under that election within 60 days after his election, nor until Jan. 12, 1857, when it was executed by himself and his sureties. This bond, reciting his election for two years from Jan. 1, 1857, was acknowledged and recorded, and he was permitted by the court to qualify and act as sheriff. Held, that the sureties of M., in his last bond were estopped by its recitals from denying that M. was sheriff, and that the bond was binding on them. *Monteith v. Com.*, 15 Gratt. 172.

In *Franklin v. Depriest*, 13 Gratt. 257, the official bond of an executor was made payable to four justices, one of whom was not a member of the court at the time. It was held, that the sureties were estopped from averring that he was not a member of the court, as by their bond they acknowl-

edged that the four persons to whom it was made payable, were justices of the county court then sitting. *Monteith v. Com.*, 15 Gratt. 172.

The sureties of a deputy in his bond to the high sheriff for the faithful discharge of his duties are estopped to deny that their principal was a deputy, unless the bond is invalid. *Cecil v. Early*, 10 Gratt. 198.

N. living in Virginia brought two suits in South Carolina, and B. living there became his security for costs. N. executed to B. a bond with sureties living in Virginia, with condition to indemnify him against injury for having entered into the undertaking as surety for the said costs. In an action by B. against N. and his sureties, the records of the suit brought by N. in South Carolina were offered in evidence by B. and were objected to on the ground that they showed that B. had not become the surety at the date of the bond of N. and his sureties to him. Held, that as the defendants did not show that B. was surety for N. for costs in other cases, their bond must be held to refer to these suits, and they are estopped by their bond from denying that B. was the surety of N. at the time of its execution. *Cordle v. Burch*, 10 Gratt. 480.

4. Foundation and Limitation.

Estoppels are founded and limited by intention, and extend not to un-contemplated objects. Hence a recital may be an estoppel for one purpose, and not for another. *McCullough v. Dashiell*, 78 Va. 634. See ante, "Extent and Operation," I, D.

Formal statements and admissions, which were perhaps looked upon as unimportant when made, and by which no one was even deceived, are not conclusive. And, as estoppels are founded on intention, they will be limited by it and will not extend to objects that the parties cannot reasonably be supposed to have had in view. A recital may consequently be an estoppel for some purposes and not for others.

The estoppel of a deed will be limited to suits based upon it or growing out of the transaction in which it was executed, and will not extend to a collateral action, where the cause is different, although the subject matter may be the same. *McCullough v. Dashiell*, 78 Va. 634. See ante, "Suit Based upon Deed—Does Not Extend to Collateral Actions," IV, A, 6, a; "By Language and Intention," IV, A, 6, c.

When a grantor recites that he has an indefeasible title to the land conveyed, or uses terms or modes of conveyance for which such fact is fairly to be inferred, he and those claiming under him, are generally estopped to deny such fact, or to oppose the legal consequences flowing from it. If, however, by the same deed which would otherwise work the estoppel, it appears that the grantor had only a particular claim or title, the estoppel would be defeated. *Wynn v. Harman*, 5 Gratt. 157, 158.

D. and wife conveyed to L. in trust to secure two notes to M., wife's realty in N. city and H. county. Later, D. and wife sold and conveyed the N. county realty to A., and D. received part of price in cash and balance in notes payable to himself. The cash, D. paid on the notes of M. The notes D. later delivered to M., to whom he was indebted on open account as well as by trust deed, without directing their application, and M. applied them to his open account. Trustee L. and M. released to purchaser A. and N. county property by deed, reciting that the two notes, to secure which said realty had been conveyed in trust, had been paid—D. and wife not being parties to the release. By M.'s order L. advertised N. city realty for sale to pay balance of trust debt. D. and wife enjoined. It was held, the intention being to recite that the two notes were paid quoad the N. county property and its purchaser A., the recital can be deemed an estoppel for that purpose only. *McCullough v. Dashiell*, 78 Va. 634.

5. Recitals Constituting Estoppel.

a. In General.

Unnecessary Recitals.—"As between the original parties, a recital unnecessary to the conveyance will not operate as an estoppel. 2 Devlin on Deeds, § 995. A party making a deed is not estopped as between the original parties to it, by recitals unnecessary to the conveyance. *Osborn v. Endicott*, 6 Call 149." *Clark v. Sayers*, 55 W. Va. 512, 47 S. E. 312.

The rule that recitals in a deed estop all parties and privies does not extend to mere description or nonessential averment. *Clark v. Sayers*, 55 W. Va. 512, 47 S. E. 312.

When the court has cognizance of the subject matter, or capacity to take a bond, and takes a bond which on its face is valid, but contains a recital of facts necessary to its validity, as in the cases of the election and induction into office of a sheriff, the presence of the justices named as obligees, and the like, the obligors shall be estopped from denying the truth of such recitals. *Gibson v. Beckham*, 16 Gratt. 321.

When Grantor's Declaration Would Be Evidence.—"A recital in a deed only operates as an estoppel in cases in which the declaration of the grantor would be evidence. A recital is not competent to show title in the grantor. *Joeckel v. Easton*, 11 Mo. 118 (47 Am. Dec. 142)." *Clark v. Sayers*, 55 W. Va. 512, 47 S. E. 312.

b. Particular Recitals.

By the recitals in the deed from I. and wife to F., dated July 22, 1893, it is stated that the conveyance from F. to I., dated March 1st, was in consideration of \$250, and that it was agreed between the parties that the same should be rescinded, and a conveyance made, and that, in consideration of the repayment of the purchase money, said I. proceeded to reconvey. This deed, on its face shows that there was a sale for \$250, and afterwards an

agreement to reconvey, nothing indicating a trust or mortgage. The recitals in this deed must be regarded as particular recitals, which Bigelow on Estoppel (page 365) says are conclusive evidence of the matters stated if the deed is valid. See also, *Wiley v. Givens*, 6 Gratt. 277. *Greer v. Mitchell*, 42 W. Va. 494, 26 S. E. 302.

c. Recitals of Consideration.

Recital of Payment.—The acknowledgment by the grantor in a deed of conveyance of the receipt of the purchase money does not estop him from proving that it has not been received. *Wilson v. Shelton*, 9 Leigh 342; *Radcliff v. High*, 2 Rob. 271.

A vendor of land executes a deed of conveyance to the purchaser, in which he acknowledges receipt of the purchase money, and subjoins to the deed a receipt in full for the same; yet upon proof that in fact the whole purchase money was not paid, he is not concluded from claiming the balance due him in equity. *Wilson v. Shelton*, 9 Leigh 342.

Estoppel to Set Up Defense of Invalid Consideration.—The consideration of a bond was stated to be "money loaned," to which the defense set up was that the consideration was Confederate treasury notes and therefore illegal and void, to which the plaintiff replied that the defendant was estopped by the bond from alleging any other consideration than that mentioned in it, and on demurrer to this replication the court below held the law to be for the plaintiff. Held, that a court ought not to lend itself to enforce contract made in violation of law, nor allow a guilty party to effectuate his ends by pleading an estoppel to the truth of the case when the policy of the law forbids this transaction. *Calfee v. Burgess*, 3 W. Va. 274.

Debts for Which Deed of Trust Given.—See ante, "In General," IV, D, 2, a; post, "Correction of Recitals," IV, D, 6.

1. Recitals as to Position or Description of Land.

Recital as to Division Line.—Where a husband owns, in its entirety, one of two adjoining tracts of land and his wife an undivided one-eighth of the other, which she conveys to one of her cotenants, by a deed, without warranty, in which her husband joins, reciting a description of the division line and one of its termini, different from that given in the deeds by which the husband obtained his lands, and referring to said terminus as an agreed corner; and, afterwards, by partition, another of her cotenants obtains that portion of the land in which the wife owned a part, lying adjacent to said boundary line, and sues the husband and wife in ejectment for a small triangular piece of land, the title of which depends upon the location of the division line, in the absence of title by adverse possession, the husband having conveyed his land to his wife in the meantime; the defendants are estopped by the recitals in their deed from relying upon the description of the division line contained in the deeds under which they claim, and can not use said deeds as evidence of the location of the disputed line, if objected to by the plaintiff (p. 316). *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154.

6. Correction of Recitals.

A mistake in the recitals of a deed, referring to a previous deed of marriage settlement between the grantors, may, in equity, be shown by the grantees, by introducing in evidence the deed referred to in the recitals. *Bower v. McCormick*, 23 Gratt. 310.

"In *Stoughton v. Lynch*, 2 John Ch. R. 209, it was held, that a recital in deed founded on a mistake and untrue in fact, will not be allowed to operate by way of estoppel to exclude the truth satisfactorily shown to the court." *Bower v. McCormick*, 23 Gratt. 310.

"And so it has been held, that formal statements and admissions, which were

perhaps looked upon as unimportant when made, and by which no one was ever deceived or induced to alter his position, are not conclusive." *McCullough v. Dashiell*, 78 Va. 634.

"Nothing is more obvious than the injustice that would ensue if the formal recitals introduced into conveyances for the convenience of the grantee, and with a view to facilitate the transfer of the title to subsequent purchasers, were treated as conclusive in opposition to the truth of the case and the understanding of the parties." *McCullough v. Dashiell*, 78 Va. 634.

A trust deed to secure creditors reciting the amount of the debts due to the different creditors is not conclusive, even as against the grantor and his administrator, of the amount of the respective debts, and it may be showed that the debts were for a less amount. *Griffin v. Macaulay*, 7 Gratt. 476.

7. Operation on After-Acquired Title. a. In General.

Where Conveyance Recites That Grantor Is Seised of a Particular Estate.—A grantor is estopped to claim a title subsequently acquired not only where he has conveyed with a warranty, but also where the deed of conveyance recites, or affirms, expressly or impliedly, that the grantor is seised of a particular estate which the deed purports to convey, and upon the faith of which the bargain is made. *Townsend v. Outten*, 95 Va. 536, 28 S. E. 958; *Flanary v. Kane*, 102 Va. 547, 46 S. E. 312, 681; *Doswell v. Buchanan*, 3 Leigh 365; *Burners v. Keran*, 24 Gratt. 42; *Nye v. Lovitt*, 92 Va. 710, 24 S. E. 345.

Where a conveyance recites or affirms, expressly or impliedly, that the grantor is seised of a particular estate which it purports to convey, he will be estopped to deny that such estate passed, although the deed contains no covenant of warranty at all. And such grantor is therefore estopped from setting up an after-acquired title to the

estate thereby conveyed. *Reynolds v. Cook*, 83 Va. 817, 3 S. E. 710, 5 Am. St. Rep. 317.

"The leading case on the subject in this country is *Van Rensselaer v. Kearney*, 11 How. 297, which was ably argued and very fully considered. In that case a deed was executed by a life tenant conveying his interest in certain lands, which was supposed by the parties at the time to be a fee simple, and upon that footing the bargain proceeded. Afterwards the grantor acquired the fee, and it was held, that he and those claiming under him were estopped by his deed from setting up such after-acquired interest, independently of the covenants in the deed, which were of doubtful import. In delivering the opinion of the court, Mr. Justice Nelson said: 'Where the deed bears on its face evidence that the grantor intended to convey, and the grantee expected to become invested with, an estate of a particular description or quality, and that the bargain had proceeded upon that footing between the parties, then, although it may not contain any covenants of title, in the technical sense of the term, still the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted, at least so far as to estop them from ever afterwards denying that he was seised of the particular estate at the time of the conveyance.'" *Reynolds v. Cook*, 83 Va. 817, 3 S. E. 710.

"He then refers to and reviews a number of authorities, English and American, on the subject, and continues as follows: 'The principle deducible from those authorities seems to be, that whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seised or possessed of a particular estate in

the premises, and which estate the deed purports to convey; or, what is the same thing, if the seisin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seised and possessed at the time he made the conveyance. *Reynolds v. Cook*, 83 Va. 817, 3 S. E. 710.

b. Married Women.

The doctrine of estoppel by recitals to set up after-acquired title does not apply to a married woman holding an equitable separate estate, who unites with her trustee merely for the purpose of showing that the trustee was making the conveyance with her knowledge and by her direction, and who makes no warranty or other covenant of title, nor any averment or affirmation that she was seised of or entitled to a particular estate in the land which the deed purports to convey. *Nye v. Lovitt*, 92 Va. 710, 24 S. E. 345.

8. Persons Estopped.

See ante, "Who Is Estopped and Who May Take Advantage of Estoppel," II.

a. Parties and Privies.

The recitals in a deed or other specialty estop all parties to deny anything set forth or affirmed by them. *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154; *Blankenship v. Ely*, 98 Va. 359, 36 S. E. 484, citing *Caskie v. Harrison*, 76 Va. 85; *Baltimore, etc., R. Co. v. Vanderwarker*, 19 W. Va. 265. See ante, "In General," IV, D, 2, a.

Recitals in a deed estop all parties and privies, as a general rule. *Clark v. Sayers*, 55 W. Va. 512, 47 S. E. 312.

Where a party is estopped to dispute his deed by reason of estoppel or otherwise, every person claiming under and through him is estopped also. *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154; *Anderson v. Phlegar*, 93 Va. 415, 25 S. E. 107.

"The general rule, as often stated, that parties and privies are estopped from denying the recitals in a deed, when taken in its broad and literal sense, is not altogether accurate. The rule properly understood and more accurately stated, is this: Where it can be collected from the deed that the parties to it have agreed upon a certain admitted state of facts, as the basis on which they contract, the statement of these facts, though but in the way of recitals, shall estop the parties to aver the contrary. See *Toney v. Raincock*, 7 Com. B. 336; *Stoughell v. Buck*, 68 Eng. C. L. R. 786; *Borst v. Corey*, 16 Barb. R. 136." *Bower v. McCormick*, 23 Gratt. 310.

Where a recital in a deed is intended to be a statement which all the parties to the deed have mutually admitted to be true, it is an estoppel upon all. But where it is intended to be the statement of one party only, the estoppel is confined to that party; and the intention is to be gathered from the deed. *Bower v. McCormick*, 23 Gratt. 310.

When the recitals in the deed refer to what the grantors have done, or intend to do, among themselves, and in which the grantees have no part or interest, and the wording of the recitals indicate that the scrivener did not have the recited deed before him and there is no evidence that the grantees knew anything of the recited deed except as recited, these recitals will be intended to be the statement of the grantors only. *Bower v. McCormick*, 23 Gratt. 310.

Where it can be collected from a deed that the parties thereto have agreed upon a certain admitted state of facts as the basis on which they contract the statement of these facts, though but in the way of recital, will estop the parties from averring the contrary. But a mere recital in a deed does not conclude all the parties. There must be a direct affirmation, so intended by all the parties, in order

to bind all; and this intention may be gathered from the whole instrument. *Bower v. McCormick*, 23 Gratt. 310.

Grantor or Obligor.—The grantor or obligor are estopped to deny the recitals thereof. *Hoke v. Hoke*, 3 W. Va. 561; *Findley v. Findley*, 42 W. Va. 372, 26 S. E. 433; *Anderson v. Phlegar*, 93 Va. 415, 25 S. E. 107; *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154; *Northwestern Bank v. Fleshman*, 22 W. Va. 317; *Cordle v. Burch*, 10 Gratt. 480; *Wynn v. Harman*, 5 Gratt. 157; *Gibson v. Beckham*, 16 Gratt. 321.

As to estoppel of grantor by recital in the deed to set up after-acquired title, see ante, "In General," IV, D, 7, a.

Sureties.—The sureties on an official bond are estopped by the recitals therein. *Cox v. Thomas*, 9 Gratt. 312, *Monteith v. Com.*, 15 Gratt. 172; *Franklin v. Depriest*, 13 Gratt. 257; *Cecil v. Early*, 10 Gratt. 198.

One Asserting Title by Reason of Deed.—Facts disclosed by deed, which is a link in chain of title, held binding on one asserting title by reason of such deed. *Flanary v. Kane*, 102 Va. 547, 46 S. E. 312, 681.

Trustee and Trust Creditor under Deed of Trust.—See ante, "Rule Illustrated," IV, D, 3.

Bond Executed by Attorney.—"The plaintiff in error is estopped from denying, that a writ of supersedeas was awarded in that case by the recitals of that fact in the bond executed by its attorney, the benefit of which it received and enjoyed. *Hoke v. Hoke*, 3 W. Va. 561; *Bates v. Merrick*, 2 Hun. 568; *Levi v. Dorn*, 28 How. (Prac.) 217; *Anderson v. Barry*, 2 J. J. Marsh 280; *Hill v. Burk*, 62 N. Y.; *Monteith v. Com.*, 15 Gratt. 172; *Franklin v. Depriest*, 13 Gratt. 257; *Wayman v. Taylor*, 1 Dana 527; *Daniels v. Tearney*, 12 Otto. 415; *Adams v. Robinson*, 1 Pick. 461; *Story on Agency*, § 24, note, 8th Ed.; *Foster v. Blount*, 1 Overton 342; *Scaggs v. Balto. & Wash. R.*

R. Co., 10 Md. 281." Baltimore, etc., R. Co. v. Vanderwarker, 19 W. Va. 265, 270.

Trustees and Creditors Estopped by Recitals in Deed of Trust.—"It seems to me, therefore, that the trustees and creditors claiming the benefit of the trust are clearly estopped and precluded by this plain and unambiguous recital in the deed from averring a want of notice of the appellee's judgment at the time of its execution. *Den v. Carroll*, 3 Johns. Cas. 174; *Carver v. Jackson*, 4 Peters 1; *Wiley v. Givens*, 6 Gratt. 277; *Hannon v. Hannah*, 9 Gratt. 146; *William Oliver and others v. Piatt*, 3 Howard 333." *Coal River Nav. Co. v. Webb*, 3 W. Va. 438, 442.

b. Married Women.

Limit of Estoppel.—"It is true that the recitals in the deed of a married woman are limited to the estate which she has at the time, and do not estop her from showing that they are false. *Herman on Est.* 716; *Griffin v. Sheffield*, 38 Miss. 359; *Banks v. Banks*, 101 U. S. 240." *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154. See ante, "Married Women," IV, D, 7, b.

9. Who May Invoke.

See ante, "Who Is Estopped and Who May Take Advantage of Estoppel," II.

Stranger.—Recitals in deeds do not operate as estoppels in favor of strangers who have not acted on or been misled by them; and formal statements and admissions, unacted upon, are not conclusive. *McCullough v. Dashiell*, 78 Va. 634. See ante, "Recitals as to Position or Description of Land," IV, D, 5, d.

D. and wife conveyed to L. in trust to secure two notes to M., wife's realty in N. city and N. county. Later, D. and wife sold and conveyed the N. county realty to A; and D. received part of the price in cash and balance in notes payable to himself. The cash, D. paid on the notes of M. The notes D. later delivered to M., to whom he

was indebted on open account as well as by trust deed, without directing their application, and M. applied them to his open account. Trustee L. and M. released to purchaser A. and N. county property by deed, reciting that the two notes, to secure which said realty had been conveyed in trust, had been paid—D. and wife not being parties to the release. By M.'s order L. advertised N. city realty for sale to pay balance of trust debt. D. and wife enjoined. It was held, D. and wife not being parties or privies to the release, and not having acted on or been misled by its recitals, it operates not as an estoppel in their favor. *McCullough v. Dashiell*, 78 Va. 634.

"In the first place, it is to be observed that Dashiell and wife were not parties to the release deed in question, and that its object was to relieve the Norfolk county property of the lien of the deed of trust in the hands of the Norfolk Land Association, which was in fact the purchaser. This, then, being its object, and such the intention of the parties, there can be no doubt that as to any question affecting the lien released on that particular property, the recital in the release deed that the notes secured therein had been fully paid would be conclusive as between the parties to that deed. But the rule does not apply in favor of strangers who have not acted upon or been misled by the recital." *McCullough v. Dashiell*, 78 Va. 634.

"It is not pretended that Dashiell and wife, or either of them, have been induced to alter their position, or have in any way been misled or prejudiced by the recital in the deed that the notes referred to had been paid, and hence, upon the principles indicated, the appellant is not estopped by that recital quoad the city property, from showing that in fact they have not been paid." *McCullough v. Dashiell*, 78 Va. 634.

"But it does not prevent him from showing that the title was already in

his grantee, and the object of the deed was merely to confirm the grantee's title, for thereby no injury can occur to such grantee. To conform a title when doubt may attach to it does not injure it." *Dewing v. Hutton*, 48 W. Va. 576, 37 S. E. 670. See post, "Quit-claim Deed or Release," IV, A, 6, b, (2).

V. Estoppel in Pais.

A. EQUITABLE ESTOPPEL OR ESTOPPEL BY REPRESENTATIONS.

1. Definition and Nature.

"Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who, on his part, acquires some corresponding right, either of property, of contract, or of remedy." *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755.

Estoppel in pais is one that arises from the acts, conduct or declarations of a person, whereby he designedly induces another to alter his position injuriously to himself. *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713.

Equitable estoppel, in the modern sense, is such conduct by a party that it would be fraudulent or a fraud upon the rights of another for him afterwards to repudiate and to set up claims inconsistent with it. *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755, 759. See post, "General Rules as to When Estoppel Arises," V, A, 3; post, "In General," V, A, 6, a.

The word "conduct" is used in its broadest meaning, as including his spoken or written words, his positive acts, and his silence or negative omission to do anything. *Norfolk, etc., R.*

Co. v. Perdue, 40 W. Va. 442, 21 S. E. 755, 759.

"This use of the term has long been familiar to courts of equity, which have always treated the word 'fraud' in a very elastic manner. The meaning here given to 'fraud' or 'fraudulent' is virtually synonymous with 'unconscientious' or 'inequitable.'" *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755, 759.

Penal in Nature.—"The principles which estop a person from claiming what is conceded to be his own property are highly penal in their nature." *Newport News, etc., Co. v. Lake*, 101 Va. 334, 344, 43 S. E. 566; *Cautley v. Morgan*, 51 W. Va. 304, 41 S. E. 201.

"They should not therefore be enforced unless there is a concurrence of circumstances, such as are necessary to the creation of equitable estoppel." *Cautley v. Morgan*, 51 W. Va. 304, 41 S. E. 201. See post, "Essential Elements," V, A, 6.

2. Underlying Principles and Purpose of Doctrine.

"Herm. Estop., § 735, says: 'There are many fundamentals of the law which are applicable to and explanatory of this doctrine of equitable estoppel;' and among them he names: 'Volenti non fit injuria' ('No one can maintain an action for a wrong where he has consented to the wrong which occasions his loss'); 'Qui non prohibet quod prohibere potest assentire videtur' ('He who does not forbid what he can forbid seems to assent'); 'Qui tacet, consentire videtur' ('He who is silent appears to consent')." *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755, 758. See ante, "Underlying Principles and Purpose of Doctrine," I, B.

"When all the varieties of equitable estoppel are compared, it will be found, I think, that the doctrine rests upon the following principle: When one of two innocent persons—that is, persons each guiltless of an intentional moral

wrong—must suffer a loss, it must be borne by that one of them who, by his conduct, acts, or omissions has rendered the injury possible." *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755, 759; *McConnell v. Rowland*, 48 W. Va. 276, 37 S. E. 586; *Roberts v. Tavenner*, 48 W. Va. 632, 37 S. E. 576; *Mercantile Co-Op. Bank v. Brown*, 96 Va. 614, 32 S. E. 64; *Hyatt v. Zion*, 102 Va. 909, 48 N. E. 1; *Slater v. Moore*, 86 Va. 26, 29 S. E. 419; *Nash v. Fugate*, 24 Gratt. 202. See also, the title MAXIMS.

Equity will not relieve him of it, and place the burden on the other innocent party, guiltless of fraud. *McConnell v. Rowland*, 48 W. Va. 276, 37 S. E. 586.

"The doctrine of estoppel in pais always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage." *Atkinson v. Plum*, 50 W. Va. 104, 40 S. E. 587.

Founded in Justice.—"The doctrine of equitable estoppel has its foundation in natural justice and good conscience. *Mercantile Co-Op. Bank v. Brown*, 96 Va. 614, 32 S. E. 64; 2 Pom., sec. 802." *Hyatt v. Zion*, 102 Va. 909, 48 S. E. 1; *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755.

"It was asserted by Lord Mansfield in *Montefiori v. Montefiori*, 1 W. Bl. 364, and repeated by Broom in his work on Legal Maxims, that 'it is an indisputable proposition that, as against an innocent party, no man shall set up his own iniquity as a defense, any more than as a cause of action.'" *Cardwell v. Kelly*, 95 Va. 570, 28 S. E. 935.

Object.—"Its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of law unless prevented by the estoppel."

Norfolk, etc., R. Co. v. Perdue, 40 W. Va. 442, 21 S. E. 755, 759.

"The doctrine [of equitable estoppel] has for its object the suppression of fraud and the enforcement of honesty and fair dealing." *Norfolk v. Nottingham*, 96 Va. 34, 30 S. E. 444; *Dingus v. Minneapolis Imp. Co.*, 98 Va. 737, 37 S. E. 353; *Borst v. Nalle*, 28 Gratt. 437; *Mauzy v. Sellars*, 26 Gratt. 641; *Webb v. Alexandria*, 33 Gratt. 168; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 278.

3. General Rules as to When Estoppel Arises.

a. In General.

"The general rule of equitable estoppel, or, as it is frequently called, estoppel in pais, is that when one person, by his statements, conduct, action, behavior, concealment, or even silence, has induced another, who has a right to rely upon those statements, etc., and who does rely upon them in good faith, to believe in the existence of the state of facts with which they are compatible, and act upon that belief, the former will not be allowed to assert, as against the latter, the existence of a different state of facts from that indicated by his statements or conduct, if the latter had so far changed his position that he would be injured thereby." 4 Amer. & Eng. Decs. in Eq., 258." *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633. See *Atkinson v. Plum*, 50 W. Va. 104, 40 S. E. 587, where it is said: "General rules have been stated. In *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874, we said that 'Where one, by words or conduct, intentionally causes another to believe in the existence of a certain state of things, or such words or conduct are of such nature as he has reason to believe will cause him to so believe, and such other, not knowing to the contrary, acts thereon, the former will be estopped from averring or claiming under a different state of things, then existing and known to

him, to the prejudice of the other party." And see, to the same effect, *Greer v. Mitchell*, 42 W. Va. 494, 26 S. E. 302; *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755; *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743; *Stone v. Tyree*, 30 W. Va. 687, 702, 5 S. E. 878; *Mercantile Co-Op. Bank v. Brown*, 96 Va. 614, 32 S. E. 64; *Norfolk v. Nottingham*, 96 Va. 34, 30 S. E. 444; *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713; *Webb v. Alexandria*, 33 Gratt. 168; *Nash v. Fugate*, 24 Gratt. 202; *Engle v. Burns*, 5 Call 463. See also, *Hast v. Railroad Co.*, 52 W. Va. 396, 44 S. E. 155, where it is said: "Where a party takes a position and gains its fruit, and thus detriments another, he can not go back on it." *McConnell v. Rowland*, 48 W. Va. 276, 37 S. E. 586; *Repass v. Richmond*, 99 Va. 508, 39 S. E. 160; *Manhattan Fire Ins. Co. v. Weill*, 28 Gratt. 389; *Nash v. Fugate*, 24 Gratt. 202. See ante, "Definition and Nature," V, A, 1; post, "In General," V, A, 6, a.

The former shall not by showing as against the latter that the state of facts did not exist cause loss or injury to him. Such a change of position would be unconscientious and inequitable, and is sternly forbidden by honesty and fair dealing. *Mercantile Co-Op. Bank v. Brown*, 96 Va. 614, 32 S. E. 64.

The very essence of the doctrine is, that the party estopped shall not be allowed to prove a state of things different or in conflict with his previous representations or conduct. *Mason v. Harper's Ferry Bridge Co.*, 28 W. Va. 639, 650. He will not be permitted to introduce evidence or set up a title inconsistent with his representations. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411; *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874; *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755; *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713; *Webb v. Alexandria*, 33 Gratt. 168; *Nash v. Fugate*, 24 Gratt. 202.

"It is settled law that whenever an act is done or a statement is made by a party, which can not be contradicted without fraud on his part and injury to the other party whose conduct has been influenced by the act or admission, the character of estoppel will attach to what would otherwise be a mere matter of evidence. *Bargamin v. Clark*, 20 Gratt. at pages 544, 552." *Repass v. Richmond*, 99 Va. 508, 39 S. E. 160. See also, *Webb v. Alexandria*, 33 Gratt. 168.

"Such an estoppel only arises where the conduct of the party estopped is fraudulent in its purpose or unjust in its results, and can only be called into life for the prevention of fraud, or the redress of injury. *Webb v. Alexandria*, 33 Gratt. 168; *Borst v. Nalle*, 28 Gratt. 437; *Mauzy v. Sellars*, 26 Gratt. 641; 2 *Smith's Leading Cases* (Amer. Ed.) 642, 637." *Dingus v. Minneapolis Imp. Co.*, 98 Va. 737, 37 S. E. 353.

Where one party has by his representation or his conduct, induced the other party to a transaction to give him an advantage which it would be against equity and good conscience to assert, he would not in a court of justice be permitted to avail himself of that advantage. *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575, 44 Am. Rep. 177; *Manhattan Fire Ins. Co. v. Weill*, 28 Gratt. 389; *Nash v. Fugate*, 24 Gratt. 202. See also, *Southern Mut. Ins. Co. v. Yates*, 28 Gratt. 585; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88.

"A man is estopped on grounds of public policy and good faith from denying what by his conduct or representations he has induced others to act upon as true; or, in the language of Lord Coke, 'a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth.'" *Stebbins v. Bruce*, 80 Va. 389; *Cardwell v. Kelley*, 95 W. Va. 570, 28 S. E. 953; *Pettit v. Jennings*, 2 Rob. 676.

"The rule laid down in 1 Fonbl. 162, note n., as cited from *Fox v. Mackreth*, 2 Bro. Ch. Cas. 420, is thus: If a

man by the suppression of a truth which he was bound to communicate, or by the suggestion of a falsehood, be the cause of prejudice to another, who had a right to a full and correct representation of the fact, his claim shall be postponed to that of the person whose confidence was induced by his representation." *Engle v. Burns*, 5 Call 463.

b. When Applied to Legal Title to Land.

See post, "Representations as to Title and Ownership," V, A, 6, b, (4).

(1) In General.

See post, "In General," V, A, 6, a.

"The general rule is that if a person interested in an estate knowingly misleads another into dealing with the estate as if he were not interested, he will be postponed to the party misled, and compelled to make his representation specifically good. It applies to one who denies his own title or encumbrance when inquired of by another who is about to purchase the land, or to loan money upon its security; to one who knowingly suffers another to deal with the land as though it were his own; to one who knowingly suffers another to expend money in improvements without giving notice of his own claim and the like. This equity, being merely an instance of fraud, requires intentional deceit, or, at least, that gross negligence which is evidence of an intent to deceive. In the language of a most recent decision, to preclude the owner of land from asserting his legal title or interest under such circumstances, "there must be shown either actual fraud or fault or negligence equivalent to fraud, on his part in concealing his title; or that he was silent when the circumstances would impel an honest man to speak; or such actual intervention on his part so as to render it just that, as between him and the party acting upon his suggestion, he should bear the loss.

* * * While the owner of the land

may by his acts in pais preclude himself from asserting his legal title, it is obvious that the doctrine should be carefully and sparingly applied, and only on the disclosure of clear and satisfactory grounds of justice and equity. It is opposed to the letter of the statute of frauds, and it would greatly tend to the insecurity of titles if they were allowed to be affected by parol evidence of light or doubtful character." 2 Pom. Eq. Juris. (2d Ed.), § 807." *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633. See also, *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411.

(2) Turpitude in Conduct of Party Estopped.

Constructive Fraud or Gross Negligence.—"These qualifications in the application of the doctrine will be found fully sustained by the authorities. There must be some degree of turpitude in the conduct of a party before a court of equity will estop him from the assertion of his title—the effect of the estoppel being to forfeit his property, and transfer its enjoyment to another. "In all this class of cases," says Story, speaking of equitable estoppels, "the doctrine proceeds upon the ground of constructive fraud, or of gross negligence, which, in effect, implies fraud. And, therefore, where the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has, accordingly, been laid down by a very learned judge, that the cases on this subject go to this result only, that there must be positive fraud, or concealment, or negligence, so gross as to amount to constructive fraud." 1 Story's Equity, § 391." *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633.

The statements, acts, or acquiescence of the owner or claimant of land, are generally evidence against him, under all the circumstances, more or less

forcible; but, unless they are vitiated by actual fraud, or culpable negligence tantamount to actual fraud, and are relied on by another as the foundation of material action or acquiescence, they do not estop the owner of the land from asserting and proving his title or boundary. *Western Mining, etc., Co. v. Petona Coal Co.*, 8 W. Va. 406. See post, "Reliance upon Representation by Person Claiming Estoppel," V, A, 6, f.

(3) Clear, Strong Case Essential.

A clear, strong case of estoppel must be made out where a clear legal title to land, requiring written conveyance to pass it, is to be divested out of its owners and vested in others as if a conveyance had been made. "While the owner of the land may by his acts in pais preclude himself from asserting his legal title, it is obvious that the doctrine should be carefully and sparingly applied, and only on the disclosure of clear and satisfactory grounds of justice and equity. It is opposed to the letter of the statute of frauds, and it would greatly tend to the insecurity of titles if they were allowed to be affected by parol evidence of a doubtful character." *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267; *McNeeley v. South Penn Oil Co.*, 52 W. Va. 616, 44 S. E. 508, citing *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411; *Delaplain v. Grubb*, 44 W. Va. 612, 30 S. E. 201; *Suttle v. Railroad Co.*, 76 Va. 284. See ante, "Certainty Essential to all Estoppels," I, C.

4. Measure of Operation.

"The measure of the operation of an estoppel is the extent of the representations made by one party and acted on by the other. The estoppel is commensurate with the thing represented, and operates to put the party entitled to its benefit in the same position as if the thing represented were true. 2 Pom. Eq. J., § 813 and cases cited." *Anderson v. Phlegar*, 93 Va. 415, 25 S. E. 107. See also, *Atkinson v. Plum*, 50

W. Va. 104, 40 S. E. 587. See ante, "Extent of Operation," I, D.

Estoppel in Pais as Effectual as the Party's Deed.—"This doctrine of estoppel in pais would seem to be stated broadly enough, when it is said that such estoppel is as effectual as the deed of the party. To say that one may, by acts in the country, by admission, by concealment, or by silence, in effect do what could not be done by deed, would be practically to dispense with all the limitations the law has imposed upon the capacity of infants or married women to alienate their estates." *Lewis v. Apperson*, 103 Va. 624, 49 S. E. 978.

5. Effect as Vesting Opposing Rights.

The practical effect of equitable estoppel is, "from motives of equity and fair dealing, to create and vest opposing rights in the party who obtains the benefit of the estoppel." *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755.

6. Essential Elements.

See ante, "Definition and Nature," V, A, 1; "General Rules as to When Estoppel Arises," V, A, 3.

a. In General.

"In order to constitute an estoppel:

1. There must have been a representation or concealment of material facts.
 2. The representation or concealment must have been with knowledge of the true state of facts, unless the party making it was bound to know the facts, or his ignorance of them was due to gross negligence.
 3. The party to whom it was made must have been ignorant of the truth of the matter as to which representation was made.
 4. It must have been made with the intention that the other party should act on it; but the place of intent will be supplied by gross and culpable negligence on the party sought to be estopped, if the effect of that negligence is to work a fraud on the party setting up the estoppel.
 5. The representation or concealment must be proved to have

been the inducement to the action of the other party. 6. The party claiming the estoppel must have been misled to his injury.' 4. Amer. & Eng. Decs. in Equity, 268." Chesapeake, etc., R. Co. v. Walker, 100 Va. 69, 40 S. E. 633. To the same effect, see *Taylor v. Cussen*, 90 Va. 40, 17 S. E. 721, and *Mason v. Harper's Ferry Bridge Co.*, 28 W. Va. 639, 649, where the elements of an estoppel in pais as set forth by Bigelow are quoted with approval; *Morgan v. Cautley*, 51 W. Va. 304, 41 S. E. 201, where it is said: "In *Blodgett v. Perry*, 97 Mo. 263, 10 Am. St. Rep. 307, it is held, to constitute an estoppel in pais 'there must be a false representation or concealment of known material facts, made to a party ignorant of their truth or falsity, and made with intent that the latter party would act upon them, and he must have so acted upon them.'" In *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755, quoting from 2 Pom. Eq. Jus., § 805, it is said: "(1) There must be conduct, acts, language or silence amounting to a representation or a concealment of material facts. (2) These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. (3) The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time when such conduct was done, and at the time when it was acted upon by him. (4) The conduct must be done with the expectation that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. There are several familiar species in which it is simply impossible to ascribe any intention or even expectation to the party estopped that his conduct will be acted upon by the one who afterwards claims the benefit of the estoppel. (5) The conduct must be relied upon by the other party, and,

thus relying, he must be led to act upon it. (6) He must in fact act upon it in such a manner as to change his position for the worse. In other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct, and to assert rights inconsistent with it." *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755, 759. In the succeeding co-ordinate subdivision of this section the essential elements of equitable estoppel as above given are separately treated and a complete list of cases cited to support each proposition.

When Applied to Legal Title to Land.—"With respect to equitable estoppels when applied to the legal title to land, 'it must appear that the party making his admission, by his declaration or conduct, was apprised of the true state of his own title. 2. That he made the admission with the express intention to deceive, or with such careless or culpable negligence as to amount to constructive fraud. 3. That the other party was not only destitute of all knowledge of the true state of the title, but of all means of acquiring such knowledge. 4. That he relied directly upon such admission, and will be injured by allowing its truth to be disproved.' 2 Pom. Eq. Jur., § 806." *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633.

In the succeeding co-ordinate subdivisions of the section, the essential elements of equitable estoppel when applied to the legal title to real estate are separately treated as above given and a complete list of cases cited in support of each proposition. See also, ante, "When Applied to Legal Title to Land," V, A, 3, b.

b. Representation or Concealment of Fact.

(1) Rule as to Necessity.

"There must have been a false representation or concealment of a ma-

terial fact." *Taylor v. Cussen*, 90 Va. 40, 17 S. E. 721; *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633; *Lewis v. Apperson*, 103 Va. 624, 49 S. E. 978; *Stewart v. Conrad*, 100 Va. 128, 40 S. E. 624; *Mercantile Co-Operative Bank v. Brown*, 96 Va. 614, 32 S. E. 64; *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713; *Biggs v. Elliston Development Co.*, 93 Va. 404, 25 S. E. 113; *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267; *Morgan v. Cautley*, 51 W. Va. 304, 41 S. E. 201; *Atkinson v. Plum*, 50 W. Va. 104, 40 S. E. 587; *Mason v. Harper's Ferry Bridge Co.*, 28 W. Va. 639.

"There must be conduct, acts, language or silence amounting to a representation or a concealment of material facts." *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271; *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411; *Stone v. Tyree*, 30 W. Va. 687, 5 S. E. 878. See also, *Farmers, etc., Fire Ins. Ass'n v. Kinsey*, 101 Va. 236, 43 S. E. 338. See post, "What Constitutes," V, A, 6, b, (3).

(2) Essential Requisites.

(a) Acts, etc., Must Be Executed.

The acts, conduct or declarations of a person, alleged as an estoppel in pais must be executed, and not merely executory. *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713.

An executory agreement never executed does not estop a party to it from acting in such a manner as to violate its stipulations. *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713.

The defendants claim that they got the plaintiff to promise to dismiss his suit and to sign a note addressed to his counsel directing him to dismiss, and stating it had been satisfactorily settled and that the defendant gave the plaintiff an order on one M., who was absent, for \$50. The note was delivered to the counsel, the suit was not dismissed but only continued, and the

order was never presented for payment, nor paid, but was returned unpaid. The plaintiff claimed that he only promised to continue the suit until the next spring, and signed no contract of any sort, and received no money, and merely signed, without reading, a note to his counsel, who had the suit continued with his approbation; and that he returned the order for \$50 without attempting to collect it. The note, however, did not literally direct the counsel either to dismiss or continue the suit but did direct him "to stop the proceeding," and did state that the suit had been "satisfactorily settled." At the ensuing term no motion was made to dismiss the suit nor was there any opposition to its continuance. The defendants claimed that the complainant was estopped from setting up his claim by his promise to dismiss the suit. It was held, that as beyond all doubt this transaction was only inchoate and executory, the promise to stop the proceedings in the suit never being executed, the acts alleged do not amount to an estoppel. *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713.

(b) Need Not Be by Deed.

"To create an estoppel it is not essential that the act in pais should be by deed. Acceptance of any estate, or acceptance of rent, are estoppels, though there be no deed; and so, I presume, where a party has by any act concluded himself absolutely from setting up any defense, his adversary may rely upon it as an estoppel." *Davis v. Thomas*, 5 Leigh 1.

(c) Must Be False.

aa. In General.

"The representations must be false or untrue; that is, it must be a misrepresentation and different from that sought to be established on the trial; for, if it is true, there can be no fault or ground for an estoppel." *Mason v. Harper's Ferry Bridge Co.*, 28 W. Va. 639, 650.

Where the facts stated in a notice upon which it was sought to base an estoppel were true, the court had decided just what it stated; it was held, that it could not for that reason constitute an estoppel. *Mason v. Harper's Ferry Bridge Co.*, 28 W. Va. 639, 650.

bb. Statements of Law or Fact.

"To make an estoppel there must be a false statement of facts, not of law. *Mason v. Harper's Ferry Bridge Co.*, 28 W. Va. 639." *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 278. See also, *Hale v. Hale*, 90 Va. 728, 19 S. E. 739.

When the statement or conduct is not resolvable into a statement of fact, as distinguished from a statement of law, the party making it is not bound. *Mason v. Harper's Ferry Bridge Co.*, 28 W. Va. 639.

"It can rarely happen that the statement of a legal proposition will conclude the party making it from denying its correctness, except when it is understood to mean nothing but a simple statement of fact." *Mason v. Harper's Ferry Bridge Co.*, 28 W. Va. 639, 649.

Mistaken View as to Legal Effect of Acts.—The mistaken view of a testatrix that her marriage subsequent to the execution of her will, was not a revocation thereof, does not estop her heirs from claiming that the will was revoked under Va. Code, § 2517. "The mistaken view of the parties as to the legal effect of the marriage can not, consistently with any sound principle, be held a ground of estoppel." *Hale v. Hale*, 90 Va. 728, 19 S. E. 739.

Opinion in Regard to Legal Decision.—An injunction is obtained by a ferry owner to restrain a bridge company from completing and operating a toll bridge near his ferry, until the damages are ascertained and paid for the injury done to the ferry by the operation of the bridge. While the injunction is in force the parties enter into an agreement, by which the ferry owner binds himself to dismiss or aban-

don his injunction, and the company in consideration thereof binds itself to pay to him a certain per diem from the time the bridge is completed and open for travel, until the said damages are ascertained, and until they are paid. Under this arrangement the bridge is completed and opened for travel, the suit is prosecuted and the damages are afterwards ascertained and fixed by a decree of the court, which directs that the company can either pay said damages and let the injunction be dissolved, or refuse to pay them and not use the bridge. The damages are not paid, but under the aforesaid agreement the bridge is kept open and the per diem paid until after a written notice is given by the ferry owner to the company, informing it of the said decree, and stating that it must elect either to pay said damages or close the bridge. Some time thereafter the company closes the bridge and refuses longer to pay the per diem. The ferry owner then brings an action of debt on said agreement for the per diem, while the bridge was so closed. The defendant enters a plea of set-off, averring that, induced by said notice, it closed its bridge and thereby suffered damages to the full amount claimed by the plaintiff. The plea sets no facts which could operate as an estoppel upon a plaintiff. The notice, so far as it contained any representation, was merely the statement of an opinion upon a proposition of law, and that too in regard to a particular written legal opinion or decision which was stated and equally open to the inspection and construction of both parties. *Mason v. Harper's Ferry Bridge Co.*, 28 W. Va. 639.

(d) As to Future Matters—Expression of Opinion or Intention.

The representation, to work an estoppel, in all ordinary cases must have reference to a present or past state of things. *Mason v. Harper's Ferry Bridge Co.*, 28 W. Va. 639. See also,

Garber v. Bresee, 96 Va. 644, 32 S. E. 39.

"If it be concerning something in the future, it must generally be either a mere statement of an intention or opinion. The intent of a party, however positive and fixed, is necessarily uncertain as to its fulfillment, and must depend on contingencies, and be subject to change and modification by subsequent events and circumstances. A person can not be bound by any rule of morality or good faith not to change his intention. *Howard v. Hudson*, 2 El. & B. 1; *Plumer v. Lord*, 9 Allen 453." *Mason v. Harper's Ferry Bridge Co.*, 28 W. Va. 639, 649. See succeeding paragraph.

"But even a matter of opinion may amount to an affirmation, and be an inducement to a contract, especially where the parties are not dealing upon equal terms, and one of them has, or is presumed to have, means of information not equally open to the other." *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713.

e. Facts, Knowledge of Which Imputed.

See post, "Knowledge of Facts or Gross Negligence by Person Claiming Estoppel," V, A, 6, d.

(f) Certainty and Definiteness.

Certainty is essential to all estoppels. The misrepresentation therefore must be plain, not doubtful, a matter of mere inference or nonexpert opinion. *Taylor v. Cussen*, 90 Va. 40, 17 S. E. 721; *Mason v. Harper's Ferry Bridge Co.*, 28 W. Va. 639. See ante, "Certainty Essential to All Estoppels," I, C; "Clear, Strong Case Essential," V, A, 3, b, (3).

(g) Time of.

See post, "Reliance upon Representation by Person Claiming Estoppel," V, A, 6, f.

Made after Party's Position Has Been Changed.—"A representation, admission or act after the party's posi-

tion has been changed will not avail as grounds for estoppel, because it can not have been acted on." 4 Am. & Eng. Dec. in Eq. 286, citing *McCall v. Powell*, 64 Ala. 254, and many other cases." *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267. See also, *Molting v. National Bank*, 99 Va. 54, 37 S. E. 804.

(3) What Constitutes.

(a) Express Statements.

aa. In General.

The representation creating an estoppel may and frequently does consist of an express statement. *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874; *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267; *McConnell v. Rowland*, 48 W. Va. 276, 37 S. E. 586; *Galloway v. Stanard Fire Ins. Co.*, 45 W. Va. 237, 31 S. E. 969; *Tuggle v. Berkeley*, 101 Va. 83, 43 S. E. 199; *Radford v. Fowlkes*, 85 Va. 820, 8 S. E. 817; *Poague v. Spriggs*, 21 Gratt. 220; *Tabb v. Cabell*, 17 Gratt. 160. See also, *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411; *Stone v. Tyree*, 30 W. Va. 687, 5 S. E. 878; *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713; *Peers v. Barnett*, 12 Gratt. 410.

Not every casual statement that a man happens to make in social intercourse, or even in a business matter, where it is sought to be set up against him as an estoppel, will so operate. Each case largely stands on its own facts. *Atkinson v. Plum*, 50 W. Va. 104, 40 S. E. 587.

"In order to make a statement operate as an estoppel there must be some misconduct of the party amounting to a representation or concealment of material facts. *Estis v. Jackson*, 111 N. C. 145, 32 Am. St. R. 784; 11 Am. & Eng. Ency. Law. (2 Ed.) 424." *Atkinson v. Plum*, 50 W. Va. 104, 40 S. E. 587. See ante, "Rule as to Necessity," V, A, 6, b, (1).

bb. Instances.

Assuring Surety That Debtor Has Paid.—If a creditor assure a surety of his debtor that the debtor has paid, and not in default, and thus induce the surety to take no steps to secure himself, or compel payment by the principal debtor, while solvent, and he becomes insolvent, the surety is discharged. Such assurance constitutes an estoppel in pais, and is available in equity, but not at law. *Poling v. Maddox*, 41 W. Va. 779, 24 S. E. 999.

"As an estoppel in pais, it releases the surety, though the statement be merely mistaken, and is not fraudulent, because the creditor, not the surety, is the author of the loss. 1 Brandt, Sur. § 245; Herm. Estop. § 1092; *Baker v. Briggs*, 10 Am. Dec. 311; *Carpenter v. King*, 43 Am. Dec. 405; *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874." *Poling v. Maddox*, 41 W. Va. 779, 24 S. E. 999. See the title SURETYSHIP.

Promise to Attend Suit.—A decree is rendered against the administrator of a sheriff's deputy in not returning an execution; and thereupon a motion is made by the administrator of the sheriff against the executor of the deputy. At the hearing of the motion, evidence is offered to show that the motion against the sheriff's administrator was not within ten years from the return day of the execution. But it appearing that the executor of the deputy had notice from the administrator of the sheriff to defend the motion against the said administrator, and promised to attend to it; held, the sheriff's administrator is entitled to judgment against the deputy's executor. *Scott v. Tankersley*, 10 Leigh 581.

Entries in Treasurer's Book as Evidence.—The books kept by the treasurer are conclusive evidence of the balance actually in the treasury at any given time, both against the treasurer, and his sureties, without being pleaded as an estoppel. *Baker v. Preston*, Gilmer 235.

Accepting Settlement of Guardian's Accounts.—Where a guardian receives the money of his ward, and loans the same to a party, taking his note secured by trust deed on real estate for the payment of the same, and, after the ward arrives at the age of twenty-one years, he enters into an agreement with the party to whom the money was loaned by his guardian to take a less sum than the amount so loaned, which sum being paid, he executes a paper to the guardian, acknowledging the receipt in full of the money in his hands to the credit of his said ward, and said ward, after waiting six years, brings suit against said guardian for the entire amount which was in his hands, he can not recover, for the reason that he is estopped by the paper executed by him to his guardian, and by reason of his laches in ascertaining his claim. *Kelly v. McQuinn*, 42 W. Va. 774, 26 S. E. 517.

Widow to Assert Equity of Redemption.—See post, "Instances," V, A, 6, b, (3), (b), bb.

(b) Acts or Conduct.**aa. In General.**

Estoppel may arise from acts or conduct calculated to impress upon the mind of another a belief in the existence of a certain state of facts. A man is estopped from denying what by his conduct he has induced others to act upon as true. *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633; *Stebbins v. Bruce*, 80 Va. 389; *Millhiser v. Gallego Mills*, 101 Va. 579, 44 S. E. 760; *Newport News, etc., R. Co. v. Lake*, 101 Va. 338, 43 S. E. 566; *Tugle v. Berkeley*, 101 Va. 83, 43 S. E. 199; *Baltimore Dental Ass'n v. Fuller*, 101 Va. 627, 44 S. E. 771; *Farmers, etc., Fire Ins. Ass'n v. Kinsey*, 101 Va. 236, 43 S. E. 338; *Repass v. Richmond*, 99 Va. 508, 39 S. E. 160; *West End Real Estate Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900; *Norfolk v. Nottingham*, 96 Va. 34, 30 S. E. 444; *Cardwell v. Kelly*, 95 Va. 570, 33 S. E. 953; *Mar-*

tin v. South Salem Land Co., 94 Va. 28, 26 S. E. 591; Nicholas v. People's Bldg., etc., Ass'n, 93 Va. 380, 25 S. E. 8; National Mut. Bldg., etc., Ass'n v. Ashworth, 91 Va. 706, 22 S. E. 521; Young v. Ellis, 91 Va. 297, 21 S. E. 480; Purcell v. Conrad, 84 Va. 557, 5 S. E. 545; Rorer Iron Co. v. Trout, 83 Va. 397, 2 S. E. 713; Lynchburg Fire Ins. Co. v. West, 76 Va. 575; Preston v. Nash, 76 Va. 1; Phelps v. Seely, 22 Gratt. 573; Harris v. Com., 20 Gratt. 833; Hughes v. Wilson, 2 Va. Dec. 315; Water Co. v. Browning, 53 W. Va. 436, 44 S. E. 267; Hast v. Piedmont, etc., R. Co., 52 W. Va. 396, 44 S. E. 155; Atkinson v. Plum, 50 W. Va. 104, 40 S. E. 587; Standard Mercantile Co. v. Ellis, 48 W. Va. 309, 37 S. E. 593; McConnell v. Rowland, 48 W. Va. 276, 37 S. E. 586; Bettman v. Harness, 42 W. Va. 433, 26 S. E. 271; Moore v. Harper, 42 W. Va. 39, 24 S. E. 633; Williamson v. Jones, 43 W. Va. 562, 27 S. E. 411; Bates v. Swiger, 40 W. Va. 420, 21 S. E. 874; Norfolk, etc., R. Co. v. Perdue, 40 W. Va. 442, 21 S. E. 755; Hanly v. Watterson, 39 W. Va. 214, 19 S. E. 536; Miller v. Lorentz, 39 W. Va. 160, 19 S. E. 391; Stone v. Tyree, 30 W. Va. 687, 5 S. E. 878; Mason v. Harper's Ferry Bridge Co., 28 W. Va. 639. See also, Spencer v. Field, 97 Va. 38, 33 S. E. 380; Lewis v. Hicks, 96 Va. 91, 30 S. E. 466; Martin v. Fielder, 82 Va. 455, 4 S. E. 602; Lewis v. Overby, 31 Gratt. 601; Southern Mut. Ins. Co. v. Yates, 28 Gratt. 585; Manhattan Fire Ins. Co. v. Weill, 28 Gratt. 389; Georgia Home Ins. Co. v. Kinnier, 28 Gratt. 88; Tabb v. Cabell, 17 Gratt. 160; Miller v. Hare, 43 W. Va. 647, 28 S. E. 722; Rogers v. Coal River Boom, etc., Co., 39 W. Va. 272, 19 S. E. 401; Schwarzbach v. Ohio Valley Protective Union, 25 W. Va. 622. See post, "Reliance upon Representation by Person Claiming Estoppel," V, A, 6, f.

The ordinary case of estoppel by conduct, is where one party takes a position and succeeds in it and gets the benefit of it to another's harm. He is

estopped to recant it. Hast v. Piedmont, etc., R. Co., 52 W. Va. 396, 44 S. E. 155.

To create an estoppel by conduct there must be some conduct of the party amounting to a representation or concealment of material facts. Atkinson v. Plum, 50 W. Va. 104, 40 S. E. 587. See ante, "Rule as to Necessity," V, A, 6, b, (1).

The doctrine of estoppel by conduct always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage. Atkinson v. Plum, 50 W. Va. 104, 40 S. E. 587.

"There are many instances in equity jurisprudence of the application of the doctrine to conduct upon the party to be estopped which does not amount to an actual fraud, or to such gross disregard of the rights of others as courts consider its equivalent. If his conduct has been unconscientious or inequitable, though there has been no willful deception, a court of equity would, in a large variety of instances, forbid him to assert a right to the injury of another, inconsistent with his conduct. 2 Pom. Eq. Jur., §§ 801 to 815 inclusive, and note to § 806." Chesapeake, etc., R. Co. v. Walker, 100 Va. 69, 40 S. E. 633.

bb. Instances.

Assent to or Participation in Judicial Proceedings.—Where a court having jurisdiction of plaintiffs' ancestor's estate and person, orders sale of latter's property to satisfy his indebtedness, and the record shows that plaintiffs appeared and were made parties, and that they acquiesced in the sale and took no steps to avoid it for thirteen years, knowing that the purchasers had sold property, such plaintiffs can not annul the sale on the ground that they were never summoned or appeared in the cause; and where it appears that the attorney for plaintiffs' ancestor was au-

thorized to represent him in such suit, and that plaintiffs were aware of such facts and did not, after their ancestor's death, revoke or question his authority pending said suit, such plaintiffs, after such sale has been made, are estopped from denying the said attorney's authority to represent them in said suit. *Marrow v. Brinkley*, 85 Va. 55, 6 S. E. 605.

A creditor agreed to accept less than the amount due from his debtors in satisfaction of his debt. He then assigned the entire debt. Of this assignment the debtors had notice. They permitted a decree to be entered against them for the entire debt. Held, that the debtors are estopped from falling back upon the compromise and release. *Smith v. Chilton*, 84 Va. 840, 6 S. E. 142.

Where a suit in equity is brought in the names of several heirs, all having the same interest, if one of them is dead at the time the suit is brought in his name, and his heirs, or their agent, are conversant of the fact that the suit is so brought, and make no objection, but intend to claim the benefit of the decree, they will be bound by the decree dismissing the bill. *Doggett v. Helm*, 17 Gratt. 96.

"In case of *Whipkey v. Nicholas*, 47 W. Va. 35, 34 S. E. 751, this court held, that 'a litigant who without objection joins in the selection of a special judge to hear and determine his case will not be permitted to raise mere technical objections to the selection and qualification of such judge after he had decided against such litigant.' The same rule applies to the appointment of a commissioner, when made by the court either in term or vacation. If the case is fully heard and determined on the merits, a defeated litigant will not be permitted to raise mere technical objections to such appointment, but his acquiescence in such appointment will be held to waive all technicalities." *Dewing v. Hutton*, 48 W. Va. 576, 37

S. E. 670. See post, "Inconsistent Positions and Admissions in Judicial Proceedings," V, C, 2.

Surety Assenting to Sale Contrary to Trust Deed.—Where land conveyed in trust to secure a bond, is required by the deed to be sold for cash, and by consent of the owner of the land, it is sold on credit at the instance of the surety on the bond, who is one of the purchasers at the sale; held, the latter can not complain of the change of terms of the sale. *Orr v. Chandler*, 86 Va. 938, 11 S. E. 978.

Legality of Levy—Accepting Benefit.—A county court laid the county levy and directed the sheriff to pay certain claims upon the county out of it, and the sheriff, having received the commissioner's books, collected the levy as far as possible, and returned a list of insolvents. Upon a motion by one of the creditors of the county, whose claim was directed to be paid out of the levy, against the sheriff and his sureties to recover the amount, it was held, that the defendants could not object that the county court was not legally constituted to be authorized to lay the levy when it was done; nor that the commissioner's books were irregularly made out, and not properly authenticated. *Cook v. Hays*, 9 Gratt. 142.

Accepting Benefit of Loan.—In June, 1866, a hotel company borrowed \$10,000 to complete their building, which sum was secured by a deed of trust on the property. Afterwards they employed W., a builder, to complete the building, contracting to give him a deed of trust upon it, subject to the first lien, to secure any balance due him on its completion. The company, out of the money borrowed, paid W. \$8,000, and when the work was completed there was due him \$5,791.50. He had recorded the contract to secure the mechanic's lien, and on the 1st of January, 1867 the company conveyed the property, subject to the lien of the first

deed in trust to secure said balance. Held, that W. was estopped from claiming against the deed of trust executed to secure the return of the money loaned. *Wroten v. Armat*, 31 Gratt. 228.

A railroad company accepting a county subscription as made by a county court accepts it as tendered by the county court, with all its terms and conditions, and is estopped from saying that such terms and conditions are void or unreasonable. *West Virginia, etc., R. Co. v. Harrison County Court*, 47 W. Va. 273, 34 S. E. 786. See also, the title MUNICIPAL AID.

Guardian De Facto Estopped to Deny Guardianship.—Where a guardian de facto receives the money of an infant and used it, he is estopped to deny that he received it as guardian. *Martin v. Fielder*, 82 Va. 455, 4 S. E. 602.

Claim Settlement of Guardian's Accounts.—L., about a year before his death in 1866, put each of his four children into possession of a parcel of land with the personal property upon it, but did not convey it. About the same time he made his will, and by it gave to each of the children the land and property in his and her possession. By a codicil he states he was the guardian of his children, and requires that each one of them shall execute a receipt for all claims against him as guardian before they shall be entitled to receive their portion under his will. And he directs that if any one of them shall refuse to do so, his or her portion shall be sold and the proceeds held to meet the liability, and the balance paid over to those executing the receipt. These children held the lands so in their possession, each of them selling a part of that given to him or her prior to 1873. In 1873 a judgment was recovered by B.'s administrator against the executors of L. upon a bond on which he was surety, and in 1877 a bill was filed by said administrator against the executors and devisees of L. to have pay-

ment. The executors had been assured by L. that he owed no debts, and was under no liability, and neither they nor the other children had ever heard of this debt until the suit was brought in April, 1873. Held, the devisees having continued to hold the land from the time they were put in possession, and having sold parts of it, they are estopped from setting up a claim to a settlement of L.'s guardian accounts, and holding him liable to them as their guardian, though they did not execute a release of their claim. *Lewis v. Overby*, 31 Gratt. 601. See also, the title GUARDIAN AND WARD.

That Duties Performed Were Not Prescribed.—Where the official bond of the cashier of a bank was conditioned for the faithful performance of the duties of the said office, "which may be prescribed by the board of directors," it was held, that the cashier, by the performance of certain duties in his office of cashier, was estopped to deny that they had been prescribed by the board. *Durkin v. Exchange Bank*, 2 Pat. & H. 277.

Corporations and Stockholders to Contest Ultra Vires Acts.—See the titles CORPORATIONS, vol. 3, pp. 574, 576; STOCK AND STOCKHOLDERS.

Question Validity of Act by One Accepting Benefit Thereunder.—See post, "To Deny Constitutionality of Law," V, C, 2, m.

To Recovery of Claim Due Insolvent Banking Corporation.—See the title BANKS AND BANKING, vol. 2, p. 315.

Tenants Treating Notice to Quit as Sufficient.—A tenant may be estopped by his acts from denying the sufficiency of an otherwise insufficient notice. *Baltimore Dental Ass'n v. Fuller*, 101 Va. 627, 44 S. E. 771. See also, the title LANDLORD AND TENANT.

Estoppel to Set Up Written Contract.—By article of agreement under seal, S. sells to H. a lot of land, of

which at the time H. is in possession as tenant of S. Sometime afterwards, H. informs S. that he can not pay for the lot, and proposes to rescind the contract, which S. consents to; and H. informs S. that P. will buy the lot at the same price. S. thereupon agrees to sell to P., and with the assent and at the request of H., S. sells and conveys the lot to P. Held, the sale of P. having been at the instance of H., and with his concurrence, even if the contract could not be rescinded by a subsequent parol agreement, H. would be estopped in equity, by his own acts, from setting up the written contract. *Phelps v. Seely*, 22 Gratt. 573.

Assert Claim under Option.—A party having an option to purchase the timber growing upon a tract of land, which is not limited as to time by his agreement, may by his own acts and acquiescence in the acts of another in cutting and removing such timber, and by assisting in the removal of the same, pointing out the timber to the men engaged in cutting it, and raising no objection to the disposal of such timber by the party asserting an adverse claim thereto, estop himself from asserting any claim under his option. *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536.

Set Up Lien of Trust Deed.—In April, 1850, W. N. conveyed real estate to secure debt to P., but the deed was not recorded until 1858. In March, 1861, W. N. sold same estate to S. H. N., who took and held possession continuously and notoriously, under his contract, from the date of his purchase, and paid the price, but received no conveyance; and had no notice of the trust deed until March, 1861, when the trustee advertised the sale thereof. S. H. N. enjoined the sale. Court below decreed that the contract of purchase had priority over the deed of trust, and perpetuated the injunction. On appeal, held, the trust creditor is equitably estopped by his conduct, from setting up

the lien of the trust deed against S. H. N. *Preston v. Nash*, 76 Va. 1.

To Demand Horizontal Measurement of Lands.—"Unless the contract of sale expressly provide otherwise, 'every survey, whether original or not, shall be made by horizontal measurement.' Code (Ed. 1891), ch. 68, § 82, p. 624. * * * 'It is well settled that if a deficiency in quantity is found to exist where the contract is a sale by the acre, the purchaser will be entitled to an abatement for the value of the deficiency, and that a court of equity will, even after a conveyance is executed, abate the deficiency from the unpaid purchase money.' *Thompson v. Catlett*, 24 W. Va. 524; *Koger v. Kane*, 5 Leigh 606. Neither is the defendant estopped from claiming such abatement by his acceptance of the deed, for as soon as he saw and read the deed he notified the plaintiff that he would not except the surface measurements as the proper mode of ascertaining the quantity, and himself proceeded to have it ascertained by careful horizontal measurement, made by the county surveyor." *Bartlett v. Bartlett*, 37 W. Va. 235, 16 S. E. 450, 452, 453.

Sale of Lands—Knowledge of Sale of Trees to Another.—A purchaser of real estate who has full knowledge at the time of his purchase that his vendor has sold certain trees growing on the land and conveyed them to the purchaser, and who thereafter accepts from his vendor a deed with covenant of general warranty and for quiet enjoyment, and pays the cash payment for the land, and executes his notes for deferred payments, and pays one of the notes and part of another, can not, after the lapse of five years, claim an abatement for the value of the trees. *Southern Va. Mining Co. v. Chase*, 95 Va. 50, 27 S. E. 826. See the title WAIVER.

To Repudiate Parol Contract for Sale of Land.—In the case of a verbal contract for the sale of land, where the

vendor has so dealt with the purchaser in receiving the whole or a part of the purchase money, or in contracting for its payment, and in putting him in actual possession of the land in part execution of the contract of the sale, that it would be a fraud on the vendor's part to repudiate the contract, and stop short of its complete execution; he is estopped by his conduct from refusing to complete it. *Miller v. Lorentz*, 39 W. Va. 160, 19 S. E. 391.

"The delivery of the possession and the conveyance were the things to be performed by the vendor. He performs it in part that is, he puts the purchaser in possession, but there stops short, relying on the statute. Equity treats such conduct as against conscience as a fraud, and applies to him the doctrine of equitable estoppel. He is estopped by his own conduct, by receiving the purchase money and delivering the possession, from refusing to complete it; and the fraud can not be compensated in damages, because it is a refusal by the vendor to complete a sale of a specific tract of land." *Miller v. Lorentz*, 39 W. Va. 160, 19 S. E. 391.

By articles of agreement under seal, S. sold to H. a lot of land of which, at the time, H. was in possession as tenant of S. Sometime afterwards, H. informed S. that he could not pay for the lot but that P. was willing to take it at the same price. S. thereupon, with the consent and at the request of H., conveyed the lot to P. Held, that the sale to P. having been at the instance of H., and with his concurrence, even if the contract could not be rescinded by a subsequent parol agreement, H. would be estopped in equity, by his own acts, from setting up the written contract. *Phelps v. Seely*, 22 Gratt. 573. See also, the title **FRAUDS, STATUTE OF.**

Vendee to Ask Rescission—Failing to Protect against Encumbrances.—W. purchased "Poplar Grove" at \$12,037 and paid all but \$2,795.75. In 1860, W.,

Mrs. C., and B. agreed under seal that B. exchange "Lammermoor" with Mrs. C. for "Millers," and convey it to W., who in consideration thereof and of \$4,000, would convey Poplar Grove, priced at \$14,000 to her. She paid the \$4,000, and took an indemnifying bond with security, but the lien on Poplar Grove for the unpaid balance remained unsatisfied. In 1867, B. and Mrs. C. sued W.'s representatives for specific performance (no conveyances having been made); and for sale of Lammermoor to pay off said lien; to enforce which W.'s representatives had brought suit. In 1869, the circuit court decreed specific performance, and also sale of Lammermoor, to relieve Poplar Grove. Mrs. C. sold parts of Poplar Grove to six different purchasers, who paid her \$2,608, and received conveyances. In May, 1878, a decree was entered to sell Poplar Grove to pay off the lien thereon. It was sold. D. purchased it, Mrs. C. going his security for \$2,756.25. Sale was confirmed and deed made. In November, 1878, in suit of B. and Mrs. C. for specific performance, it was decreed that by the sale of Poplar Grove to satisfy the lien thereon the object of the suit for specific performance had been frustrated; that the decree to sell Lammermoor be rescinded; and that Mrs. C. had leave to file an amended and supplemental bill. B. had been adjudicated a bankrupt in 1872. After due proceedings in the bankrupt court, B.'s assignee, in 1873, sold Millers to F. The sale was confirmed, the money paid, F. put in possession and received conveyance. Afterwards he sold and conveyed part of Millers to H. But neither B.'s assignee, nor F. nor H. was made party to the suit of B. and Mrs. C. In a few days Mrs. C. filed her new bill, making them and W.'s representatives parties. By it she asked rescission of the contract of 1860, restitution of Millers to her, and repayment to her of the \$4,000, with interest. F. and H. answered. At the hearing

in 1880, the circuit court decreed that Mrs. C. had been evicted from Poplar Grove, by the sale thereof; and having been thus deprived of Poplar Grove, for which she had paid Millers and the \$4,000, and still retaining title to Millers, she was remitted to her rights to Millers; that within thirty days, F. and H. should surrender to her possession of Millers; and that W.'s administrator should be de bonis testatoris, pay her \$4,000 with interest from sale of Poplar Grove. On appeal to this court, it was held, that by her own acts Mrs. C. was estopped from asking rescission of the contract of 1860, which rescission would result in injustice to others who could not be placed in statu quo. *Ferry v. Clarke*, 77 Va. 397.

Widow to Assert Equity of Redemption.—In the case in judgment a widow with a large family conveyed her life estate in her house and lot, and the garden lot adjoining, to her son-in-law in consideration of his agreement to pay delinquent taxes thereon amounting to \$600, and he covenanted that he would reconvey the same to her whenever she refunded the amount and interest. The son-in-law subsequently bought the shares of all the remaindermen but one, who was an infant. He then brought suit for sale of garden lot, alleging that it was not susceptible of partition. Under proceedings in this suit he acquired the share of the infant in the garden lot, and soon thereafter sold the lot for \$2,000. At that time, he claimed that the transaction with the widow was a conditional sale, and that the sale had become absolute by reason of her failure to refund. In this claim the widow fully acquiesced, and made no claim to any part of the proceeds of the sale of the garden lot. For awhile his wife boarded with the widow in lieu of paying rent for the dwelling house, and subsequently it was agreed that the widow should pay the taxes and insurance as compensation for the use of the house. The evidence,

however, shows that the widow was wholly ignorant of her rights, or of ordinary affairs of business, and that she relied upon her son-in-law to aid her and help to relieve her of her burden. Her life estate in the whole property was worth several times as much as the taxes paid by him, and when the deed was made he stated that all he wanted was to free the property from the tax lien and preserve it as a home for the family. When the garden lot was sold he promised to convey to the widow her life estate in the house, and to two of the daughters their interest therein. Held, the transaction was a mortgage, and, under all the circumstances of the case, the widow is not estopped either by her language or conduct from asserting her equity of redemption. *Tuggle v. Berkeley*, 101 Va. 83, 43 S. E. 199. See also, the title MORTGAGES.

By Hindering Performance of Contract.—See the title CONTRACTS, vol. 3, p. 435.

Delay to Set Up Particular Defense.

—The mere delay of a defendant in chancery in setting up a particular defense will not necessarily estop him from making the defense. *Repass v. Richmond*, 99 Va. 508, 39 S. E. 160.

Failure to Verify by Affidavit Plea to Declaration in Assumpsit.—See the title ASSUMPSIT, vol. 2, p. 58.

To Object to Filing Deposition.—See the title DEPOSITIONS, vol. 4, p. 549.

Cancel City Bonds Exchanged for Confiscated City Certificates of Stock.

—F. was the owner of \$8,700 of the certificates of stock of the city of A., which by a decree of the United States court in May, 1864, were confiscated and sold by the marshal, and \$2,000 of it purchased by W.; and at his request the marshal made a transfer of the same on the books of the city. When the stock became due, W. received from the city of A. four coupon bonds of \$500 each in exchange for his stock. In 1874, F. sued the city for his stock and recovered it, the court holding

that the decree of the United States court confiscating it was invalid. The city of A. then sued W. to recover the four bonds issued to him for the stock. Held, the city of A. is entitled to recover the bonds. "It is not estopped from asserting its right to have the bonds issued to the appellant cancelled, by its conduct in issuing and delivering to him these coupon bonds in the place of the certificates of stock transferred on their books (by order of the United States marshal) as purchaser of the same at the confiscation sale." *Webb v. Alexandria*, 33 Gratt. 168. See also, the title MUNICIPAL, STATE AND COUNTY SECURITIES.

(c) Silence and Passive Acquiescence.
aa. In General.

"Silence, where it is so intended, or where it has that effect, to mislead a party, to his disadvantage, and to the other party's advantage, is an equitable estoppel." *Nicholas v. Austin*, 82 Va. 817, 1 S. E. 132; *Anderson v. Phlegar*, 93 Va. 415, 25 S. E. 107. See also, *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271; *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411; *Stone v. Tyree*, 30 W. Va. 687, 5 S. E. 878; *Farmers, etc., Fire Ins. Ass'n v. Kinsey*, 101 Va. 236, 43 S. E. 338; *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713. See post, "Representations Inducing Outlay of Money," V, A, 6, b, (8); "Injury to Person Claiming Benefit of Estoppel," V, A, 6, g.

"Passive acquiescence estops equally with active interference." *Nicholas v. Austin*, 82 Va. 817, 1 S. E. 132. See also, *Watson v. Conrad*, 38 W. Va. 536, 18 S. E. 744; *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633; *Smith v. Chilton*, 84 Va. 840, 6 S. E. 142.

By acquiescence a transaction, although originally impeachable, becomes

unimpeachable in equity. *Despard v. Despard*, 53 W. Va. 443, 44 S. E. 448; *Mann v. Peck*, 45 W. Va. 18, 30 S. E. 206; *Burton v. Brown*, 22 Gratt. 1; *Shirley v. Rice*, 79 Va. 442.

"It must be understood at the outset that by silence we mean entire silence, as distinguished from that sort which merely keeps back part of the truth told or suggested. But, speaking of pure silence, the general rule stated is very strong. It governs even though the silence is meditated, and with knowledge that the other party was laboring under mistake or ignorance." *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411.

"Herm. Estop., § 776, states the law on this subject as follows: 'If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise abstain from it, to believe that he assents to its being committed, he can not afterwards be heard to complain of the act. This is the proper sense of the term "acquiescence," and in that sense it may be defined as "acquiescence" under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct.' " *Hanly v. Watterson*, 89 W. Va. 214, 19 S. E. 536; *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755.

"When a man with full knowledge, or at least with sufficient notice or means of knowledge of his rights, and of all the material circumstances of the case, freely and advisedly does anything which amounts to the recognition of a transaction, or acts in a manner inconsistent with its reputation, or lies by for a considerable time, and knowingly and deliberately permits another to deal with property, or incur expense, under the belief that

the transaction has been recognized, or freely and advisedly abstains for a considerable lapse of time from impeaching it, there is acquiescence." *Despard v. Despard*, 53 W. Va. 443, 44 S. E. 448; *Mann v. Peck*, 45 W. Va. 18, 30 S. E. 206. See also, *Morgan v. Cautley*, 51 W. Va. 304, 41 S. E. 201.

May Bar Relief in Very Short Period.—"Acquiescence in a transaction may bar a party of his relief in a very short period. Thus, if one has knowledge of an act, or it is done with his full approbation, he can not afterwards have relief. He is estopped by his acquiescence, and can not undo that which has been done. So, if a party stands by, and sees another dealing with property in a manner inconsistent with his rights, and makes no objection, he can not afterwards have relief. His silence permits or encourages others to part with their money or property, and he can not complain that his interests are affected. His silence is acquiescence and it estops him." *Despard v. Despard*, 53 W. Va. 443, 44 S. E. 448.

Representation Implied from Silence.—"14 Am. & Eng. Ency. Law 643, says that, as 'such estoppels as arise out of failure to assert a right, or out of silence or acquiescence in the right claimed by others, arise only because from such silence and acquiescence, a representation is implied.'" *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411. See ante, "Rule as to Necessity," V, A, 6, b, (1).

Silence to work an estoppel must involve a representation. *Smith v. Gott*, 51 W. Va. 141, 41 S. E. 175; *McNeely v. South Penn Oil Co.*, 52 W. Va. 616, 44 S. E. 508.

Parties Dealing at Arm's Length.—"Silence alone, it may be declared as a general rule, is not unlawful in transactions between men at arm's length, however great the advantage gained thereby. A man's unpublished thought is surely his own." *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411.

bb. Underlying Principles.

"He who is silent when conscience requires him to speak shall be debarred from speaking when conscience requires him to be silent." *Nicholas v. Austin*, 82 Va. 817; *Anderson v. Phlegar*, 93 Va. 415, 25 S. E. 107; *Lancaster v. Barton*, 92 Va. 615, 24 S. E. 251; *Marrow v. Brinkley*, 85 Va. 55, 6 S. E. 605; *Hill v. Woodward*, 78 Va. 765, 776; *Urpman v. Lowther Oil Co.*, 53 W. Va. 501, 44 S. E. 433. See also, *McGee v. Johnson*, 85 Va. 161, 7 S. E. 374; *Smith v. Chilton*, 84 Va. 840, 6 S. E. 142; *Shirely v. Rice*, 79 Va. 442; *Robertson v. Tapscott*, 81 Va. 533; *Smith v. Henkle*, 81 Va. 524; *Tuggle v. Berkeley*, 101 Va. 83, 43 S. E. 199; *Durkin v. Exchange Bank*, 2 Pat. & H. 277; *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874; *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755; *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536; *Stone v. Tyree*, 30 W. Va. 687, 5 S. E. 878; *Mason v. Harper's Ferry Bridge Co.*, 28 W. Va. 639.

"He who fails to speak when he should, will not afterwards be heard when he would; for such would be contrary to the orderly administration of justice, and is trifling with the court." *Dewing v. Hutton*, 48 W. Va. 576, 37 S. E. 670.

"Among the maxims laid down in *Herm. Estop.*, § 735, we find these: 'No one can maintain an action for a wrong where he has consented to the act which occasioned his loss.' 'He who does not forbid what he can forbid seems to assent.'" *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536.

cc. Right and Duty to Speak—Necessity for Knowledge.

See post, "Knowledge of Facts of Gross Negligence by Persons Making Representations," V, A, 6, c; "Knowledge of Facts or Gross Negligence by Person Claiming Benefit of Estoppel," V, A, 6, d.

(aa) In General.

Silence will not estop, unless there

is not only a right but a duty to speak. *Morgan v. Cautley*, 51 W. Va. 304, 41 S. E. 201; *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267; *Smith v. Gott*, 51 W. Va. 141, 41 S. E. 175; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411; *Jameson v. Rixey*, 94 Va. 348, 26 S. E. 861; *Tunstall v. Christian*, 80 Va. 1.

"The rule has ben laid down unqualifiedly that silence, in the absence of knowledge of one's rights, will not work an estoppel." *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633.

"For an estoppel to arise from silence, the person upon whom the duty to speak rests must have an opportunity to speak, and knowledge of the circumstances requiring him to speak." *Pettyjohn v. National Exchange Bank*, 101 Va. 111, 43 S. E. 203; *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633.

"To create a duty to speak, it must be known by the one keeping silence that some one is relying on that silence, and is either acting or is about to act as he would not have done had the truth been told." *Veile v. Judson*, 82 N. Y. 40. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411; *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267; *Atkinson v. Plum*, 50 W. Va. 104, 40 S. E. 587; *Hall v. Hall*, 30 W. Va. 779, 5 S. E. 280; *Stuart v. Ludington*, 1 Rand. 403.

There can be no acquiescence without knowledge. *Morgan v. Cautley*, 51 W. Va. 304, 41 S. E. 201; *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267; *Mann v. Peck*, 45 W. Va. 18, 30 S. E. 206; *Smith v. Gott*, 51 W. Va. 141, 41 S. E. 175.

Silence, to work an estoppel, must amount to bad faith, and this can not be predicated of a transaction of which a party has neither knowledge nor means of knowledge. *Pettyjohn v. National Exchange Bank*, 101 Va. 111, 43 S. E. 203; *Chesapeake, etc., R. Co. v.*

Walker, 100 Va. 69, 40 S. E. 633; *Tuggle v. Berkeley*, 101 Va. 83, 43 S. E. 199; *Jameson v. Rixey*, 94 Va. 342, 26 S. E. 861.

Means of Knowledge Equally Open to Both Parties.—See post, "Knowledge of Facts or Gross Negligence by Person Claiming Benefit of Estoppel," V, A, 6, d.

(bb) When Applied to Legal Title to Land.

"In *Bigelow, Estop.*, p. 594, it is said: 'It is settled law that standing by in silence will not bar a man from asserting a title of record in the public registry or other like office so long as no act is done to mislead the other party. There is no duty to speak in such a case.' * * * The records of the proper office are the best notice of the title, and, if they speak for a person, he is under no obligation to speak for himself." *Southern Building & Loan Ass'n v. Page*, 46 W. Va. 302, 33 S. E. 336, 337. See post, "Knowledge of Title to Land," V, A, 6, c, (2); "Knowledge of Legal Title to Land," V, A, 6, d, (2).

"Mere silence will not rob him of title until time does the work under the statute." *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411. See also, *McNeely v. South Penn Oil Co.*, 52 W. Va. 616, 44 S. E. 508.

"It would be indeed a singular perversion of the doctrine of equitable estoppel to hold that it deprives persons clothed with a complete legal title, and who have resorted to every means in their power, short of physical force, to prevent an invasion of their premises—of their land on the theory of acquiescence. Title to real property rests on no such unstable foundation in this commonwealth." *Newport News, etc., Co. v. Lake*, 101 Va. 334, 342, 43 S. E. 566.

If one claiming sole right to another's land spends money in improving or operating upon it, though igno-

rant of that other's right, the mere silence of that other will not estop him from asserting his title. He need not seek the other to tell him of his right, or speak at all, unless placed in such a situation as calls upon him to declare his right. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411.

"If one man chooses to go upon another's land, and clear and improve it, the mere failure of the owner to go to him and warn him not to do so will not take away the true owner's title. He is given the time fixed by the statute of limitations, though he do know that his adversary is expending money in improvements. He may every week pass along and see the work." *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411.

"The idea that one man can get title to another man's land, or title to an easement upon it, by improvement upon it, or making a road upon it, or a sewer, because he is silent, just as if he had given a grant, is absurd. No estoppel to work that grave result can exist except in the clearest case. The statute of frauds says it takes a deed to do this; but here it is sought to pass an easement in fee not even by word of mouth, but by mere silence. If this proposition prevails, what tenure has a man of his lands?" *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267.

But this doctrine does not apply where the real owner resorts to any affirmative acts or words, or makes any representations. "It would be in the highest degree inequitable to permit him to say that the other party, who had relied upon his conduct, and had been misled thereby, might have ascertained the falsity of his representations. 2 Pom. Eq. J., § 810." *Anderson v. Phlegar*, 93 Va. 415, 25 S. E. 107. See also, *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411. See post, "Representations

as to Title and Ownership," V, A, 6, b, (4).

dd. Instances.

Right to Easement.—Where a party lays a pipe line for conveyance of water by mistake partly in land of another without right of way, he can not maintain the easement on the theory of estoppel based on conduct of the landowner. The landowner's silence in omitting to tell the other party of his right is not an estoppel in pais. *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267.

To Deny Signing and Swearing to Answer.—Although the answer of an infant defendant over fourteen years of age to a bill for the sale of lands in which she has an interest was in fact neither signed nor sworn to by her, yet where the record shows an answer both signed and sworn to by her, and she has full knowledge of all the proceedings in the suit for the sale of the lands, and fully consents to a decree for the sale, and is regularly proceeded against as an infant on the record, and the sale is not made until eighteen months after she becomes of age, and she makes no objection to a confirmation of the sale, of which she has full knowledge, and about which she is consulted, such infant will thereafter be estopped from setting up against a bona fide purchaser of said land for value the fact that she had not signed and sworn to the answer. *Lancaster v. Barton*, 92 Va. 615, 24 S. E. 251. See post, "Infants," V, A, 9, b.

Failure to Assert Title.—Where a father purchases a tract of land in the name of his son, and in the written contract the vendor is required upon the payment of the purchase money to convey the land to the son, and the father pays the purchase price, the son is not estopped to compel conveyance to himself by the fact that he was silent as to his claim for many years, during which time he occupied the land under a deed of trust to his wife and

children. *Lorentz v. Lorentz*, 14 W. Va. 809. See post, "Representations as to Title and Ownership," V, A, 6, b, (4).

The owner of land is not estopped to claim title thereto by the fact that he kept silence while his title was disparaged in his presence, the disparaging remarks not being addressed to him. *Fry v. Stowers*, 92 Va. 13, 22 S. E. 500.

Counterclaims Arising Out of Contract.—A party who has purchased property under a contract, and given his notes for the purchase money, and deliberately executed a deed of trust to secure them, will not be readily entertained in a court of chancery when he seeks to escape their entire obligation by setting up counterclaims arising out of the same contract, which existed when he executed the notes and deed of trust, and about which he was then silent. *Farland v. Wood*, 35 W. Va. 458, 14 S. E. 140, 141.

Vendee Acquiescing in Fraud of Vendor.—Even where the evidence is sufficient to establish fraud on the part of the vendor, the vendees may be estopped by their acquiescence, by the lapse of time and other circumstances from setting up such defense. *Smith v. Henkel*, 81 Va. 524.

Void Contract.—Where a vendee, knowing that the contract can not immediately be carried out by the vendor, and that it is a nullity as to him, goes on for years acting as if it were a valid contract, he is estopped to deny the validity thereof. *Dodson v. Hays*, 29 W. Va. 577, 2 S. E. 415.

Manner of Computing Royalties on Ore.—Where the terms of a contract were not clear whether royalties on ore were to be computed when the ore was wet or dry, the acceptance by the mine owner for seven years of settlements on a dry weight, with full knowledge of the facts, estops him to claim a different construction. *American Mang. Co. v. Va. Mang. Co.*, 91 Va. 272, 21 S. E. 466.

"If the defendant knew of any irregularity or had ground of complaint at the time these monthly statements, returns and payments were made, it was the duty of the defendant to have made known and insisted upon its objections then; but, if, instead of doing so, it accepted such payments, and gave receipts in full for the amounts shown to be due by such settlements and returns, it is concluded by the original amounts as fully as if formal and final settlement of accounts had been made between the parties, and the defendant can not now go behind such settlements and receipts in full without showing that there was fraud or mistake in weighing the ore, or in making returns thereof, according to the method actually adopted for weighing and making such returns. *Shillingford v. Good*, trustee, 95 Pa. St. 25, 34." *American Mang. Co. v. Va. Mang. Co.*, 91 Va. 272, 21 S. E. 466. See also, the title MINES AND MINERALS.

To Manner in Which Boom Is Constructed.—A party who leases the river bank in front of his land to another for the use of a boom to be operated in the river opposite said land, and who, after the boom is constructed, receives rent, year after year, from the boom company for said land without protest, is estopped from objecting to the manner in which the boom is constructed. *Rogers v. Coal River Boom, etc., Co.*, 39 W. Va. 272, 19 S. E. 401.

H., after acquiescing and even assisting M. in maintaining a boom for the catching and preserving of ties, timber, etc., and receiving the benefits thereof in the saving of large numbers of his ties at an expense far less than it must have cost him if they had passed beyond the boom, can not, in a court of equity, be heard to say that the boom was constructed and maintained in violation of law, and was a public nuisance, interfering with steamboat navigation, and therefore that he should not be required to pay a just and reasonable compensation for the

catching and preserving of his said ties in said boom. *Miller v. Hare*, 43 W. Va. 647, 28 S. E. 722.

Executor Borrowing Money—Acquiescence of Legatees.—An executor borrowed money of his wife to pay the debts of the estate. The testator's widow urged the wife to loan the money, and the widow, the executor, and his wife all understood that the wife should be reimbursed from the estate. A legatee testified that there had been frequent family conferences between the legatees, and that it was agreed to borrow money to pay the estate debts, but other legatees testified that they had heard the matter spoken of, but only in a general way. Held, not sufficient to show an acquiescence of the legatees which would estop them from objecting to the payment of the money so loaned. *Robertson v. Breckenridge*, 98 Va. 569, 37 S. E. 8.

To Defend against Assignee of Debt.—See post, "Representations Relating to Choses in Action and Negotiable Instruments," V, A, 6, b, (5).

To Contest Commissioner's Sale.—A commissioner who sold lots under a decree made deeds to third persons who he claimed were vendees of the purchaser. The latter and her husband stood by for nine years after the deeds were made without making any complaint or claim to the lots, and in the meantime the lots passed through the hands of several successive owners. Held, that their silence was inconsistent with a claim of ownership afterwards set up by them. *Williams v. Reynolds*, 2 Va. Dec. 535.

Confirmation of Partition Sale.—Commissioners appointed under a decree to make partition between two part owners of a tract of land reported such real estate as partitionable, and divided the same between said parties by actual survey, as shown by a plat returned with their report showing the number of acres to which the parties are respectively entitled. Said par-

ties, by consent decree, without awaiting the confirmation of said report of partition, agreed that said land may be sold by commissioners appointed by decree of the court as an entire tract, or in separate tracts, as described in said plat and report. At such sale, made under such consent decree, the land that had been allotted to W. in said report (against whose interest liens to the amount of its value exist) was purchased by C., against whose parcel no liens exist. The court confirmed said sale to C. without awaiting the sale of the entire tract; and subsequently the court, on motion, confirmed said partition as to the parcel allotted to C. It was held, that W., by his laches and acquiescence in the action of said commissioners, is estopped from objecting. *Connell v. Wilhelm*, 36 W. Va. 598, 15 S. E. 245.

To Deny That He Was Purchaser.—Under decree in 1855, T. sold house and lot to J. W. Sale was confirmed. J. W. died. His heir, C. W., in 1860 sold it to R., the receiver in the suit, at \$1,500. J. W.'s estate still owed \$1,292 on the purchase. Possession was given to and has ever since been kept by R., though he has not paid a cent. After many years a commissioner was appointed to look into the transactions of R. as receiver. In 1883, he reported that there was in R.'s hands, as receiver, over \$10,000, including \$1,292, principal and \$2,124.48 interest, the purchase money aforesaid. R. made no exceptions to the report, which was confirmed; and in April, 1883, a decree was based on this report, directing R., as receiver, to pay out this money. R., still defaulting, in April, 1884, a decree was entered directing resale of the house and lot unless in sixty days R. should pay the purchase money. Both these decrees treated R. as purchaser, and R. assented to them by endorsement thereon. The sale was advertised. In September, 1884, R. got an injunction upon the grounds that he bought the property of the heir of J.

W., the purchaser at the judicial sale; that C. W. contracted it to R. with covenants to perfect the title in himself and convey it free of incumbrances; that he had not done so; that the title was bad, and that he wanted the sale rescinded. On motion to dissolve, held, R. is estopped to deny he was the purchaser, after his acquiescence in the proceedings treating him as such. His acquiescence in and approval of the proceedings above referred to estop him. *Robertson v. Tapscott*, 81 Va. 533.

To Maintain Ejectment.—C. and M. & H. owned adjoining lots. C., desiring to build a business house on her lot and to make a party wall, an agreement in writing was entered into providing that such wall should be built to extend over on the ground of M. & H. ten inches only. C., without invoking the aid of M. & H. to assist in locating the division line or notifying them when she proposed to locate it, fixed the line herself with the aid of the city engineer and built the wall, completing it in 1893, and in 1899, when M. & H. desired to use the wall, they discovered it covered six inches more of their ground than was allowed by the contract. It was held, that M. and H. were not estopped to recover possession of the said strip of six inches so built upon in an action in ejectment. *Cautley v. Morgan*, 51 W. Va. 304, 41 S. E. 201. See also, the title EJECTMENT, vol. 4, p. 871.

To Treat Property as Personalty.—See the title CONVERSION AND RECONVERSION, vol. 3, p. 505.

To Claim Benefit of Compromise.—See the title COMPROMISE, vol. 3, p. 44.

To Deny Right of Support for Building.—See the title ADJOINING LANDOWNERS, vol. 1, p. 178.

Acquiescence in Interlocutory Decree.—A party may be concluded by his acquiescence in a decree affecting his rights made in the progress of the

cause, under which decree he takes a part of the fund affected by it, and makes no objection to it until after the final decree in the cause made twenty-two years after it. *Burton v. Brown*, 22 Gratt. 1.

The mere lapse of ten years will not estop a party to a pending suit from filing a petition to rehear an interlocutory decree in the suit. *Todd v. McFall*, 96 Va. 754, 32 S. E. 472.

(4) Representations as to Title and Ownership.

(a) Representations Inducing Purchase or Erection of Improvements.

aa. In General.

See ante, "Right and Duty to Speak—Necessity for Knowledge," V, A, 6, b, (3), (c), cc.

"No principle of equity seems better established, or more readily applied in equity, than that if a person knowing his rights stands by and encourages or permits an innocent party to purchase his property or to make valuable improvements upon it without making known to such purchaser his rights in the property, is estopped from afterwards asserting any claim to it." *Heavener v. Godfrey*, 3 W. Va. 426; *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755." *Upman v. Lowther Oil Co.*, 53 W. Va. 501, 44 S. E. 433; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411; *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633. See post, "Knowledge of Facts or Gross Negligence by Person Making Representation," V, A, 6, c.

bb. Rules as to Representation or Concealment of Ownership.

(aa) In General.

"In 7 Am. & Eng. Ency. Law 18, the law is laid down that, 'where the owner or person having an interest in property represents another as the owner, or permits him to appear as such, or as having complete authority over it, he will be estopped to deny such ownership or authority against persons who, relying on his representations or

silence, have purchased or acquired interests in the property.'" *Bodkin v. Arnold*, 45 W. Va. 90, 30 S. E. 154. See post, "Oral Admission as to Vested Title to Land," V, A, 6, b, (4), (a), bb, (bb).

"If a party stands by and sees another dealing with property in a manner inconsistent with his rights, and makes no objection, he can not afterwards have relief." *Despard v. Despard*, 53 W. Va. 443, 44 S. E. 448; *Urpman v. Lowther Oil Co.*, 53 W. Va. 501, 44 S. E. 433.

The general rule is that, if a person interested in an estate knowingly misleads another into dealing with the estate as if he were not interested, he will be postponed to the party misled and compelled to make his representation good. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411; *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755.

If a person with full knowledge permits another, without objection, to sell his property or the property of the vendor, he will not be permitted to question the title of a bona fide purchaser. *Hill v. Woodward*, 78 Va. 765, 776; *McGee v. Johnson*, 85 Va. 161, 7 S. E. 374. See also, *Bennett v. Harper*, 36 W. Va. 546, 552, 15 S. E. 143; *Floyd v. Jones*, 19 W. Va. 365; *Engle v. Burns*, 5 Call 463, where it is held: If the owner of a tract of land sees it sold to another person, without disclosing his title, it is a fraud which forfeits his right. But see *Applebury v. Anthony*, 1 Wash. 287, where it is held: If the owner of an equitable title stand by, and suffer another to purchase without disclosing his title, he is guilty of a fraud sufficient to defeat his claim. But a legal claim can not be so lost even in favor of a purchaser, and it is doubtful if even an equitable claim can be so lost, in the case of a mere voluntary conveyance. See post, "Oral Admission as to Vested Title to Land," V, A, 6, b, (4), (a), bb, (bb).

"If the owner of real estate, whether he has the legal title in him or not, permits such real estate to be sold in his presence by another, who claims to be the owner of the land, or by one who claims that he has full authority and power to dispose of the same, it is the duty of the true owner of the land to assert his claim then. And if he stands by and permits an innocent purchaser to buy such land from such person claiming to have full power to dispose of it, he will be estopped thereafter from setting up a claim to such land, because of a want of full power and authority on the part of the person selling it to make good title thereto, as against such innocent purchaser, by his acquiescence at the time in the legality of such sale made in his presence." *Stone v. Tyree*, 30 W. Va. 687, 701, 5 S. E. 878; *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755; *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874; *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536; *Engle v. Burns*, 5 Call 463.

The rule thus laid down, supposes the party to be present at, or consensual of, the treaty in which the fraud is practiced, and encouraging the purchaser, either in express terms, or by silence and concealment of his own title, to proceed in the purchase. *Engle v. Burns*, 5 Call 463.

(bb) Oral Admission as to Vested Title to Land.

One can not lose vested title to land by oral admission that it is the property of another. *Waldron v. Harvey*, 54 W. Va. 608, 46 S. E. 603; *Yock v. Mann (W. Va.)*, 49 S. E. 1019.

"Title to land can not pass by admission, when statute requires a deed." *Waldron v. Harvey*, 54 W. Va. 608, 46 S. E. 603; *McNeely v. South Penn Oil Co.*, 52 W. Va. 616, 44 S. E. 508; *High v. Pancake*, 42 W. Va. 602, 26 S. E. 536.

"Upon this question we find that in the case of *Hayes v. Livingston*, 34

Mich. 384, it was held, that 'while it is a recognized ground of equitable relief to compel the owner of lands to surrender them up to one who, by reliance upon such owner's fraudulent conduct, has been misled into taking action which gives him a superior equity, yet, at law, the legal title must prevail, and, under the statute of frauds, it is not permissible that an estoppel resting in parol should work a transfer of the legal title to lands.' Judge Cooley in that case reviews the authorities at length and, referring to the Illinois decisions, he says they are equally clear and pointed." *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536. See ante, "In General," V, A, 6, b, (4), (a), bb, (aa).

cc. Underlying Principles.

"This is founded on the principle that no man can take advantage of his own wrong. Even if his title was ever so good, having deceived them into purchasing under another title, he and his vendees are forever estopped from asserting his title against those deceived by him or their vendees." *Bodkin v. Arnold*, 45 W. Va. 90, 30 S. E. 154.

"The ground on which a man is bound, who has a title, and stands by, and either encourages, or does not forbid a purchase, or the completion of the purchase (for I make no distinction between the two), is that of an implied assent to such purchase. 1 Fonbl. 151." *Engle v. Burns*, 5 Call 463. See ante, "Silence and Passive Acquiescence," V, A, 6, b, (3), (c).

dd. Extent of Operation of Doctrine.

"This rule applies to one who denies his own title or encumbrance when inquired of by another who is about to purchase the land, or to loan money upon its security; to one who knowingly suffers another to deal with the land as though it were his own; to one who knowingly suffers another to expend money in improvements without giving notice of his own claim,

and the like." *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755.

So far did the case of *Stone v. Tyree*, 30 W. Va. 687, 5 S. E. 878, carry this doctrine that it held, that a court of equity would compel him to convey to the innocent purchaser. *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874, 876; *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755. See also, the title SPECIFIC PERFORMANCE.

"Where the true owner of property, for however short a time, holds out another, or allows another to appear, as the owner of, or as having full power of disposition over, the property, the same being in the latter's actual possession (here the deed carried possession), and innocent third parties are thus led into dealing with such apparent owner, they will be protected." *Greer v. Mitchell*, 42 W. Va. 494, 26 S. E. 302, 308.

"Where others are innocently induced to acquire rights in derogation of the secret or undisclosed claims of those who cause such action, the rights so acquired are secure, whether contested at law or in equity. Such rights do not depend upon the actual title or right or authority of the party with whom they have directly dealt, but are derived from conduct of the real owner, which precludes him from disputing against them the existence of the title or right or power which he caused or allowed to appear to be vested in the party making the sale." *Greer v. Mitchell*, 42 W. Va. 494, 26 S. E. 302, 308.

Encouragement to Pay Only a Small

Sum.—"The assent is much to be inferred from the encouragement to pay a small sum, as the whole purchase money; for the purchaser inferring such assent from such payment, may reasonably go on there'ter to complete his purchase. To protect the first purchaser from the effect resulting from such partial payment, it is incumbent

on him to show an intermediate prohibition of payments on his part, or retraction of such assent." *Engle v. Burns*, 5 Call 463.

ea. Instances.

Concealing Encumbrance from Enquiring Purchaser.—"Where a purchaser has knowledge of any fact or circumstance sufficient to put him upon inquiry as to the existence of some right or title in conflict with that which he is about to purchase, and makes the inquiry suggested by such fact or circumstance, and anything detrimental to the right he is about to acquire is concealed or withheld from him, he can not afterwards be charged with notice of it, or be affected by an undisclosed encumbrance or latent equity. 2 *Devlin on Deeds*, § 745; and *Massie v. Greenhow*, 2 Pat. & H. 255." *Kelly v. Fairmount Land Co.*, 97 Va. 227, 33 S. E. 598. See post, "Representations upon Which Credit Extended," V, A, 6, b, (6).

The vendor of real estate who had not conveyed the legal title, also held an unrecorded deed of trust from his vendee on the same land for money advanced to him. Upon inquiry by a proposed purchaser as to what was necessary for the vendee to do to acquire title he disclosed the balance of purchase money due but said nothing about the unrecorded deed of trust. Under these circumstances the vendor is estopped to assert his deed of trust against the purchaser from the vendee. *Kelly v. Fairmount Land Co.*, 97 Va. 227, 33 S. E. 598. See post, "Representation Inducing Mortgage or Loan," V, A, 6, b, (4), (b).

One owning or having any interest in or charge upon land, knowing that another is about to purchase it, who declares to such other person that he has no interest in the land, and that the one proposing to sell has the absolute right to the land, can not set up any ownership, interest, or charge, then existing, hostile to the right ac-

quired by such purchaser. *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874. See also, *Bodkin v. Arnold*, 45 W. Va. 90, 30 S. E. 154. *Mason v. Harper's Ferry Bridge Co.*, 28 W. Va. 639; *Stone v. Tyree*, 30 W. Va. 687, 5 S. E. 878; *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755.

Representation by Innocent Person Making Injury Possible.—Where one of two innocent persons, each guiltless of an intentional moral wrong, must suffer loss by the fraud of a grantor, the grantee who puts it in the power of the grantor to commit the injury must bear the consequences. *Slater v. Moore*, 86 Va. 26, 9 S. E. 419. See also, *Hyatt v. Zion*, 102 Va. 909, 48 S. E. 1; *McConnell v. Rowland*, 48 W. Va. 276, 37 S. E. 586; *Roberts v. Tavener*, 48 W. Va. 632, 37 S. E. 576. See ante, "Underlying Principles and Purpose of Doctrine," V, A, 2.

Failure to Assert Title.—Where land is sold at public auction, and a third person makes a declaration in the hearing of the vendor and the bidders, that he is agent for persons having a claim to part of the land, but that an agreement has been made between him and the vendor, by which the purchaser shall not be injured by the conflicting claims, and the vendor remains silent, he shall be bound by such declaration. *Allen v. Winston*, 1 Rand. 65.

Dedication of Land to Public Use, etc.—Where land has been reserved and "dedicated" to some public, charitable or pious use, an estoppel arises precluding the owner from revoking the dedication; especially is such dedication irrevocable where it was created by agreement. *Benn v. Hatcher*, 81 Va. 25. See also, the title DEDICATION, vol. 4, p. 350.

Where property in a town is set apart for public use, and is enjoyed as such, and private and public rights are acquired with reference to it and to its enjoyment, the law presumes an acceptance as will operate as an estoppel

in pais, and preclude the owner from revoking the dedication. *Harris v. Com.*, 20 Gratt. 833; *Richmond v. Stokes*, 31 Gratt. 713; *Buntin v. Danville*, 93 Va. 200, 24 S. E. 830; *Norfolk v. Nottingham*, 96 Va. 34, 30 S. E. 444; *Ralston v. Weston*, 46 W. Va. 544, 33 S. E. 326.

"The owner is estopped to assert there has been no formal acceptance, where the public, relying upon the manifest interest of the party to dedicate the property, have entered into the occupation of it, in such a manner as renders it improper and unjust to reclaim it." Quoting *Harris' case*, 20 Gratt. 833. *Richmond v. Stokes*, 31 Gratt. 713; *Norfolk v. Nottingham*, 96 Va. 34, 30 S. E. 444.

In this state there may be a valid acceptance of an easement in a town without any distinct act of recognition by the corporate authorities of such town. The mere user, however, by the public of the locus in quo will not of itself constitute an acceptance, without regard to the character of the use and the circumstances and length of time under which it is claimed and enjoyed. But where property in a town is set apart for public use, and is enjoyed as such, and public and private rights acquired with reference, to it and to its enjoyment, the law presumes such an acceptance on the part of the public as will operate an estoppel in pais and preclude the owner from revoking the dedication. *Richmond v. Stokes*, 31 Gratt. 713.

A street of the city having been used according to a certain line from 1817 to 1847, and having been graded and paved by the city authorities, without any objection or claim by the owners of the soil on which a part of the street was laid, and public and private rights having been acquired with reference to it and its enjoyment, its dedication to the public will be presumed, and the owner of the soil can not revoke it. *Richmond v. Stokes*, 31 Gratt. 713.

Sale of Lots with Reference to Streets, Alleys, etc.—"If an owner of land lays it out into streets, lots and alleys and sells lots with reference to such streets and alleys by plat or otherwise, it is a dedication of such streets and alleys irrevocable by him, and makes them public as to all lot owners, and consequently as to the general public. He is estopped to deny them that character. *Riddle v. Charlestown*, 43 W. Va. 796, 28 S. E. 831; *Skeen v. Lynch*, 1 Rob. 186, 9 Am. & Eng. Ency. L. (2d Ed.) 34." *Hast v. Piedmont*, etc., R. Co., 52 W. Va. 396, 44 S. E. 155. See the title DEDICATION, vol. 4, p. 350.

"The sale of lots in accordance with a map vests in the purchasers the right to the use of the streets appearing upon such map, and the right so vested can not be defeated by the act of the vendor, because by the sale under such circumstances he is estopped to deny or impeach rights thus acquired. That the sale operates by way of estoppel is fully established by the authorities. See *Herman on Estoppel*, §§ 1145, 1146, 1147, 1148; *City of Cincinnati v. White*, 6 Peters 431; *Weisbrod v. Railway Co.*, 18 Wis. 43." *Norfolk v. Nottingham*, 96 Va. 34, 30 S. E. 444; *Skeen v. Lynch*, 1 Rob. 186; *Hast v. Piedmont*, etc., R. Co., 52 W. Va. 396, 44 S. E. 155; *Riddle v. Charlestown*, 43 W. Va. 796, 28 S. E. 831.

Where, therefore, lots have been offered for sale, and have been purchased in accordance with a map or plat upon which streets are made to appear, it is presumed that the purchase was induced, and the price of the lots enhanced thereby, and the seller is estopped to deny the right which has been thus acquired. To permit him to sell the lots under such circumstances, and then to close the streets, would be to permit him to perpetrate a fraud upon his vendees." *Norfolk v. Nottingham*, 96 Va. 34, 30 S. E. 444.

"Such an estoppel, however, operates

only in favor of him who has been misled to his injury, and he alone can set it up." It does not operate in favor of a city or county which has acquired no rights thereunder. *Norfolk v. Nottingham*, 96 Va. 34, 30 S. E. 444; *Newport News, etc., Co. v. Lake*, 101 Va. 334, 43 S. E. 566. See ante, "Who Is Estopped and Who May Take Advantage of Estoppel," II; post, "In Whose Favor Estoppel Operates," V, A. 7.

It is not in the power of the grantor of land in a deed of trust to secure the payment of money (which is in fact purchase money which he owes on the land), and which deed of trust is duly recorded, to dedicate the streets and alleys laid off by him on the land conveyed in trust to the public use, so as to destroy or release the trust lien of the cestui que trust thereon, or estop him from the assertion thereof, without the concurrence of the cestui que trust clearly established. *Walker v. Summers*, 9 W. Va. 533.

Deed Fraudulently Placed on Record.—Where a deed is executed and placed in the hands of depositary to be held subject to the joint order of the grantor and grantee, and the grantee has possession of the property by its agent, who surreptitiously obtains such deeds and places it on record, and then conveys the property to an innocent holder for value, and places him in possession thereof, and a period of seven months is permitted to elapse before the original grantor makes inquiry about the deed or property, and then permits the fraudulent agent to escape without arrest, a court of equity will refuse to cancel such deed and restore the property to such grantor, but will hold him estopped from setting up title to such property as against the innocent purchaser. *McConnell v. Rowland*, 48 W. Va. 276, 37 S. E. 586.

Vendee under Executory Contract.—A vendee under an executory contract for the sale of land who stands by and

permits an innocent party to purchase the property or make valuable improvements, is estopped thereafter to obtain any relief therefor. *Urpman v. Lowther Oil Co.*, 53 W. Va. 501, 44 S. E. 433.

Pendente Lite Purchaser Failing to Object to Sale.—In 1881, H., and in March, 1882, J., against W. & Q., and in July, 1882, S., against W. alone, brought their respective bills to enforce judgments on lands alleged therein to belong to W., who answered admitting the ownership, whilst Q. failed to answer. In each suit there was a decree to rent. Commissioner reported his inability to rent for enough to pay the judgments, and in October, 1882, there was a decree in these three suits heard together to sell. In February, 1883, J. filed a supplemental bill alleging that he had just learned that these lands had, before the institution of these suits, been sold under proceedings in bankruptcy and bought by W., who still owned part of the purchase money. In these suits there was an account of liens and lands, the latter being reported as the lands of W., who was present and did not object. In April, 1883, account was confirmed and sale decreed and made in June, 1883, to J., Q. being present and T. having notice thereof, and neither objecting. Sale was confirmed, and J. had paid half the purchase money on June 18th, 1884. Twelve months after such payment, Q., T. and W. filed their cross bills, making all W.'s creditors parties, and charged that just after the sale in bankruptcy in 1878, W. had sold by parol, and by deed recorded in October, 1882, conveyed to Q. 93 acres, and to T. 30 acres of said land by deed recorded in November, 1882, and that both had paid him the price thereof, which he had paid to his assignee in bankruptcy on the purchase money due him, and had each made improvements on said parcels of land and prayed that the decree of sale be set aside. Defendants answered the cross bill, de-

nying the parol sales and the alleged payments thereon, which sales and payments were not established by evidence. It was held, that Q. and T. are estopped from claiming said parcels of land, having notice of the sale to J. and not objecting until twelve months after the payment of half the purchase money. *McGee v. Johnson*, 85 Va. 161, 7 S. E. 374, citing *Hill v. Woodward*, 78 Va. 765, 776.

Erroneous Confirmation of Judicial Sale.—If a purchaser at a judicial sale stands silent and suffers to be confirmed without objection, the sale to himself, and also a sale to another, and makes no complaint until the land last referred to has been conveyed for value to a third party, he would be estopped quoad such third party for the correction of an alleged mistake certainly. *Shirly v. Rice*, 79 Va. 442. See also, the title JUDICIAL SALES.

Children to Claim under Deed from Father.—Children to whom land had been conveyed by their fathers are estopped to claim title under a deed from him to the prejudice of others whom they had induced to purchase the land. *Virginia Iron, etc., Co. v. Roberts*, 103 Va. 661, 49 S. E. 984.

Where the complainant purchased from a father a tract of land which he had previously conveyed to certain of his children; the complainant knew nothing of the existence of the deed; he purchased in good faith; and the purchase was made with the knowledge, acquiescence, and consent of the children, the children are estopped from setting up the conveyance to them against such purchaser. *Virginia Iron, etc., Co. v. Roberts*, 103 Va. 661.

The fact that children, to whom land has been conveyed by their father, revive a suit brought by their father involving the land in their names as heirs and not as purchasers, does not estop them to claim under the deed. *Virginia Iron, etc., Co. v. Roberts*, 103 Va. 661, 49 S. E. 984.

Parol Agreement to Procure Wife to Release Dower.—Under a decree of the court, a commissioner is directed to sell three tracts of land; on the day of sale the land is bid off to A., the debtor, and he being unable to comply with the terms of the sale makes a parol agreement with D., by which it is agreed he shall be reported as the purchaser instead of A., and the latter, as an inducement to D. to purchase, agrees to get his wife to release her contingent dower in the lands, which the wife afterwards refuses to do; the commissioner reports D. as the purchaser, and the court confirms the sale without objection; on a subsequent day of the same term N., a creditor of A., offers for one of said tracts an upset bid of twenty per cent. advance on the price of said tract, and the court sets aside the confirmation as to said one tract; at a subsequent term D. moves the court to confirm the sale to him of said tract, and A. moves to have the same set aside and a resale ordered; the court sets aside the sale and orders a resale on the basis of the upset bid, the resale is made and N. becomes the purchaser at his upset bid; this sale is confirmed, and D. appeals to this court. It was held, that the parol agreement could not operate as an estoppel or conclude the right of A. to resist the confirmation of the sale. *National Bank v. Jarvis*, 28 W. Va. 805.

Statements as to Boundary.—Innocent, though erroneous statements or acts, made to or done in the presence of, the owner of coterminous land, without any purpose to deceive, and not relied on by the other as evidence of boundary, can not render the party so speaking or acting, in any manner liable, in equity, to the forfeiture of his own land, or the payment of money to indemnify the owner of the adjoining land for improvements he may have made on it, or for expenditures made elsewhere, in order to facilitate and enhance the use and value of the land owned by the other, as to the bound-

ary of which the mistake has existed. *Western Mining, etc., Co. v. Peytona Cannel Coal Co.*, 8 W. Va. 406, 407.

Property Represented by Warehouse Receipt.—The doctrine that "a warehouse receipt vests in a bona fide purchaser of it for value, or in a bona fide pledgee for value, the legal title to and possession of the property represented by the receipt, rests, not upon the theory of a symbolical delivery of the property, but upon the principles of equitable estoppel, whereby one who has armed another with such indicia title to the property that he may deceive innocent third parties and make them believe he is the real owner, will be estopped to set up any claim of title to the property as against one who is a bona fide purchaser of it without notice. This doctrine was enunciated in *Wright v. Campbell*, 4 Burrows 2046, and received pronounced judicial sanction in the early case of *Lickbarrow v. Mason*, 2 Durn. & East., p. 63 (2 Smith's L. C., 9 Ed., 1045, et seq.) repeatedly cited with approval by text-writers as well as in the decided cases, and never criticised so far as we have been able to find. See also, *McNeil v. Bank*, 46 N. Y. 325, 7 Am. Rep. 341, where the doctrine is elucidated and a very instructive opinion delivered." *Millhiser v. Gallego Mills*, 101 Va. 579, 594, 44 S. E. 760. See also, the title WAREHOUSES AND WAREHOUSEMEN.

(b) Representations Inducing Mortgage or Loan.

See post, "Representations upon which Credits Extended," V, A, 6, b, (6).

(5) Representations Relating to Chooses in Action and Negotiable Instruments.

Representations as to Validity of Notes or Bonds.—Where the maker of a promissory note tells a prospective purchaser thereof that there is no defense to the note, he is estopped from

setting up any defense in a suit by such purchaser. *Davis v. Thomas*, 5 Leigh 1.

Representations by Debtor Inducing Assignment.—A debtor will be estopped from setting up any equity or defense, however well founded originally, if by his assurance, made beforehand he has induced the assignee to acquire the debt. *Stebbins v. Bruce*, 80 Va. 389. See also, *Pettit v. Jennings*, 2 Rob. 676.

"In the case of *Pettit v. Jennings*, 2 Rob. 676, it was held, that where the assignee is induced to take the assignment of the debt by the assurances of the debtor that the same is just, and will be duly paid, the latter is estopped from setting up any defense he may have against the assignor, even though the debt be for a gaming consideration, and therefore void in its inception, provided the assignee before he accepted the assignment had no knowledge as to the consideration of the instrument assigned." *Stebbins v. Bruce*, 80 Va. 389. See also, *Woodson v. Barrett*, 2 Hen. & M. 80; *Davis v. Thomas*, 5 Leigh 1; *Buckner v. Smith*, 1 Wash. 296; *Hoomes v. Smock*, 1 Wash. 389; *Nicholas v. Austin*, 82 Va. 817, 1 S. E. 132. See also, the title GAMBLING CONTRACTS.

A, the holder of a promissory note of B, being about to transfer it to C, for valuable consideration, and this being known to B, the maker, he promises to pay the debt to C, who is induced by that promise to take the note; in a suit in the name of A for the benefit of C, upon the note, the maker pleads the general issue; and on the trial thereof, B offers proof that he had paid the contents of the note to A before the transfer thereof to C, and to repel that defense, C offers proof of B's promise to pay the debt to him. Held, B's promise to pay the debt to C estopped him from alleging payment to A before assignment. *Davis v. Thomas*, 5 Leigh 1.

Representations by Debtor after Assignment.—Subject to one qualification

the rule is that no acknowledgment made after assignment will preclude the debtor from proving if he can, any equity against the assignor, acquired before he had notice of the assignment. *Stebbins v. Bruce*, 80 Va. 389. See the title **ASSIGNMENTS**, vol. 1, p. 770. See following paragraph.

Debtor's Promising to Pay after Notice of Assignment.—"Where, after notice of assignment, the debtor expressly or impliedly promises the assignee to pay the debt, he will be concluded thereby, if the retraction of such promise would operate as a fraud upon the assignee. As where, relying on the debtor's promise or admissions, the assignee takes no steps against, or to obtain additional security of, the assignor, who afterwards becomes insolvent, in consequence of which loss is sustained by the assignee. In this and other like cases where the assignee has been influenced to act, or to refrain from taking action, by the representations of the debtor, to permit the latter to repudiate those representations to the injury of the former, would be contrary, no less to the well-settled rule of the common law, than to the plainest principles of natural justice. And the same principle prevails in equity. 1 Greenleaf on Evidence, § 207, et seq.; *Pettit v. Jennings*, 2 Rob. 676, 2 Pom. Eq., § 812." *Stebbins v. Bruce*, 80 Va. 389. See also, *Feazle v. Dillard*, 5 Leigh 30.

Mere silence will not operate such estoppel. *Stebbins v. Bruce*, 80 Va. 389. See also, *Feazle v. Dillard*, 5 Leigh 30.

"In *Bank v. Authur*, 3 Gratt. 173, it was held, that notwithstanding the obligor, in a bond tainted with usury, had acknowledged the debt, after notice of the assignment, and promised the assignee to pay it, he was not thereby estopped from afterwards setting up the defense of usury. And this was so, said the court, because, first, the promise to pay the assignee could not be treated as a new contract, the same being without a valuable consideration; and, secondly, because under

the circumstances of the case, the assertion of the defense could not operate as a fraud upon the assignee, inasmuch as the representations of the obligor were not made with fraudulent intent, and no loss was occasioned thereby to the assignee." *Stebbins v. Bruce*, 80 Va. 389.

(6) Representations upon which Credit Extended.

Representations Inducing Mortgage and Loan.—A applies to B for a loan of money, upon the property of a mortgage of slaves then held by A, and B, being doubtful as to A's title to the slaves, and apprehensive that C has some claim to them, applies to C to know, whether he has such claim, explaining his reason for the inquiry; upon which C informs him he has no right to the slaves, being at the time apprised of all the facts, on which his right, if he has any, depends; B lends the money, and takes the mortgage of the slaves. Held, that C. can not be allowed, in equity, to assert the right he had disclaimed against the mortgagee, B. *Dickenson v. Davis*, 2 Leigh 401. See ante, "Instances," V, A, 6, b, (4), (a), ee.

Credit Extended Holder of Naked Legal Title.—Where the owner of a tract of land conveys the same to his brother by deed absolute on its face, and allows the said deed to remain for years on the record of the county in which the land lies, thus giving notice to the world of the title thereto, in said brother, and third parties extend credit to that brother, and allow him to become indebted to them, and said third parties obtain judgments against said brother for the debts thus created, and docket the same in the county where the land is situated, such creditors thereby acquire a valid lien upon said land, and the party who conveyed said land to his brother and allowed the deed to so remain recorded, is estopped from claiming title to said land, as against said creditors. *Greer v. Mitchell*, 42 W. Va. 494, 26 S. E. 302.

Husband to Deny Validity of Wife's Deed.—A married woman and her trustee, without the concurrence of her husband, executed a deed of trust on her equitable separate estate in land to secure a loan negotiated by her husband. It did not appear that the loan secured by the deed was for her benefit nor that it was her intention to create a specific lien on the estate. There was no proof that the husband was guilty of any fraud, actual or constructive in negotiating the loan. It was held, that he was not estopped to deny the validity of the deed. *Taylor v. Cussen*, 90 Va. 40, 17 S. E. 721. See post, "Married Women," V, A, 9, c.

As to Membership of Firm.—If a person held himself out as a member of the firm, he is liable to the payment of such debts as were contracted on the faith of his representations, even though there was no such partnership, for by his conduct, to the extent of such debts, he is estopped from denying the partnership. 17 Am. & Eng. Ency. Law, p. 879; *Jacobs v. Shorey*, 48 N. H. 100." *Moore v. Harper*, 42 W. Va. 39, 24 S. E. 633.

Where a person, by his conduct, conversation, admissions, or otherwise, allows himself to be held out as a member of a prospective firm, and thereby a third party is induced to credit such firm, such person, to the extent of liability thus incurred, is estopped from denying the existence of such firm. *Moore v. Harper*, 42 W. Va. 39, 24 S. E. 633. See the title PARTNERSHIP.

Wife Fraudulently Induced to Unite in Trust Deed.—Although a husband fraudulently induces his wife to unite with him in a deed of trust on their joint property to secure a debt due by him, the wife is estopped to set up the fraud against the creditor secured where it appears that she knew nothing of the fraud at the time, and, relying upon the validity of the deed, gave the husband further time within which to pay the debt, took a note without an

endorser, and surrendered notes which he claimed and believed were endorsed by party whose name appeared thereon as endorser, although the latter claimed that his endorsement was a forgery. *Hyatt v. Zion*, 102 Va. 909, 48 S. E. 1. See post, "Married Women," V, A, 9, c.

Wife Equitable Owner—Legal Title in Husband.—When a wife is the equitable owner of real estate, the legal title to which stands in her husband's name, she is not estopped from setting up her equitable title against creditors of the husband, unless it appear that with her knowledge credit was extended to the husband on the faith of his apparent ownership of the land. *Smith v. Gott*, 51 W. Va. 141, 41 S. E. 175; *Standard Mercantile Co. v. Ellis*, 48 W. Va. 309, 37 S. E. 593; *Hamilton v. Steele*, 22 W. Va. 348; *Steagall v. Steagall*, 90 Va. 73, 17 S. E. 756. See also, *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411. See post, "Married Women," V, A, 9, c.

"The decisions touching a wife's rights are at variance, some jurisdictions holding there must be bad faith or fraud on her part to create an estoppel, *Deberry v. Wheeler*, 128 Mo. 84; *Kemp v. Folsom*, 14 Wash. 16, and others that actual bad faith or fraudulent intent are unnecessary. *Hopkins v. Joyce*, 78 Wis. 443; *Pierce v. Hower*, 142 Ind. 626, yet all agree that it must appear that credit was extended to the husband on the faith of his apparent ownership." *Standard Mercantile Co. v. Ellis*, 48 W. Va. 309, 37 S. E. 593.

Where property has been purchased with the wife's money, and, without her knowledge or consent, the deed is made in the husband's name, the wife will not be estopped from setting up the resulting trust which arises in her favor by permitting the legal title to remain in her husband's name, unless it appear that credit was knowingly extended to the husband on the faith of his apparent ownership. *Standard*

Mercantile Co. v. Ellis, 48 W. Va. 309, 37 S. E. 593. See also, the title **TRUSTS AND TRUSTEES**.

A married woman is not estopped from claiming as against her husband's creditors, a resulting trust in land paid for by her father and intended to be hers, but deeded to her husband by his collusion with the grantor, by reason of the failure of her father and herself to take positive action during his lifetime, if she did not then know how the title stood, nor what her father's intentions were, and did assert her title before it was assailed. *Steagall v. Steagall*, 90 Va. 73, 17 S. E. 756.

(7) Representations Inducing Execution of Conveyance.

N. gave his bonds to A. for land. They contained a clause that they were not transferable until the land was free of encumbrances except the dower of A.'s wife. She declined to execute conveyance unless one bond was given to her in lieu of her dower. This being agreed to, she asked if the clause against transfer would keep her out of the money. She was told in N.'s presence, and with his acquiescence, that it would not, and that the other bonds were ample to pay all liens and leave her the bond. Thus assured, she executed the conveyance, and the bond was assigned her. Afterwards, N. refused to pay her the bond, saying he had used all the purchase money to pay the encumbrances, and that the bond was not transferable. It was held, that N. is estopped from making such defense. *Nicholas v. Austin*, 82 Va. 817, 1 S. E. 132.

(8) Representations Inducing Outlay of Money.

See ante, "Silence and Passive Acquiescence," V, A, 6, b, (3), (c).

Where a party by acquiescence or silence permits or encourages another to part with their money, he can not complain that his interests are affected. *Despard v. Despard*, 53 W. Va.

443, 44 S. E. 448; *Urpman v. Lowther Oil Co.*, 53 W. Va. 501, 44 S. E. 433; *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267, citing *Atkinson v. Plum*, 50 W. Va. 104, 40 S. E. 587; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411; *Hall v. Hall*, 30 W. Va. 779, 3 S. E. 29; *Stuart v. Ludington*, 1 Rand. 403.

Right of Way for Pipe Line.—A water company laid its pipe line for some 870 feet through land not owned by it, but owned by S. After the pipe line had been done some seven years, B., the vendee of S., began to remove that part of it upon his land. The water company brought suit to enjoin B. from removing the pipes and to declare an estoppel against him from conduct of S. It is not claimed that S. ever expressly gave a right of way or his consent to the construction of the pipe line. The whole claim is that he knew of the laying of the line and made no objection; in short he was silent. All that can be said in support of this contention is that S. passed along by where the ditch for the pipe line was made, and while it was open, and saw some of the iron pipes lying on his land, and thus knew of the construction of the work, and made no protest. And that in the town of P. while the work was going on in the country, he talked with the superintendent, asking him when the work would be completed so as to be used in the town, and expressed interest in its completion, and said he had suffered loss as a property owner in the town from fire and that the water would be a great benefit to the town. S. claimed that he did not know that the line passed through his land until after it had been laid and it was not otherwise proven. It was held, that B. was not estopped by S.'s silence from removing the pipes from his land. The judge who delivered the opinion did not think that S. would be divested of his land even, if the contention of the water company were true as to his having known before the pipe line was completed that

it was being laid out through his land. *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267.

Failure to Assert Title to Oil Lands.

—James W. Metz made a written agreement selling and binding himself to convey to John W. Metz a track of seventy acres of land for \$800, of which the instrument says \$450 were paid. John W. Metz gave three notes payable yearly thereafter. This agreement was recorded on its date. The purchaser delayed over nine years to ask performance of the agreement. He did not pay any of the \$325 deferred purchase money. Five years after the sale, oil increased the value beyond comparison with the value of the land at the date of the sale. The purchaser still pays nothing and he lets four more years go by without asking performance. James W. Metz was all the time in possession, using the land as his own, John W. Metz, knowing of such use and in fact renting the land for one or two seasons for cropping, paying a share of the crop. James W. Metz leased the land to one M. for oil and under the lease the Miller-Sibley Oil Co. bored two wells, the purchaser uttering no words against it, though well knowing it and often visiting the land during the oil operations. James W. Metz made a second lease to one Lowther under which the Lowther Oil Co. developed oil, John W. Metz being present when the lease was made. He was frequently on the land during the operations. Standing by and seeing the oil company spending large amounts of money, he gave forth not a whisper of protest. When oil was found in large quantities he asked no deed from James W. Metz. Nine years after his purchase said John W. Metz conveyed said seventy acres to A. W. Urman. Urman brought a chancery suit against the Lowther Oil Co. and James W. Metz to enforce a specific performance of said executory contract of sale made by said James W. Metz to John W. Metz. It was held, that

John W. Metz, by standing silent on the ground when the oil company was spending thousands of dollars, was estopped from afterwards asserting any claim to the property and that his assignee, Urman, was estopped from asserting any claim by the conduct of his assignor, John W. Metz, as a purchaser of only an equity in land gets only such title as his vendor has. *Urman v. Lowther Oil Co.*, 53 W. Va. 501, 44 S. E. 433.

Excavating Tunnel—Failure to Assert Title.—Where a party who claims to be the owner of a tract of land has notice of the fact that the railroad company is excavating a tunnel through a mountain located on said land, under claim of title thereto, remains silent as to his ownership of the land, with full knowledge of his rights, and assists in the construction of said tunnel from its commencement until its completion, and the railroad is constructed through the same, without asserting any claim to the land through which the tunnel passes, and then institutes an action for damages against the railroad company for taking his land, he will be estopped from recovering in said action, and may be enjoined from further prosecuting such action for damages. *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755. See also, *Tufts v. Copen*, 37 W. Va. 623, 16 S. E. 793. See also, the title **INJUNCTIONS**.

(8) Estoppel Arising Out of Relationship of Principal and Agent.

(a) Corporation from Asserting Title to Real Estate.

A corporation can be estopped from asserting title to real estate by the conduct of its agents acting within the scope of their authority, but there must be something in the facts established to show either a fraudulent intent upon the part of the company or of its officers, or such willful disregard of the rights of others as is necessary to estop the company from the assertion of title to the real estate, even though

it were conceded that the agents and officials, whose conduct is relied upon, were charged with such duties with respect to the possession and title to the real estate of the company as would bind it by their acts and declarations. *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633. See the titles **CORPORATIONS**, vol. 3, p. 568; **OFFICERS AND AGENTS OF PRIVATE CORPORATIONS**.

(b) Unauthorized Acts of Agent.

In the Absence of Ratification.—In the absence of acquiescence or ratification, a principal is not estopped to deny the unauthorized acts of an agent whom he has not held out to the other party to an alleged contract, or to the world, as having the authority claimed. *Rowland Lumber Co. v. Ross*, 100 Va. 275, 40 S. E. 922.

In the case at bar there was a valid written contract between two principals, and the evidence fails to show authority in the agent of one of them who was superintending the execution of the contract to modify that contract, or that his principal held him out as having such authority, or that such principal had any knowledge of the alleged modification, or that he has since acquiesced in or ratified the unauthorized acts or declarations of the agent, if any such there were, and hence the principal is not bound by the alleged modification. *Rowland Lumber Co. v. Ross*, 100 Va. 275, 40 S. E. 922.

When Principal Adopts Acts of Agent.—If a principal adopts the act of an unauthorized agent, or if, with knowledge of the facts, he accepts the benefit of such act, he will be estopped to deny the agent's authority. He who accepts a contract entered into on his behalf by an unauthorized agent, assumes its burdens as well as its benefits. *Rowland Lumber Co. v. Ross*, 100 Va. 275, 40 S. E. 922; *Day v. Building Ass'n*, 96 Va. 484, 31 S. E. 902; *Owens v. Boyd Land Co.*, 95 Va. 560,

28 S. E. 950; *New York Life Ins. Co. v. Taliaferro*, 95 Va. 522, 28 S. E. 879; *Harvey v. Steptoe*, 17 Gratt. 303; *Crump v. United States Mining Co.*, 7 Gratt. 369; *Curry v. Hall*, 15 W. Va. 867; *State v. Baltimore, etc., R. Co.*, 15 W. Va. 362; *Detwiler v. Green*, 1 W. Va. 109; *Dewing v. Hutton*, 48 W. Va. 576, 37 S. E. 670. See the title **AGENCY**, vol. 1, pp. 247, 279.

"The law is well settled that where a corporation, or indeed a private individual, seeks to avail itself of the act of an unauthorized agent, it must accept the burden along with the benefit; and if a contract has been entered into by an unauthorized agent, induced by representations, which he had no authority to make, then if the corporation [or private individual], seeks to have the advantage of that contract, it must make good the representations by which it was procured. *Crump v. United States Mining Co.*, 7 Gratt. 369; *Owens v. Boyd Land Co.*, 95 Va. 560, 28 S. E. 950; *Day v. Building Ass'n*, 96 Va. 484, 31 S. E. 902." *Rowland Lumber Co. v. Ross*, 100 Va. 275, 40 S. E. 922.

A principal who holds a lien on real estate which has been purchased by one who has assumed the payment of the lien is not bound by the undisclosed statements of an agent, acting beyond the scope of his agency, made to such purchaser before his purchase, as to the amount of the balance due on the lien, and, in a suit by the purchaser against the principal, to enjoin the enforcement of the lien, a mere prayer in the answer of the principal for a personal decree against the purchaser for any balance that may remain after exhausting the real estate, does not operate, by estoppel or otherwise, to prevent the principal from denying the agency. *Day v. Building Ass'n*, 96 Va. 484, 31 S. E. 902.

Disavowal Must Be within Reasonable Time.—"A principal should within a reasonable time examine his agent's report, and disavow such acts as are

unauthorized, and if he fails to do so his silence will be deemed good evidence of a ratification. So it has been held, that a ratification may be inferred where the agent has informed his principal of his acts by letter and received no reply." *Dewing v. Hut-ton*, 48 W. Va. 576, 37 S. E. 670.

Connecting Carrier.—See the title CARRIERS, vol. 2, p. 685.

Building and Loan Associations.—See the title BUILDING AND LOAN ASSOCIATIONS, vol. 1, p. 646.

c. Knowledge of Facts or Gross Negligence by Persons Making Representations.

See ante, "Right and Duty to Speak—Necessity for Knowledge," V, A, 6, b, (3), (c), cc.

(1) In General.

(a) Rule Stated.

"It may be stated as a general rule, that the representations or concealment relied on to sustain an estoppel must have been made with full knowledge of the facts by the party to be estopped, unless his ignorance was the result of gross negligence or otherwise involves gross culpability, as where he is consciously ignorant of the facts at the very time of professing full knowledge of them." *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633. See to the same effect *Mercantile Co-Op. Bank v. Brown*, 96 Va. 614, 32 S. E. 64; *Pettyjohn v. National Exchange Bank*, 101 Va. 111, 43 S. E. 203; *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713; *Citizen's Bank v. Lay*, 80 Va. 436; *Water Co. v. Browning*, 53 W. Va. 436, 4 S. E. 267; *Morgan v. Cautley*, 51 W. Va. 304, 41 S. E. 201; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271; *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874; *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 855; *Mason v. Harper's Ferry Bridge Co.*, 29 W. Va. 639. See also, *Lewis v. Apperson*, 103 Va. 624, 49 S. E. 978; *Farmers, etc., Fire Ins. Ass'n v. Kin-*

sey, 101 Va. 236, 43 S. E. 338; *Steagall v. Steagall*, 90 Va. 73, 17 S. E. 756; *Stuart v. Com.*, 91 Va. 152, 21 S. E. 246, where it is said: "Without knowledge, there can in this case be no waiver or estoppel; and in this instance knowledge was impossible." *Stone v. Tyree*, 30 W. Va. 687, 5 S. E. 878; *Smith v. Gott*, 51 W. Va. 141, 41 S. E. 175; *Standard Mercantile Co. v. Ellis*, 48 W. Va. 309, 37 S. E. 593; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411; *Hamilton v. Steele*, 22 W. Va. 348; *Black v. Campbell*, 6 W. Va. 51. See ante, "Representations as to Title and Ownership," V, A, 6, b, (4).

The person to be bound by an equitable estoppel must know that his own right in the matter is being prejudiced by the act of another." Since fraud is the gist of estoppel, unless the person is fully acquainted with the true state of affairs, and with his rights in the matter, he will not be estopped, and therefore one who makes statements or does acts in bona fide ignorance of the facts and his rights will not be estopped, unless his ignorance was the result of gross negligence. 4 Am. & Eng. Dec. in Eq. 269; *Bigelow, Esto.* p. 519; *Bower v. McCormick*, 23 Gratt. 310, 321." *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267.

To bind a man by estoppel, should it not appear that he knew that a given transaction was about to take place so as to enable us to say that he intended to further it by his statement, or at least enable us to say that he was grossly negligent in using language which might induce such action. *Atkinson v. Plum*, 50 W. Va. 104, 40 S. E. 587.

When Actual Knowledge Not Essential.—Actual knowledge of the truth as to the material facts, represented or concealed, is not indispensable where the circumstances are such that a knowledge of the truth is necessarily imputed to the party sought to be estopped; nor where he has been negli-

gent in failing to perform some duty. *Mercantile Co-Operative Bank v. Brown*, 96 Va. 614, 32 S. E. 64; *Hughes v. Harvey*, 75 Va. 200, 212.

(b) Rule Illustrated.

Claim of Right of Way.—Where a party lays a pipe line for conveyance of water by mistake partly in land of another without right of way, and seeks to maintain the easement on the theory of estoppel based on conduct of the landowner, he can not assert such estoppel, where he did not know, that the line would pass or was laid, through his land until after its completion. *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267.

Vendor Who Has Not Legal Title.

—A vendor, who has contracted to deliver a good and sufficient deed to land, and who knows that he has not the legal title thereto, and can not make such deed, can not complain of the failure of the vendee to notify him of objections thereto. He can not deny knowledge of the condition of his own title. *Newberry v. French*, 98 Va. 479, 36 S. E. 519, 6 Va. Law Reg. 352.

Knowledge of Party to Written Instruments.—If one sign a written contract without acquainting himself with its contents, he is estopped by his own negligence from asking relief against its obligation, if his signature is procured without fraud (p. 521). *Ferrell v. Ferrell*, 53 W. Va. 515, 44 S. E. 187.

A party to instruments in writing, in the absence of all pretence of fraud, is estopped from proving that he did not read the instruments before executing them, and thus by parol obviate the effect of written evidence. *Southern Mut. Ins. Co. v. Yates*, 28 Gratt. 585; *Ware v. Starkey*, 80 Va. 191.

“One is never required to, and never should, execute a written instrument without first becoming fully acquainted with its contents. He should read it, if able; or if illiterate, have it read to him. And when he has signed

a written contract, the law prima facie presumes that he discharged this duty; therefore, whether in fact he did it, or chose to waive the privilege, the signature binds him.” *Bishop, Contracts*, § 346.” *Ferrell v. Ferrell*, 53 W. Va. 515, 44 S. E. 187.

Purchaser Having Knowledge of Judicial Sale.—A sale of land to satisfy judgments was confirmed, half the purchase money paid, and a writ of possession awarded. Two sons of the former owner, 15 months after the sale, filed a bill, claiming portions of the land under oral contracts with their father, accompanied by full payment and possession, and conveyances made during the proceedings under which the sale was made. The only direct testimony proving the sale was complainants' own, which was materially contradicted by written evidence. They pretended to have paid a portion of the money to the assignee in bankruptcy of their father, but neither the assignee's nor the father's testimony was taken. One of the sons was a defendant to the suits in which the sale was had, and present at the sale, but never set up any claim to the land, and the father admitted ownership in his answer. Both complainants were in the vicinity pending these proceedings, and must have known of them. Held, that this evidence would not sustain the bill. *McGee v. Johnson*, 85 Va. 161, 7 S. E. 374.

To Dispute Priority of Deed of Trust.

—A deed of trust to secure a debt was duly admitted to record by the proper clerk and so endorsed by the clerk, and the creditor secured was notified of that fact by his attorney, but before it was actually engrossed on the deed book the attorney instructed the clerk not to record it till further ordered. Ten days before such further orders were given a second deed of trust on the same property, securing a different creditor, was duly recorded. After the first deed was recorded, the date of the former indorsement was erased, and

the date of its actual record was indorsed thereon, and it was forwarded to the creditor secured. A year or more after the first deed, with the indorsement thereon, was delivered to the creditor secured thereby, the creditor secured by the second deed assigned his debt to a third party for value received of him. The creditor secured by the first deed took no steps, prior to said assignment, to have the date of the recordation of his deed corrected. It was held, that the endorsement on the first deed of trust was notice to the creditor secured of the date when his deed purported to have been admitted to record, and, having taken no steps to have the record corrected, he is estopped to assert his lien as against the assignees of the debt secured by the second deed, and they take priority over his. *Mercantile Co-Operative Bank v. Brown*, 96 Va. 614, 32 S. E. 64. The court in this case said: "By its negligent conduct, the bank thereby represented to the world that the admission of its deed to record as it appeared upon the public record of titles was true. It is now estopped from asserting the contrary."

Incomplete Sale—Agreement Not to Take Advantage of Allegations.—B. agreed to convey to H. and N. certain land, they to give for half the price three bonds, with sureties. J. and three others promised to become the sureties, provided vendees secured them by a trust deed. The bonds were executed and left with a third party until the conveyance and trust deed were given. B. gave possession to vendees but no conveyance, and they gave no trust deed. The bonds remained with third party. H. acquired the rights of co-vendee, and died indebted. B. filed a bill against N. and J. and his associates, calling on the latter to answer whether the bonds had been delivered, and on N. whether he was willing to complete the purchase, and if not, then B. asked for a rescission. Defendants answered, denying the delivery, and took deposi-

tions sustaining the denial. B. filed amended bill, alleging that the allegations in the original bill were mistaken. He then brought an action at law on the bonds, which was enjoined. By representing to defendants that he would endeavor to have the contract rescinded, B. obtained from defendants an agreement that they would not take advantage of any allegation that the bonds were not delivered, when the bill had, without their knowledge, been already filed. Held, defendants were not estopped by such agreement. *Jones v. Bond*, 86 Va. 81, 9 S. E. 503.

Knowledge of Agent.—See the title AGENCY, vol. 1, p. 276.

Agent of Insurance Company.—See the title INSURANCE.

(3) Knowledge of Title to Land.

With respect to equitable estoppels when applied to legal title to land, "it must appear that the party making his admission, by his declaration or conduct, was appraised of the true state of his own title." *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633. See ante, "When Applied to Legal Title to Land," V, A, 6, b, (3), (c), cc, (bb).

"The omission to assert title to land against persons dealing with it as their own, in the absence of knowledge of such title will not estop the owner to set up his claim thereto." *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633.

"It has been held, that positive acts tending to mislead one ignorant of the truth, which do mislead him to his injury, are a good ground of estoppel, and ignorance of title or right on the part of him who is estopped will not excuse his act. Thus, where an owner positively encourages another to purchase land from a third person, on the faith that such third person is the owner, ignorance of the facts of the case on the part of the true owner will not, as a general rule, prevent the operation of an estoppel against him." *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633.

Mistake as to Boundary of Land.—The acquiescence or admission of the owner of land, made under a mistake as to the rights, should neither estop nor prejudice him from subsequently enlarging his possession to the limits of his deed, provided no actual adversary possession has intervened to defeat his title. *White v. Ward*, 35 W. Va. 418, 14 S. E. 22.

"Consent by coterminous proprietors of real estate to mark a boundary line supposed to run according to the marking between undisputed tracts, given by both in ignorance of the real facts and of the existence of a conflict, does not estop either from claiming his rights when the mistake is discovered." *Hatfield v. Workman*, 35 W. Va. 578, 14 S. E. 153, 156.

Where a large tract of land was laid off, for the convenience of selling, into smaller tracts by running a base line and laying down the division lines by protraction, which division lines were never actually surveyed, and the coterminous owners of two of said tracts attempted to survey and mark the true division line between their said lots, and in so doing a mistake is made in running said lines so as to include a large portion of one of said lots within the other, there being no dispute as to the true boundary, when said mistake is discovered neither of the parties is estopped thereby from claiming his rights. *Hatfield v. Workman*, 35 W. Va. 578, 14 S. E. 153.

d. Knowledge of Facts or Gross Negligence by Person Claiming Benefit of Estoppel.

See ante, "Right and Duty to Speak—Necessity for Knowledge," V, A, 6, b, (3), (c), cc.

(1) In General.

(a) Rule Stated.

"It may be stated, as a general rule, that it is essential to the application of the principle of equitable estoppel that the party claiming to have been influenced by the conduct of declarations

of another to his injury, was himself not only destitute of knowledge of the state of facts, but was also destitute of any convenient and available means of acquiring such knowledge; and that, where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel." 2 Amer. & Eng. Ency. L. (2d Ed.) 433-4." *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633; *Taylor v. Cussen*, 90 Va. 40, 17 S. E. 721; *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713; *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267; *Atkinson v. Plum*, 50 W. Va. 104, 40 S. E. 578; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271; *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874; *Dawson v. Grow*, 29 W. Va. 333, 1 S. E. 564; *Mason v. Harper's Ferry Bridge Co.*, 28 W. Va. 639. See also, *Jordan v. Buena Vista Co.*, 95 Va. 285, 28 S. E. 321; *Jameson v. Rixey*, 94 Va. 342, 26 S. E. 861; *Newport News, etc., Co. v. Lake*, 101 Va. 334, 43 S. E. 566; *Farmers, etc., Fire Ins. Ass'n v. Kinsey*, 101 Va. 236, 43 S. E. 338; *Southwest Va. Mining Co. v. Chase*, 95 Va. 50, 27 S. E. 826; *Standard Mercantile Co. v. Ellis*, 48 W. Va. 309, 37 S. E. 593.

The truth concerning the material facts as to which there is a representation or concealment, "must be unknown to the other party claiming the benefit of the estoppel at the time when such conduct was done, and at the time when it was acted upon by him." *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411. See post, "Reliance upon Representation by Person Claiming Estoppel," V, A, 6, f.

The party who claims the benefit of an equitable estoppel must have been permissibly ignorant of the truth in regard to the misrepresentation made. *Jordan v. Buena Vista Co.*, 95 Va. 285, 28 S. E. 321.

Actual Knowledge Not Essential.

"It is not necessary to prove that one claiming estoppel had actual knowledge of the truth in order to defeat him; it is enough if he was bound to know the facts, or his means of knowledge were equal to those of the other party; for a failure to protect himself by using means of knowledge was negligence and disentitles him to equitable relief. 4 Am. & Eng. Dec. in Eq. 274. He must not know, or must be without means of knowing the facts. *Atkinson v. Plum*, 50 W. Va. 104, 40 S. E. 587." *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267; *Newport News, etc., Co. v. Lake*, 101 Va. 334, 43 S. E. 566.

Mistake as to Legal Rights.—"When everything is equally known to both parties, although they are mistaken as to their legal rights, no estoppel arises." *Morgan v. Cautley*, 51 W. Va. 304, 41 S. E. 201.

Means of Knowledge Equally Open to Both Parties.—Mere silence or some act done where the means of knowledge are equally open to both parties does not create an estoppel in pais. *Morgan v. Cautley*, 51 W. Va. 304, 41 S. E. 201; *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267; *Jameson v. Rixey*, 94 Va. 342, 26 S. E. 861. *Taylor v. Cussen*, 90 Va. 40, 17 S. E. 721; *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633.

(b) Rule Illustrated.**Growing Crops Not Included in Sale.**

—If a sale of land is made under a deed of trust, and at the time thereof there is an understanding had, concurred in by the purchaser, that a portion of the crop growing on such land is not included in such sale, such purchaser can not afterwards set up a valid claim to such excluded portion of such crop under such sale. *Hubbs v. Swabacker*, 51 W. Va. 438, 41 S. E. 164.

As to Amount of Property Bid for.

—A purchaser at a trustee's sale, who

gets the whole amount of property that he understood he was bidding for, can not sustain a valid legal claim to a portion of the property covered by the trust deed, which he understood at the time of the sale was excluded therefrom. *Hubbs v. Swabacker*, 51 W. Va. 438, 41 S. E. 164.

Of Existence and Termination of Suit.

—The complainants in a suit to cancel a lease on the ground of fraud promised to dismiss their suit in consideration of an order for \$50. The suit, however, was not dismissed, but was merely continued to the next term. And the order for \$50 was not presented or paid, but was returned unpaid; and thus the agreement was not executed. Held, that the complainants were not estopped by such agreement from prosecuting their claim, although one of the defendants had expended money relying on the information that the suit had been settled, it not appearing that his information as to the dismissal of the suit came from the complainants, since having notice of the existence of the suit, he was bound to know its termination. *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285.

Knowledge of Agent.—See the title AGENCY, vol. 1, p. 276.

(3) Knowledge of Legal Title to Land.

With respect to equitable estoppels when applied to legal title to land, it must appear, that the party claiming the benefit of estoppel "was not only destitute of all knowledge of the true state of the title, but of all means of acquiring such knowledge." *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633; *Jameson v. Rixey*, 94 Va. 342, 26 S. E. 861. See to the same effect, *Taylor v. Cussen*, 90 Va. 40, 17 S. E. 721; *Atkinson v. Plum*, 50 W. Va. 104, 40 S. E. 587. See ante, "When Applied to Legal Title to Land," V, A, 6, b, (3), (c), cc, (bb).

"Where the same means and opportunity of tracing the title to real estate

are equally open to both parties, the doctrine of equitable estoppel does not apply." *Jameson v. Rixey*, 94 Va. 342, 28 S. E. 861; *Taylor v. Cussen*, 90 Va. 40, 17 S. E. 721; *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633; *Morgan v. Cautley*, 51 W. Va. 304, 41 S. E. 201.

"The doctrine 'that where one stands by and sees another laying out money on property to which he has claim, and does not give notice of it, can not afterwards, in equity and good conscience, set up such claim, does not apply to an act of encroachment on lands the title to which is equally well known or equally open to the notice of both parties.' *Gray v. Bartlett*, 20 Pick. 186; *Casey v. Inloe*, 39 Am. Dec. 677." *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267.

Equity will not, on the mere ground of silence, relieve one who is perfectly acquainted with his rights, or has the means of becoming so, and yet willfully undertakes to proceed in expending money on the land of another, without obtaining or asking his consent. His ignorance, if it exists, is willful, and he acts at his peril. *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267.

Knowledge Imputed to Purchaser.—It is the duty of a purchaser of real estate to look to the papers under which he buys. He is charged with notice of all that the records disclose affecting his title, and also of all to which the knowledge there acquired would have led him. Means of knowledge with the duty of using them, are, in equity, equivalent to knowledge itself. *Jameson v. Rixey*, 94 Va. 342, 28 S. E. 861. See the title NOTICE.

"The law imputes to the purchaser a knowledge of every fact of which the exercise of ordinary diligence would have put him in possession. And such imputation of knowledge is sufficient to rebut the inference of a merely constructive fraud, which might other-

wise be implied from the silence of the party." *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267.

Knowledge of Lessor's Title.—A person claiming the benefit of an estoppel as a witness, said his agent T., to procure oil leases, reported to him that a lease of the land in question from Mrs. W. would not be safe, "as she only owned part in fee and a life interest in the balance," and the only way was to buy it. It was held, that this knowledge defeats his plea of estoppel. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, citing *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 278; *Dawson v. Grow*, 29 W. Va. 333, 1 S. E. 564.

e. Intention in Making Representation.

(1) In General.

"In order to establish an estoppel it is necessary that the representation or conduct relied upon should have been intended to influence the other party to act; and if there was no such intent, the estoppel is not made out.' 'If the person who makes the representations does not know, and has no reason to believe, that the other will act upon them, he will not be estopped.' 4 Am. & Eng. Dec. in Eq. 276; Pom. Eq., § 806." *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267; *McNeely v. South Penn Oil Co.*, 52 W. Va. 616, 44 S. E. 508; *Morgan v. Cautley*, 51 W. Va. 304, 41 S. E. 201; *Atkinson v. Plum*, 50 W. Va. 104, 40 S. E. 587; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411; *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755; *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874; *Stone v. Tyree*, 30 W. Va. 687, 5 S. E. 878; *Mason v. Harper's Ferry Bridge Co.*, 28 W. Va. 539; *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633; *Scott v. Moore*, 98 Va. 668, 37 S. E. 342; *Jordan v. Buena Vista Co.*, 95 Va. 285, 28 S. E. 321; *Taylor v. Cussen*, 90 Va. 40, 17 S. E. 721; *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713;

Webb v. Alexandria, 33 Gratt. 168; *Nash v. Fugate*, 24 Gratt. 202.

In *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755, it said that the statement must be made "either designedly or with willful disregard for the interests of others." The word "intentionally" used in *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874, is not too strong. "It is not meant thereby that there must be an intention to deceive; but 'the representation must have been made with the intention either actual or reasonably to be inferred by the person to whom it was made, that it should be acted upon. In general, where there is nothing reasonably indicating that the representation was intended to be acted upon as a statement of the truth, or that it was tantamount to a promise or agreement that the declaration is true so as to amount to an undertaking to respond in case of its falsity, the party making it is not estopped from proving the truth.'" *Atkinson v. Plum*, 50 W. Va. 104, 40 S. E. 587. See also, *Jordan v. Buena Vista Co.*, 95 Va. 285, 28 S. E. 321.

"The word 'willfully' is frequently used in defining estoppel." *Atkinson v. Plum*, 50 W. Va. 104, 40 S. E. 587.

When Intention Presumed.—"It is not always necessary that there should be some intended deception in the act or conduct of the party estopped; it is sufficient if there be such gross negligence on his part as would amount to constructive fraud if he were not estopped from denying such act or conduct. *Hanshaw v. Birsell*, 18 Wall. 255, 272, 21 L. Ed. 835; *Repass v. Richmond*, 99 Va. 508, 511, 39 S. E. 160." *Hyatt v. Zion*, 102 Va. 909, 48 S. E. 1. *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633; *Atkinson v. Plum*, 50 W. Va. 104, 40 S. E. 587; *Stolle v. Ætna, etc., Ins. Co.*, 10 W. Va. 546. See also, *McConnell v. Rowland*, 48 W. Va. 276, 37 S. E. 586; *Nash v. Fugate*, 24 Gratt. 202.

"In all this class of cases," says Judge Story, 'the doctrine proceeds

upon the ground of constructive fraud, or of gross negligence, which in effect implies fraud. And, therefore, where the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has, accordingly, been laid down by a very learned judge, that the cases on this subject go to this result only, that there must be positive fraud, or concealment, or negligence, so gross as to amount to constructive fraud.' 1 Story Eq., § 391." *Taylor v. Cussen*, 90 Va. 40, 17 S. E. 721.

"But whatever may be the intent, if he makes such a representation as a sensible man would take to be true, and believe that it was meant he should act upon it, and he does so act, the party making the representation is precluded from contesting its truth. To sustain which position the court refers to *Bigelow on Estoppel*, pp. 524, 553; *Ripley v. Ætna Ins. Co.*, 30 N. Y. 136, 164; 50 N. Y. 575, *Herman's Law of Estoppel*, 343, § 331." *Stolle v. Ætna, etc., Ins. Co.*, 10 W. Va. 546, 553.

It is sufficient if his acts were calculated to mislead another acting upon it in good faith, and exercising reasonable care. *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755, 758.

(2) With Respect to Legal Title to Land.

With respect to equitable estoppel when applied to the legal title to land, it must appear that the party "made the admission with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud." *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633.

Overt Act Essential to Show Intent.—"There must be some overt act to show intent to mislead. *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874. A man is not bound to speak, unless he is so situated as to the rights of others that the law calls upon him to speak

out. *Greer v. Mitchell*, 42 W. Va. 494, 26 S. E. 302 (64 Am. St. Rep. 920). The true owner need not seek an adverse claimant and tell him of his rights. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411 (point 8); 64 Am. St. Rep. 891, note, p. 920." *McNeeley v. South Penn Oil Co.*, 52 W. Va. 616, 44 S. E. 508.

(3) As Applied to Abandonment of Easement.

Abandonment of easements by matters in pais is founded upon the doctrine of estoppel, but to establish such estoppel it is necessary that the representation or conduct relied upon as such should have been intended to influence the other party to act; and, if there was no such intention, the estoppel is not made out. *Scott v. Moore*, 98 Va. 698, 669, 37 S. E. 342.

"A party entitled to a right of way or other mere easement in land may abandon and extinguish such right by acts in pais, and without deed or other writing; and a cessation of the use, coupled with any act indicative of an intention to abandon the right, would have the same effect as an express release of the easement, without any reference whatever to time. *Vogeler v. Geiss*, 51 Md. 408. There are a great number of like decisions of courts of last resort, and they rest upon the equitable doctrine of estoppel." *Scott v. Moore*, 98 Va. 668, 669, 37 S. E. 342.

I. Reliance upon Representation by Person Claiming Estoppel.

(1) In General.

See ante, "Turpitude in Conduct of Party Estopped," V, A, 3, b, (2).

"The representation or concealment must be proved to be the inducement to the action of the other party." *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633. See to the same effect *Taylor v. Cussen*, 90 Va. 40, 17 S. E. 721; *Ashworth v. Tramwell*, 102 Va. 852, 47 S. E. 1011; *Mercantile Co-Op. Bank v. Brown*, 96 Va. 614, 32 S. E.

64; *Cardwell v. Kelly*, 95 Va. 570, 28 S. E. 953; *Farmers, etc., Fire Ins. Ass'n v. Kinsey*, 101 Va. 236, 43 S. E. 338; *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713; *Webb v. Alexandria*, 33 Gratt. 168; *Nash v. Fugate*, 24 Gratt. 202; *Scott v. Tankersley*, 10 Leigh 581; *Stuart v. Ludington*, 1 Rand. 403; *Pettit v. Jennings*, 2 Rob. 676; *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267; *McNeely v. South Penn Oil Co.*, 52 W. Va. 616, 44 S. E. 508; *Morgan v. Cautley*, 51 W. Va. 304, 41 S. E. 201; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 281; *Greer v. Mitchell*, 42 W. Va. 494, 26 S. E. 302; *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874; *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755; *Hall v. Hall*, 30 W. Va. 779, 5 S. E. 260; *Stone v. Tyree*, 30 W. Va. 687, 5 S. E. 878; *Mason v. Harper's Ferry Bridge Co.*, 28 W. Va. 639; *Western Mining, etc., Co. v. Peytona Cannel Coal Co.*, 8 W. Va. 406; *Black v. Campbell*, 6 W. Va. 51. See also, *Lewis v. Apperson*, 103 Va. 624, 49 S. E. 978; *Stewart v. Conrad*, 100 Va. 128, 40 S. E. 624; *Standard Mercantile Co. v. Ellis*, 48 W. Va. 309, 37 S. E. 593.

"The conduct must be relied upon by the other party, and thus relying, he must be led to act upon it." *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755. See ante, "Time of," V, A, 6, b, (2), (g); "Knowledge or Facts or Gross Negligence by Person Claiming Benefit of Estoppel," V, A, 6, d.

An estoppel by conduct does not exist where the party setting it up has not relied on the conduct of the other party, nor been induced to do something which otherwise he would not have done. *Repass v. Richmond*, 99 Va. 508, 39 S. E. 160; *Bargamin v. Clarke*, 20 Gratt. 544. See ante, "Acts or Conduct," V, A, 6, b, (3), (b).

"To constitute an estoppel, the party claiming it must have acted upon the statement or conduct of the other dif-

ferently from what would have been his course without such statement or conduct." *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 278; *Greer v. Mitchell*, 42 W. Va. 494, 26 S. E. 302.

"Neither a statement of any kind nor an admission in pais can amount of itself to conclusive evidence." *Greer v. Mitchell*, 42 W. Va. 494, 26 S. E. 302.

"It is of the essence of estoppel by conduct, where one alleges that the conduct of another has misled and betrayed him, that the former should be inspiring false belief and confidence in that other." *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 277.

Right to Rely on Representation.—

"A man to whom a particular and distinct representation has been made is entitled to rely on the representation, and need not make any further inquiry." "No man can complain that another has relied too implicitly on what he himself stated." *Brown v. Rice*, 26 Gratt. 467. Some of the authorities go so far as to hold that even silence alone will make it needless to go to the record. *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874, and authorities cited." *Anderson v. Phlegar*, 93 Va. 415, 25 S. E. 107.

"No man can complain that another has relied too implicitly on the truth of what he himself stated." *Hull v. Fields*, 76 Va. 594; *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713.

Must Not Act Recklessly.—One must not act recklessly, but must use some care and diligence himself. *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267.

Where Speculation Motive.—Where a person claiming the benefit of an estoppel was not moved by any words or act or representation of the other parties, nor by their silence, but hazarded his action in the spirit of speculation, not relying on their silence, but his own judgment, he can not therefore hold them estopped. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411.

(2) With Respect to Legal Title to Land.

In General.—With respect to equitable estoppel when applied to legal title to lands, it must appear that the party claiming the benefit of the estoppel "relied directly upon such admission." *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633.

The statements, acts, or acquiescence of the owner or claimant of land, unless they are relied on by another as the foundation of material action or acquiescence, do not estop the owner of the land from asserting and proving his title or boundary. *Western Mining, etc., Co. v. Peytona Cannel Coal Co.*, 8 W. Va. 406.

Where the proof shows that from the beginning to the end the parties setting up an estoppel acted independently of any declaration conduct, influence or inducement on the part of the owner of real estate, and where such person has furnished to the attorney for the landowner information as to the title upon which he based an opinion that for a time impaired his confidence in the sufficiency of its title, the principles which underlie the doctrine of equitable estoppel as applied to title to land does not forbid the landowner to assert his title. *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633.

g. Injury to Person Claiming Benefit of Estoppel.

(1) In General.

(a) Rule Stated.

"As a general rule the doctrine of estoppel is not applicable except in cases where the person against whom it is invoked has by her representations or conduct, misled another to his injury, so that it would be a fraud to allow the true state of facts to be proved. *Taylor v. Cussen*, 90 Va. 40, 17 S. E. 721." *Pettyjohn v. National Exchange Bank*, 101 Va. 111, 43 S. E. 203; *Newport News, etc., Co. v. Lake*, 101 Va. 334, 43 S. E. 566; *Mercantile*

Co-Op. Bank *v.* Brown, 96 Va. 614, 32 S. E. 64; *Norfolk v. Nottingham*, 96 Va. 34, 30 S. E. 444; *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633; *Ashworth v. Tramwell*, 102 Va. 832, 47 S. E. 1011; *Repass v. Richmond*, 99 Va. 508, 39 S. E. 160; *Smith v. Powell*, 98 Va. 431, 36 S. E. 522; *South-ern R. Co. v. Glenn*, 98 Va. 309, 36 S. E. 395; *Farmers, etc., Fire Ins. Ass'n v. Kinsey*, 101 Va. 236, 43 S. E. 338; *Cardwell v. Kelly*, 95 Va. 570, 28 S. E. 953; *Biggs v. Elliston Development Co.*, 93 Va. 404, 25 S. E. 113; *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713; *Nash v. Fugate*, 24 Gratt. 202; *Stuart v. Ludington*, 1 Rand. 403; *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267; *Morgan v. Cautley*, 51 W. Va. 304, 41 S. E. 201; *Atkinson v. Plum*, 50 W. Va. 104, 40 S. E. 587; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411; *Greer v. Mitchell*, 42 W. Va. 494, 26 S. E. 302; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271; *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874; *Hall v. Hall*, 30 W. Va. 779, 5 S. E. 260; *Stone v. Tyree*, 30 W. Va. 687, 5 S. E. 878; *Robrecht v. Marling*, 29 W. Va. 765, 2 S. E. 827; *Mason v. Harper's Ferry Bridge Co.*, 28 W. Va. 639. See post, "In Whose Favor Estoppel Operates," V, A, 7.

The person claiming the estoppel must in fact act upon the conduct, acts, language or silence in such a manner as to change his position for the worse. "In other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct, and to assert rights inconsistent with it." *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755, 759.

"It is of the essence of estoppel that the act relied upon as such should have been injurious, and to the prejudice of him who relies upon it as an estoppel." *Smith v. Powell*, 98 Va. 431, 36 S. E. 522; *Repass v. Richmond*, 99 Va. 508,

39 S. E. 160. See ante, "Silence and Passive Acquiescence," V, A, 6, b. (3), (c).

Fraud as Basis.—"Estoppel is founded upon the idea that the acts of the party estopped must result in injury to the other party, and generally that it would be a fraud if the right asserted be maintained." *Montague v. Massey*, 76 Va. 307. See also, *Bolling v. Petersburg*, 3 Rand. 563.

Words to constitute an estoppel must operate to induce the person claiming the benefit of the estoppel to change his condition or to spend money. *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271; *McNeely v. South Penn Oil Co.*, 52 W. Va. 616, 44 S. E. 508.

No concealment or misrepresentation can have the effect of barring the rights of a party, unless another person is thereby induced to part with his money, or unless it be so gross as to amount to fraud. *Stuart v. Ludington*, 1 Rand. 403, 10 Am. Dec. 550. See also, *Repass v. Richmond*, 99 Va. 508, 39 S. E. 160.

(b) Rule Illustrated.

Tenant to Deny Sufficiency of Notice.

—In order that a tenant may be estopped to deny sufficiency of an insufficient notice to quit, his conduct must have been such as to mislead the landlord to his prejudice. *Baltimore Dental Ass'n v. Fuller*, 101 Va. 627, 44 S. E. 771.

Forfeiture for Nonpayment of Rent.

—"If a tenant agrees to pay rent on a day named, or his lease will be forfeited, and if the landlord agrees, without consideration, that he may pay after the day, and he by reason thereof omits to pay at the day, the landlord will be estopped from enforcing the forfeiture." *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425, 431.

Plaintiffs Repudiating Note Accepted by Counsel.—One P. approached S.,

who was counsel for B., and promised him to pay \$608.15 on a judgment for the sum of \$867.23 against certain other persons. On the next day, P. went to S. with a note drawn by P. payable one year after date to B. S. declined to receive the note on the ground that he had no authority to take anything in payment of the judgment but money. P. stated that B. was willing to accept the note in question. S. replied that "if this is true I have nothing further to say," and agreed to take the note in part payment of the decree and gave a receipt. In a short time it was discovered that P. was mistaken in representing B. as willing to accept his note as a payment upon the decree, and the parties were notified of the fact. B. was wholly ignorant of the transaction at the time of its occurrence and repudiated as soon as it came to his knowledge. The note was never at any time in his possession. P's note was not paid and the truth of the matter was known to all the parties interested before it was due. It was held, that S.'s conduct does not estop B. or any one in any view of the case, the defendants, who were primarily liable for the amount of the judgment, not having been injured by anything done or said by B. or his counsel. *Smith v. Powell*, 98 Va. 431, 36 S. E. 522.

Partner to Deny Forged Indorsement.—If a negotiable note be made by a firm payable to one of its members, and the payee's name be indorsed on the note without his knowledge or consent, by another member of the firm, and the note be discounted for the firm and the money placed to its credit, the payee member of the firm is not estopped to deny liability thereon, where prior to the discounting of the note the payee member had withdrawn from the firm and failed to inform the bank of his withdrawal; and being ignorant of the existence of the notes and forged indorsements, he did no act which induced the bank to believe his signature genuine. It can not

be said that he misled the bank or has been guilty of the omission of any duty in respect to it, that ought to estop him from setting up the forgery under the statute. *Pettyjohn v. National Exchange Bank*, 101 Va. 111, 43 S. E. 203. See also, the title **BILLS, NOTES AND CHECKS**, vol. 2, p. 438.

Assent to Payment of Barred Claims.

—If an heir, in consideration of concession made him by the other heirs and administratrix, agree not to object to payment by her of just claims presented by another heir, though barred by the statute of limitations, he will be estopped from excepting to her account on the ground that she improperly paid them. *Radford v. Fowkes*, 85 Va. 820, 8 S. E. 817.

Agreement to Accept Payment in Confederate Bonds.—S. has a judgment docketed for an ante-war debt, against C., the principal, and E. and P. his sureties, well secured by the judgment lien upon the lands of the debtors. If S., to enable C. to sell his land for Confederate money, and make a good title to the purchaser, agrees, in May, 1863, to accept payment of the judgment in Confederate notes or bonds, and if, in pursuance of this agreement, C. immediately advertises and sells his land and receives payment of the purchaser in such money or bonds and conveys to him the land, S. can not afterwards revoke his agreement to accept such payment, but his promise is binding upon S., not only in behalf of C., but of his sureties also, and the purchaser considering S.'s promise as an equitable estoppel, it is binding on the ground that it would be a fraud in him to restrict the promise after it had been acted upon by C. *Poague v. Spriggs*, 21 Gratt. 220.

Delay to Set Up Particular Defense.

—In order that the mere delay of a defendant in chancery in setting up a particular defense may estop him from making the defense it must clearly appear that the complainant was, by such conduct, misled to his prejudice. Re-

pass *v. Richmond*, 99 Va. 508, 39 S. E. 160.

It was insisted "that the delay of the appellees in denying the execution of the bond, their consent to the order for an account, their appearance before the commissioners as witnesses, and the testimony given by them estopped them from relying upon the defense of non est factum. * * * The appellees neither made nor attempted to set up any defense until they tendered their plea of non est factum." It was held, that "their consenting to a decree for an account, to which they had no right to object; their testifying before the commissioner as witnesses for the deputy treasurer that they had heard the treasurer admit that the sum due from his deputy was much less than he now claimed; their failure to make any defense until the account came in showing the balance due from the deputy, are circumstances to be considered in passing upon the plea of non est factum, but they do not amount to an estoppel, for it does not clearly appear that the appellant was, by their conduct, misled to his prejudice, without which, whatever may be its force as evidence, their conduct will not amount to an estoppel. *Bigelow on Estoppel*, 433-4, 492-3; 7 Rob. Pr. 447-8." *Repass v. Richmond*, 99 Va. 508, 39 S. E. 160.

To Deny Correctness of Decree.—

Receiver reported sale to court stating agreement as to commissions, and procured a decree for payment thereof, "whenever whole price should be fully paid." Agent, who was no party to the suit, drew an order on receiver for a sum out of any funds payable to him as commissions under the court's decree. Held, the order did not estop agent from denying correctness of the decree. "The appellant has in no way been prejudiced by the delay of the appellee to complain of the order, and we see no ground, therefore, for the application of the doctrine of estoppel." *Peters v. Anderson*, 88 Va. 1051, 14 S. E. 974.

Prevent an Appeal.—The mere statement of an appellant to an appellee that he did not intend to or would not appeal does not estop the appellant to appeal unless the appellee has acted on it to his prejudice. *Southern Ry. Co. v. Glenn*, 98 Va. 309, 36 S. E. 395, 6 Va. Law Reg. 222. See the title APPEAL AND ERROR, vol. 1, p. 474.

B., having obtained a decree against several defendants, a note was tendered to his attorney in satisfaction of it, which he received on representation of defendants that B. had agreed to accept it, when he had never made such agreement. B. repudiated the act of the attorney as soon as it came to his knowledge, while there was yet ample time to move the trial court to have the decree corrected, and before the time to appeal had expired. It was held, that B. was not estopped from enforcing payment of the decree on the ground that defendants, by the attorney's acceptance, were prevented from taking an appeal. *Smith v. Powell*, 98 Va. 431, 36 S. E. 522.

(2) With Respect to Legal Title to Land.

In General.—With respect to equitable estoppels when applied to the legal title to land, it must appear that the party claiming the benefit of the estoppel will be injured by allowing the truth of the admission to be disproved. *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633. See also, *Western Mining, etc., Co. v. Peytona Cannel Coal Co.*, 8 W. Va. 406.

Instances.—Where a husband had fraudulently induced his wife to unite with him in a deed of trust on their joint property to secure a debt due by him to a bank, the wife would not be estopped from having the deed of trust set aside, if the bank by reason of taking such deed is not in any worse condition than it would have been in if the said deed had not been executed. *Hyatt v. Zion*, 102 Va. 909, 48 S. E. 1.

Revocation of Dedication of Street
—Where persons offer to dedicate land

to a public road or street and the offer is withdrawn before there is any acceptance, express or implied, on the part of the county or municipality, such county or municipality is not misled to its prejudice by such persons, and it can not invoke against them the doctrine of estoppel. *Norfolk v. Nottingham*, 96 Va. 34, 30 S. E. 444; *Newport News, etc., Co. v. Lake*, 101 Va. 334, 43 S. E. 566. See post, "In Whose Favor Estoppel Operates," V, A, 7.

7. In Whose Favor Estoppel Operates.

An equitable estoppel operates only in favor of him who has been misled to his injury. A person who has been misled to his injury, alone can set up an equitable estoppel as a defense. *Newport News, etc., Co. v. Lake*, 101 Va. 334, 43 S. E. 566; *Norfolk v. Nottingham*, 96 Va. 34, 30 S. E. 444. See also, *Cardwell v. Kelly*, 95 Va. 570, 28 S. E. 953; *Nickell v. Tomlinson*, 27 W. Va. 697-714. See ante, "Instances," V, A, 6, b, (4), (a), ee; "Injury to Person Claiming Benefit of Estoppel," V, A, 6, g.

8. Against Whom Estoppel Operates.

See ante, "Who Is Estopped and Who May Take Advantage of Estoppel," II; post, "Persons Liable to Be Precluded by Estoppel," V, A, 9.

9. Persons Liable to Be Precluded by Estoppel.

a. In General.

See ante, "Who Is Estopped and Who May Take Advantage of Estoppel," II.

b. Infants.

See ante, "Infants and Females Covert," II, C.

An infant of years' discretion, by positive intentional fraudulent conduct, will be barred, under the doctrine of estoppel in pais, from asserting her title to either real or personal property against one misled thereby. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411. See also, *Central Land Co. v. Laidley*, 32 W. Va. 134, 9 S. E. 61; *Smith v. Henkle*, 81 Va. 524; *Lancaster*

v. Barton, 92 Va. 615, 24 S. E. 251. But mere silence or quiescence surely will not. The weight of authority is that matter sufficient to raise an estoppel, if unconnected with a contract, would bar an infant from asserting a right even to land. It must, however, be intentionally fraudulent. Mere silence or quiescence, as in this case, will not do. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411. But see *Smith v. Henkle*, 81 Va. 524, where it is said: "Vendees may be estopped by their acquiescence, by the lapse of time and other circumstances from setting up such defense." See ante, "Instances," V, A, 6, b, (3), (c), dd.

c. Married Women.

(1) In General.

"Pomeroy, in his *Equity Jurisprudence* (vol. 2, § 814), says: 'Upon the question how far the doctrine of equitable estoppel by conduct applies to married women, there is some conflict among the decisions. The tendency of modern authority, however, is strongly towards the enforcement of the estoppel against married women, as against persons sui juris, with little or no limitation on account of their disability. This is plainly so in states where the legislature has freed their property from all interest or control of their husbands, and has clothed them with partial or complete capacity to deal with it as though they were single.'" *Tufts v. Copen*, 37 W. Va. 623, 16 S. E. 793, 795.

By Silence or Acquiescence.—"14 Am. & Eng. Ency. Law, 643, says that, as 'such estoppels as arise out of failure to assert a right, or out of silence or acquiescence in the right claimed by others, arise only because from such silence and acquiescence a representation is implied, it is clear that a married woman can be bound by silence and acquiescence only in cases where she would have been bound had she expressly made the statement implied.'" *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 417.

Concurring in Breach of Trust.—See the title TRUSTS AND TRUSTEES.

(2) Common-Law Disabilities Not Removed.

(a) General Rule.

The doctrine of equitable estoppel does not generally apply to married women laboring under the common-law disabilities as to their rights. *Lewis v. Apperson*, 103 Va. 624, 49 S. E. 978.

(b) With Reference to Title to Land.

In General.—A married women, whether her land is, or is not, separate estate, can not lose her title by estoppel in pais. It seems to be a general rule that a married women can not be estopped with reference to her legal title to real estate, since that can only be conveyed according to the statutory requirements. *Waldron v. Harvey*, 54 W. Va. 608, 46 S. E. 603; *McNeely v. South Penn Oil Co.*, 52 W. Va. 616, 44 S. E. 508; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411; *Tufts v. Copen*, 37 W. Va. 623, 16 S. E. 793; *Lewis v. Apperson*, 103 Va. 624, 49 S. E. 978; *Stuart v. Conrad*, 100 Va. 128, 40 S. E. 624.

Land Exchanged as Husband's.—A married woman will not, by reason of estoppel in pais lose her right to land owned jointly by her and her husband of which her husband is negotiating an exchange in his name, or which he has exchanged by expressing casually satisfaction with the exchange after it has been made. *McNeely v. South Penn Oil Co.*, 52 W. Va. 616, 44 S. E. 508. See ante, "Time of," V, A, 6, b, (2), (g).

Mere Silence.—Mere silence does not bar the right of a wife to land owned jointly by her and her husband where she knows that he is negotiating an exchange of the whole land in his name or has exchanged it as his sole land. *McNeely v. South Penn Oil Co.*, 52 W. Va. 616; 44 S. E. 508; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411. See ante, "Silence and Passive Acquiescence," V, A, 6, b, (3), (c).

The Code allows a woman to pass her land only by a deed joined in her by her husband, and acknowledged by both. She can not convey by mere silence. *McNeely v. South Penn Oil Co.*, 52 W. Va. 616, 44 S. E. 508.

By Fraudulent Act.—"There are authorities which, conceding that a married woman can not be estopped by her contract, hold that she may be estopped by a fraudulent act. It is needless to discuss this distinction. It will be time enough to undertake to define its extent when a case arises which renders it necessary." *Lewis v. Apperson*, 103 Va. 624, 49 S. E. 978. See also, *Stewart v. Conrad*, 100 Va. 128, 40 S. E. 624, where it is held: "It is insisted that even Mrs. Stewart is not bound by her deed of release as such; she is estopped from denying the act as equity will not allow a married woman to do an act inducing another to pursue a line of action, and afterwards come into a court of equity and deny her power to perform it. When and under what circumstances a married woman will be considered as estopped by her conduct, it is unnecessary to consider in this case." See ante, "Instances," V, A, 6, b, (4), ee.

"Whether a married women, by positive, intentional fraud, can lose her land, when her sole deed will not divest her of it, the authorities are divided. I should say that, as the law scrupulously limits her power of alienation to only one mode, she could not do so; that she could not do indirectly what she could not do directly by a solemn deed, because it is the policy and positive provision of statute that she shall be disabled by an act of hers to part with her land except in one way. *Bigelow*, Estop. 599; *Bishop. Mar. Wom.*, § 488; 2 *Herm. Estop.*, § 1102." *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 417.

A married women can not lose her land, separate or not separate estate, by estoppel by conduct (in pais) with-

out actual fraud, if even by it. *Waldron v. Harvey*, 54 W. Va. 608, 46 S. E. 603; *Yock v. Mann* (W. Va.), 49 S. E. 1019. But see *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, where it is held: A married woman can not, by even fraudulent conduct, be barred under the principle of estoppel in pais from asserting title to land, though separate estate.

"It is cautious to observe that the law books say that, in order that a fraud by a married women shall constitute an estoppel against her, it must be unconnected with a contract, because, as her contract would be void, her mere conduct connected with it would not operate to enforce it; but that was when she was disabled from contracting; and, now that our statute has fully enabled her to contract, I think that any fraudulent act which would estop her when not connected with a contract would also do so though connected with a contract. This limitation proceeded from her disability, and, that having been removed, the limitation would be removed. *Bish. Mar. Wem.*, § 493; 1 *Pom. Eq. Jur.*, § 418; *Tufts v. Copen*, 37 W. Va. 629, 16 S. E. 793. But observe, further, that as to selling and conveying her land, she remains under limited disability. Wherefore I am clearly of opinion that the mere silence or inaction of the married women—their quiescence, for it is not acquiescence—does not bar them." *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 417.

Recognizing Void Deed.—Where a married women laboring under the common-law disabilities as to her rights, makes a void deed, she is not estopped, by afterwards recognizing its validity, and allowing the grantee to improve the property, from asserting her title, for she would not be estopped therefrom by expressly telling the grantee that she would never claim any title thereto. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411; *McNeely v. South Penn Oil Co.*, 52 W. Va. 616, 44

S. E. 508. See post, "Estoppel Not Created by Void Contract," V, D, 1.

Right to Fair Partition.—In 1835, M. gave his two daughters, Jane and Margaret, the remnant of 1,000 acres of land, amounting to 300 or 400 acres. Margaret desired her portion in something else and disposed of her undivided moiety to J., her brother. Jane married and she and her husband take possession of one end of the tract. J. obtains title to Margaret's undivided moiety, and by agreement, in 1838, a division line is run partitioning the land between the parties in interest, to which Jane, then married to G., never fully gave her consent, although she stood by and seemingly acquiesced in a sale of J.'s portion to B. & H., in 1843, who took possession and cleared up to the partition line. Afterwards, in 1851, Jane and her husband brought suit for a partition and obtained a decree, assigning to them parts of the land sold by J. to B. & H. Held, that the court below should have dismissed the bill, but without prejudice to the rights of Jane or her heirs, and she and her heirs are not bound by the fraudulent acts of her husband, G., nor has she in any other way lost or surrendered her right to a fair and equitable partition of the land in question. *Heavener v. Godfrey*, 3 W. Va. 426.

"In *Heavener v. Godfrey*, 3 W. Va. 426, it was held, that a wife had not lost her right to a fair partition by the fraudulent acts of her husband." *McNeely v. South Penn Oil Co.*, 52 W. Va. 616, 44 S. E. 508.

In *Heavener v. Godfrey*, 3 W. Va. 426, it was held, that a wife had not lost her right to a fair partition by her explicit participation in and consent to a partition made by her husband with another. *McNeely v. South Penn Oil Co.*, 52 W. Va. 616, 44 S. E. 508.

Coverture as Bar to a Release.—A married women will not be estopped to set up her coverture in bar of a release executed by her in the absence of evidence of any fraud, misrepresen-

tation, or concealment on her part, or that the party released did not have full knowledge of the fact that she was a married woman and unable to execute the release. *Stewart v. Conrad*, 100 Va. 128, 40 S. E. 624.

Wife Equitable Owner—Legal Title in Husband.—See ante, "Representations upon Which Credit Extended," V, A, 6, b, (6).

(3) Where Common-Law Disabilities Removed.

Now that a married woman is enabled to contract as if single, she will be bound by estoppel in pais touching her contracts as if single. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411. See also, *Tufts v. Copen*, 37 W. Va. 223, 16 S. E. 793.

A married woman may, by fraudulent conduct, be barred under the principle of estoppel in pais from asserting her title to personal property as she is competent to sell that. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 417.

Where a married woman can contract as a feme sole and makes a void deed, she is estopped, by afterwards recognizing its validity, and allowing the grantee to improve the property, upon the faith of a title given him by her from asserting her title. She would also be estopped therefrom by expressly telling the grantee that she would never claim any title thereto. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 417.

d Heirs, Distributees and Devisees.

See ante, "Parties and Privies," II, A. Heirs at law can not successfully assert right which the ancestor was estopped to assert. *Morris v. Roseberry*, 46 W. Va. 24, 32 S. E. 1019.

"So far as appears, he acquiesced in the conveyance by the tax deed to his sister, and, if he thus in his lifetime waived his right to assail said tax deed, his heirs at law could not assert such right successfully." *Morris v. Roseberry*, 46 W. Va. 24, 32 S. E. 1019.

Where a married woman would not be estopped to assert her right to land owned jointly with her husband, her heirs will not be barred by mere silence, though they know of improvements put upon the land by or under the party claiming the estoppel. *McNeely v. South Penn Oil Co.*, 52 W. Va. 616, 44 S. E. 508.

Where a married woman assigns a judgment as a part of her separate estate, and dies solvent, leaving her husband the sole devisee and executor of her estate; and he thereafter ratifies the assignment, and dies pending a settlement of his wife's estate, leaving to beneficiaries a solvent estate consisting largely of the property acquired under the will of his wife, the beneficiaries are estopped from questioning the validity of the assignment. They claim under the husband and are estopped by his act, recognizing the validity of the claim from setting up any defense arising prior to the ratification of the assignment by the husband. The beneficiaries did not rely on any fact or circumstance whatever arising since the husband ratified the assignment. *Hughes v. Wilson*, 2 Va. Dec. 315.

e. Cestui Que Trust—Trustee.

See the title TRUSTS AND TRUSTEES.

f. Assignees and Subsequent Purchasers.

Assignees.—See ante, "Representations Relating to Chooses in Action and Negotiable Instruments," V, A, 6, b, (5). See the title ASSIGNMENTS, vol. 1, p. 770.

Purchaser without Notice.—See the titles NOTICE; VENDOR AND PURCHASER.

A bona fide purchaser without notice of an estoppel in pais resting on his vendor, is not bound thereby. *Citizens' Bank v. Lay*, 80 Va. 436.

C. purchased a lot and owed thereon \$2,440, evidenced by his note secured by trust deed on the lot. P. bought

the lot of C., and, as part of the price, agreed to pay the note when due. When due, P. paid the note and took it up. It was not marked 'paid,' as P. told the note clerk he wanted to deposit it elsewhere as collateral. He did so deposit it with the Citizens' Bank. Afterwards P. sold and conveyed the lot to L. The trust deed had not been released, but P. told L. the note had been paid. Later, the bank had the lot advertised for sale to pay the note, and L. obtained an injunction. L. was entitled to rely on the statement of P. that the note had been paid and was not estopped from denying its existence as a valid security. *Citizens' Bank v. Lay*, 80 Va. 436.

g. Executors, Guardians, etc.

See ante, "Instances," V, A, 6, b, (3), (b), bb. See the titles EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD.

h. Stockholders.

See ante, "Stockholders," II, G.

i. Corporations.

See ante, "Corporations from Asserting Title to Real Estate," V, A, 6, b, (9), (a). See the title CORPORATIONS, vol. 3, p. 542.

j. Counties and Municipalities.

See ante, "Counties and Municipalities," II, E.

k. State.

See ante, "State," II, D.

B. ACCEPTING CONVEYANCE OR TAKING POSSESSION OF PROPERTY.

1. In General.

Acceptance of an estate is an estoppel though there be no deed. *Davis v. Thomas*, 5 Leigh 1.

V. executed a deed by which he conveyed to A. and I. his lands, on the consideration that they should pay his debts and should pay him \$500 a year for his life. A. and I. did not execute the deed, but they accepted it and took possession and held the lands. Held, that they were personally liable for the

debts of V. *Vanmeter v. Vanmeters*, 3 Gratt. 148.

2. Grantee or Purchaser.

If the grantee assert no other title than that from the common grantor, he will be precluded from denying that his grantor had title which he conveyed. *Bolling v. Teel*, 76 Va. 487. See also, the title VENDOR AND PURCHASER.

A grantee relying upon the title he derives from his grantor can not be heard to question that title or to invoke an outstanding title in other persons. *Bolling v. Teel*, 76 Va. 487.

If vendee buys up a better title than that of vendor, and latter was guilty of no fraud, he can only be compelled to refund the amount paid for better title. Vendee can not disavow vendor's title. "The vendor and the vendee stand in the relation of landlord and tenant." *Roller v. Effinger*, 88 Va. 641, 14 S. E. 347.

Where one is let into possession of land under conveyance from another, and enjoys the property, he can not set up want of title in such other person, or his incapacity to convey, to defeat an action by such other person for the recovery of possession. *Lutheran Church v. Arkle*, 49 W. Va. 92, 38 S. E. 486.

Where defendants to an action of ejectment do not attempt to show title in any other person than the plaintiff, but claim under him, and seek to defend their possession by virtue of a contract of purchase, they are estopped from denying his title. *McClung v. Echols*, 5 W. Va. 204; *Emerick v. Tavener*, 9 Gratt. 220.

"A corporation conveyed land upon condition that if the grantee should sell or manufacture intoxicating liquors on the premises, the title should revert to the grantor. The grantee taking possession was held to be estopped from denying the validity of the title conveyed or the corporate existence of the grantor, when sued by the grantor

for the premises, upon breach of the condition." *Lutheran Church v. Arkle*, 49 W. Va. 92, 38 S. E. 486.

Purchaser under Executory Contract.—A vendee who enters under an executory contract which leaves the legal title where it was, and contemplates a future conveyance, enters in subordination to it, holds under and relies upon it to protect his possession in the meantime. And in such case, where one is in under the owner of the legal title, a privity exists which precludes the idea of a hostile, tortious possession, which could silently ripen into a title by adverse possession under the statute of limitations. *Clarke v. McClure*, 10 Gratt. 305.

3. Parties Claiming Title from Common Source.

"Where parties claim title from one person as a common source, they are estopped from denying the title of the original claimant from whom they derive title." *Herman on Est.*, § 593." *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154. See the title EJECTMENT, vol. 4, p. 871.

Where plaintiff and defendant claim title from same source, neither can question its validity. *Bolling v. Teel*, 76 Va. 487.

Where both plaintiff and defendant in ejectment derive title from a common grantor, the plaintiff need not trace his title back of that grantor, as the validity of his title can not be disputed by either party. *Chesterman v. Bolling*, 102 Va. 471, 46 S. E. 470.

4. Lessor.

Acceptance of Rent.—Acceptance of rent is an estoppel though there be no deed. *Davis v. Thomas*, 5 Leigh 1. See also, the title LANDLORD AND TENANT.

Lessor from Bona Fide Effort to Protect Property.—The refusal of one of several joint lessors to sell to the lessee a right of way for a railway over other lands not leased does not estop such lessor from taking advantage of

a provision in the lease rendering it void if a right of way for a railway to the leased premises is not obtained by condemnation or otherwise in a given time. The mere existence of a lease does not impose an obligation to grant the right of way, nor estop the lessor from a bona fide effort to protect his property from serious injury. *Laurel Creek, etc., Co. v. Browning*, 99 Va. 528, 39 S. E. 156.

5. Tenant.

See the title LANDLORD AND TENANT.

A tenant can not dispute his landlord's title. *Rakes v. Rustin Land Co.*, 2 Va. Dec. 156; *Lock v. Frashier*, 79 Va. 409; *Jordan v. Katz*, 89 Va. 628, 16 S. E. 866; *Suttle v. Richmond, etc., R. Co.*, 76 Va. 284; *Hurst v. Dulany*, 84 Va. 701, 5 S. E. 802; *Turpin v. Saunders*, 32 Gratt. 27; *Allen v. Paul*, 24 Gratt. 332; *Miller v. Williams*, 15 Gratt. 213; *Alderson v. Miller*, 15 Gratt. 279; *Emerick v. Tavener*, 9 Gratt. 220; *Stewart v. Andrews*, 1 Va. Dec. 449; *Lutheran Church v. Arkle*, 49 W. Va. 92, 38 S. E. 486; *Bodkin v. Arnold*, 45 W. Va. 90, 30 S. E. 154; *Wade v. South Penn Oil Co.*, 45 W. Va. 380, 32 S. E. 169; *Voss v. King*, 38 W. Va. 607, 18 S. E. 762; *Voss v. King*, 33 W. Va. 236, 10 S. E. 402; *Marmet Co. v. Archibald*, 37 W. Va. 778, 17 S. E. 299; *Campbell v. Fetterman*, 20 W. Va. 398; *McFarland v. Douglass*, 11 W. Va. 637; *Gale v. Oil Run, etc., Co.*, 6 W. Va. 200; *McClung v. Echols*, 5 W. Va. 204. See also, *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347; *Wilcher v. Robertson*, 78 Va. 602; *Clark v. McClure*, 10 Gratt. 305; *Bushong v. Rector*, 32 W. Va. 317, 9 S. E. 225, distinguishing *Emerick v. Tavener*, 9 Gratt. 220.

In the case of a lessee who is in under the owner of the legal title, a privity exists which precludes the idea of a hostile, tortious possession, which could silently ripen into a title by adverse possession under the statute of limitations. *Clark v. McClure*, 10 Gratt. 305.

6. Mortgagor.

See the title **MORTGAGES**.

In the case of a mortgagor who is in under the owner of the legal title, a privity exists which precludes the idea of a hostile, tortious possession, which could silently ripen into a title by adverse possession under the statute of limitations. *Clarke v. McClure*, 10 Gratt. 305.

7. Trustee.

Acceptance of a trust estops the trustee from denying the title of the person for whom he holds. "Under no circumstances can a trustee claim or set up a claim to the trust property adverse to the cestui que trust. Nor can he deny his title." *Morris v. Morris*, 48 W. Va. 430, 37 S. E. 570. See also, *Clarke v. McClure*, 10 Gratt. 305. See the title **TRUSTS AND TRUSTEES**.

8. Cestui Que Trust.

In the case of a cestui que trust, who is in under the owner of the legal title, a privity exists which precludes the idea of a hostile, tortious possession, which could silently ripen into a title by adverse possession under the statute. *Clarke v. McClure*, 10 Gratt. 305. See the title **TRUSTS AND TRUSTEES**.

9. Devisees and Legatees.

Claiming under and against the same will is inadmissible in law. *Burton v. Brown*, 22 Gratt. 1; *Fifield v. Vanwyck*, 94 Va. 537, 27 S. E. 446; *Lewis v. Overby*, 31 Gratt. 601; *Hughes v. Wilson*, 2 Va. Dec. 315. See the title **WILLS**.

When a legatee receives money under a will, he thereby concludes himself from afterwards claiming against it. *Burton v. Brown*, 22 Gratt. 1.

10. Heirs and Distributees.

Acceptance and Use of Advancement.—Where a child accepts and uses an advancement which was given him upon condition that it should be received in full of his share of his father's estate, he is estopped from denying the express conditions thereof

contained in the instrument by virtue of which he receives it. If he does not want to be bound thereby he should not receive it. *Coffman v. Coffman*, 41 W. Va. 8, 23 S. E. 523. See the titles **ADVANCEMENTS**, vol. 1, p. 189; **DESCENT AND DISTRIBUTION**, vol. 4, p. 609.

C. INCONSISTENT POSITIONS.**1. In General.**

A party can not occupy inconsistent grounds or positions; and, where he has an election between inconsistent courses of action, he will be confined to that which he first adopts. *Georgia Home Ins. Co. v. Goode*, 95 Va. 751, 30 S. E. 366; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271. See also, *Chesapeake, etc., R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633. "Any decisive act of the party, done with knowledge of his rights and of the facts, determines his election and works an estoppel." *Bigelow on Estoppel* (3d Ed.) 562; *Webster v. Phoenix Ins. Co.*, 36 Wis. 57; and 2 *Wood on Insurance*, § 526." *Georgia Home Insurance Co. v. Goode*, 95 Va. 751, 30 S. E. 366. See the title **WAIVER**.

2. Inconsistent Positions and Admissions in Legal Proceedings.**a. In General.****(1) Doctrine Stated.**

"A party is forbidden to assume successive positions in the course of a suit or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other and mutually contradictory." *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320. To the same effect, see *Hast v. Piedmont, etc., R. Co.*, 52 W. Va. 396, 44 S. E. 155. See also, *Frazer v. Beville*, 11 Gratt. 9.

"Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining it, he can not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of a party who has acquiesced in the po-

sition formerly taken by him.' *Davis v. Wakelee*, 156 U. S. 689, 15 Sup. Ct. 555, 39 L. Ed. 578. To the same effect, *Daniels v. Tearney*, 102 U. S. 415, 26 L. Ed. 187; 11 Am. & Eng. Ency. L. (2d Ed.) 446; opinion in *Weston v. Ralston*, 48 W. Va. 170, 36 S. E. 446." *LeComte v. Carson* (W. Va.), 49 S. E. 238; *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320; *Rhea v. Shields*, 103 Va. 305, 49 S. E. 70.

"A party can not recover on a statement of facts entirely at variance with, and inconsistent with, claims set up by him in a prior suit for the same cause." Note 3, 7 Am. & Eng. Ency. L. 3." *Weston v. Ralston*, 48 W. Va. 170, 36 S. E. 446.

Having assumed one position, he and his privies are thereafter estopped from assuming a conflicting position touching the same subject matter. *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320; *Weston v. Ralston*, 48 W. Va. 170, 36 S. E. 446. See ante, "Parties and Privies," II, A.

(2) Doctrine Illustrated.

The vendee of property sold under decree in a creditors' suit against D. had notice of a suit setting up the claim of D.'s children thereto in the right of their deceased mother. The property was deeded to such vendee, though knocked off to the insolvent, and, as he had asserted title as the actual purchaser in the children's suit, he was held to be estopped to deny that he was such purchaser. *Simpson v. Dugger*, 88 Va. 963, 14 S. E. 760.

The fact that a suit to enjoin the collection of municipal taxes because defendant town has forfeited its charter is brought against the town does not admit that the charter is not forfeited. *Hornbrook v. Elm Grove*, 40 W. Va. 543, 21 S. E. 851.

A party in a suit against cotrespanders alleged that one of them had been released. The remaining defendants pleaded not guilty, and also pleaded accord and satisfaction on which issue

was joined. It was held, that as the plea of not guilty put in issue the allegations of the declaration, and thus threw on the plaintiff the burden of proving them, the defendants were estopped to use them as evidence to prove and sustain their plea of accord and satisfaction. As to that plea and all facts necessary to sustain it, the onus probandi was upon them, and they could not resort to the plaintiff's allegations in his declaration to aid them in it after having denied the same by their plea of the general issue. *Bloss v. Plymale*, 3 W. Va. 393.

Material Facts of Former Adjudication.—A person who relies upon an adjudication as an estoppel can not dispute the truth of the material fact on which such adjudication is predicated. *Buford v. Adair*, 43 W. Va. 211, 27 S. E. 260.

Those under whom the defendant in error claims have heretofore recovered damages for unlawfully erecting a dam, he is now estopped from recovering damages for failure to keep in repair the same dam. *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320.

Where the defendant relies on an acquisition and judgment of the court authorizing the construction of a mill dam as the grounds of his defense, he can not deny the ownership of the land by the applicant for the mill. *Calhoun v. Palmer*, 8 Gratt. 88.

Insist upon Attachment Lien.—A mortgage was executed by a Pennsylvania railroad company authorized under its charter to build a road "from Pittsburg, Pennsylvania, in the direction of Steubenville, Ohio, to the Pennsylvania State line." The said mortgage grants the whole of their "railroad;" and other property "situated between and at the terminus of their railway at the city of Pittsburg and the boundary line of the state of Virginia in the counties of Alleghany and Washington in the state of Pennsylvania." It conveyed no property

whatever in the state of Virginia. An attaching creditor in this state bid upon property at the sale under such mortgage in the state of Pennsylvania. It was held, such attaching creditor is not estopped to insist upon his attachment lien on the property in this state, as the attached lands are not included in the mortgage. *Chapman v. Pittsburgh, etc., R. Co.*, 26 W. Va. 299.

To Question Validity of Executory Limitation.—Where the validity of the limitation over in a will was recognized in a formal appeal, in requiring new security from the life tenants, at the instance of those claiming as remaindermen, it can not afterwards be claimed that the limitation was void for remoteness. *Hawthorne v. Beckwith*, 89 Va. 786, 17 S. E. 241.

Decree Conformable to Position Taken.—When one takes a position in a judicial proceeding, and a decree is made conformable thereto, and another party relies upon it, and acquires property under the decree, he that takes such position is estopped from afterwards claiming contrary to such position to the prejudice of the other party. *LeComte v. Carson* (W. Va.), 49 S. E. 238.

Specific Performance Denied—Suit to Reform and Enforce.—"An unsuccessful plaintiff in a suit for the specific performance of a contract was not permitted to maintain a suit to reform the contract and enforce it as reformed. *Black on Judgments*, § 632; *Simpson v. Dugger*, 88 Va. 963, 14 S. E. 760." *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320.

b. Admissions during Course of Judicial Proceedings.

(1) In General.

"An admission made during the course of judicial proceedings, whether it be direct, or by inference from the position assumed, the relief sought, or the defense set up, will estop the one who makes it from subsequently asserting any claim inconsistent there-

with." 4 Am. Eng. Dec. in Eq. 304." *Weston v. Ralston*, 48 W. Va. 170, 36 S. E. 446; *LeComte v. Carson* (W. Va.), 49 S. E. 238.

"A party who has alleged in his pleadings the existence of a fact, or expressly admitted it in the facts agreed in the case, will not be permitted in that case to question the existence of such fact." *National Building, etc., Ass'n v. Ashworth*, 91 Va. 706, 22 S. E. 521.

A defendant can plead as many matters of law and fact as to him may seem necessary to defense, and the facts stated in one or more of them can not be used as evidence or admission to disprove anything contained in the others, nor to sustain the plaintiff's declaration. Therefore, where a defendant has pleaded not guilty in an action of trespass for taking and carrying away the goods of another, and also specially pleaded justification by reason of being in the service of the Confederate States of America, and the special pleas have been demurred to and the demurrer sustained, it is error for the circuit court to permit the plaintiff to offer the special pleas to go to the jury to prove the trespass; and to instruct the jury that the defendant is estopped on the issue joined on the plea of not guilty, from denying the alleged trespass. And if the plaintiff fails to prove the allegations of the declaration by other evidence independent of the defendant's special pleas, the plaintiff can not recover. *Nadenbousch v. Sharer*, 2 W. Va. 285.

Existence of Incorporation.—The fact of incorporation of a company can not be called in question by a party who has alleged that fact in his pleading, or expressly admitted it in the facts agreed in the case. *National Building, etc., Ass'n v. Ashworth*, 91 Va. 706, 22 S. E. 521, 1 Va. Law Reg. 519.

Admission—Party Praying to Be Admitted as Defendant.—A party who

files a petition in a cause praying to be admitted as a party defendant, and in his petition admits a fact, can not thereafter, when so admitted, deny that fact in his answer to the bill. *McClanahan v. Hockman*, 96 Va. 392, 31 S. E. 516.

(2) Held to Defenses Set Up in Pleadings.

"Defendants must be held to the defenses set up in their pleadings. *Campbell v. Bowles*, 30 Gratt. 652; *Highman v. Stewart*, 38 Mich. 513; *Davis v. Thomas*, 5 Leigh 1; *Hayes v. Mutual Protection Ass'n*, 76 Va. 225." *Tatum v. Ballard*, 94 Va. 370, 26 S. E. 871.

Defendants in a suit in chancery who deny in their answer that they are bound by a personal decree rendered against them on a bond in a foreclosure suit in another state, can not afterwards claim that the bond was merged in the decree the validity of which they deny. *Tatum v. Ballard*, 94 Va. 370, 26 S. E. 871.

(3) Allegations in Former Declaration or Petition.

Where land is conveyed in consideration that grantee pay grantor's debts, and grantee subsequently conveys part to grantor's mother in satisfaction of one of said debts, and F. and G., creditors of grantor, filed petitions in bankruptcy to set aside the conveyances as fraudulent, and a compromise being made, the bankruptcy proceedings were abandoned, the grantor's mother gave her notes, secured on the land conveyed to her, to pay certain of her son's debts; afterwards another of his creditors instituted suit to subject this land to his debts, and under decree in this suit, F. was one of the purchasers, the averment of fraud in said petition does not estop F. from maintaining that he was an innocent purchaser. *Penn v. Penn*, 88 Va. 361, 13 S. E. 707.

Where, in a suit by a depositor against a bank to recover a balance alleged to be due, the plaintiff stated that

the suit was for the benefit of certain other parties, and he recovered judgment, such statement did not estop him from claiming the funds in a subsequent suit in which the bank endeavored to set off against the balance a debt due from the others, the depositor explaining that what he meant was that, in case he failed to recover the alleged balance, the other parties would be liable for it to him, and it appearing that the debt due the bank had been contracted prior to the statement. *Nolting v. National Bank of Virginia*, 99 Va. 54, 37 S. E. 804.

A tenant obtained an injunction to restrain a trespass and declared in his bill that the defendant was a sole trespasser, and afterwards brought his action against his landlord for committing the trespass and dispossessing him of the property he claimed to have leased from him. Held, that a plea of estoppel in the second action to deny what he claimed in the first was properly rejected. *Robrecht v. Marling*, 29 W. Va. 765, 2 S. E. 827.

Bills of exception, 2, 3, 4 and 5, are to the rejection of four several pleas in bar, which attempt to set up the fact as an estoppel that Robrecht, the plaintiff, had in his bill and other pleading in the injunction suit against Silas W. Wharton claimed that Silas W. Wharton was sole trespasser, and, without the authority of Marling, had dispossessed him, whereas in this action in his declaration he claims that Wharton was incited to commit the trespass by Marling. There is no estoppel here. It does not appear that by anything he said or did in that suit he put Marling in any worse position than he otherwise would have occupied. He might have been honestly mistaken as to the facts, when he filed his bill. There was no *res judicata* in that case, so he is not estopped by the record. See *Robrecht v. Wharton*, 2 S. E. 793. Indeed, the pleas are not that he was estopped by the record. The pleas were properly rejected. Ro-

brecht v. Marling, 29 W. Va. 765, 2 S. E. 827, 832.

(4) Statements in Answer in Another Case.

Where a party to a suit made a statement in an answer, parties claiming under him were held not estopped to contest the statement; but that it had only the effect of an admission as evidence. *Hast v. Piedmont, etc., R. Co.*, 52 W. Va. 396, 44 S. E. 155; *Tabb v. Cabell*, 17 Gratt. 160. See also, *Penn v. Penn*, 88 Va. 361, 13 S. E. 707.

In a suit against parties claiming under C., plaintiffs rely on statements in the answer of C. in another case. The parties claiming under C. are not estopped by these statements; but they have only the effect of admissions or declarations, not made in the pleadings in the cause, and their weight is to be ascertained by the circumstances connected with them. *Tabb v. Cabell*, 17 Gratt. 160.

In such a case the parties claiming under C. are not concluded by the admissions of C. of the legal rights of the plaintiffs in the subject in controversy. *Tabb v. Cabell*, 17 Gratt. 160.

C., under whom defendant claims, having stated in her answer in another case, that a certain arrangement was made by the consent of the parties interested, the defendant must be bound by this admission, unless he can clearly establish that it was made under a mistake. *Tabb v. Cabell*, 17 Gratt. 160.

(5) Inconsistent Defenses in Separate Causes.

A party in a suit will not be estopped from setting up a defense on the ground that it is inconsistent with the defense he made in another suit by other plaintiffs, unless the fact of such inconsistency distinctly appears. Nor is the judgment in the first suit, or the opinion of the judge in it competent evidence for the plaintiffs in the second suit, to show the nature of the title

set up in it by the defendants. *Bargamin v. Clarke*, 20 Gratt. 544.

"It would seem to be very clear, upon principle, that this rule can not be applied in any case, in the absence of clear proof, that the party had, in the previous case, made use of a defense inconsistent with that which he proposes to use in the subsequent case. In a case in which the fact distinctly appears, the rule is eminently wise and just, because it prevents a fraud upon the administration of justice. But, when the fact is to be made out by inference and conjecture only, as to the character of the first defense, and it can not be said to be established with certainty, it would be a violation of the plainest justice to apply the rule." *Bargamin v. Clarke*, 20 Gratt. 544.

In 1819, L. conveys a lot of ground to C., in trust, to pay certain debts, some of which are upon execution in the hands of the sheriff, and the other is due to the father of C. Ten years after, the father dies and makes C. his executor and one of his residuary legatees. The lot is never sold under the deed of L., but, in 1839, C. takes possession of it and encloses it, and some years after leases it, in his own name to R. for eight years. In 1854, W., claiming it under another title, sues R. for it, and C., being then dead, his heirs make themselves parties and defend the suit, and obtain a final judgment in 1867. Then the heirs of L. sue the heirs of C. for the lot, alleging that C. took and held possession as trustee under the deed, and his heirs held under the trust, and defended the action on that title. The heirs of C. deny this, claim that C. took possession for himself, and he and they have so held for twenty-eight years, and they defended the suit for themselves. It was held, that the heirs of C. are not estopped to defend the suit for themselves. *Bargamin v. Clarke*, 20 Gratt. 544.

As to Dedication of Land by Railway Company.—In an action by the

owner of a village lot against a railroad company for damage to a lot resulting from the taking of a street near the lot by the company for its tracks, the company gave oral evidence to show in defense or mitigation of damages, that the company had dedicated a street or way over a lot owned by it in lieu of the street taken for its tracks, and thus took the position that such dedication had been made. Afterwards, in other suits, it sought to deny such dedication, so as to defeat or mitigate a recovery of damages. It was held, that, in such action, an attorney of the railroad company in adducing evidence to prove such dedication and making such defense of dedication, does not bind the company against its denial in another suit of such dedication for the purpose of defeating or mitigating a recovery of damages. *Hast v. Piedmont, etc., R. Co.*, 52 W. Va. 396, 44 S. E. 155.

"There was no plea of such dedication, nothing of record to signify and explicitly manifest that the company admitted as a binding fact the fact of dedication. It simply gave some evidence to show it and asked instructions upon the theory of dedication. The estoppel is inferential, not so plainly manifested as if in an answer or plea." *Hast v. Piedmont, etc., R. Co.*, 52 W. Va. 396, 44 S. E. 155.

c. To Deny Service of Process.

"In *Hill v. Woodward*, 78 Va. 765, 775, in which the record showed that the party had not been served with process at all, but in which the party had stood by and seen the property sold without making objection to the sale, the court uses this language: 'By her conduct, as disclosed by the record, the appellant is estopped from questioning the verity of the record. Her evident knowledge of the pendency of this suit and its object, her seeming acquiescence, and her delay and refusal to speak, though not served with notice in the regular way, makes it

proper for her to remain silent, now that others have acquired rights while she was standing by in silence, if not in actual acquiescence. It was not only competent for her to speak in time, and be made a party, if she had not been, but it was her duty.'" *Lancaster v. Barton*, 92 Va. 615, 24 S. E. 251. See also, the title SERVICE OF PROCESS.

d. To Take Advantage of Nonsuit.

C. & J. sue B. in assumpsit. B. pleads general issue. Jury impaneled April 15, 1895. Plaintiff fails to appear, court enters nonsuit and judgment for five dollars damages and costs. Plaintiffs at once move to set aside nonsuit, and ask leave to file amended declaration, which motion is entered of record. Plaintiffs, on June 29, 1895, sue out writ on amended declaration, and file amended declaration at August rules. On February 14, 1896, plaintiffs set out another writ, and at March rules, 1896, filed their second amended declaration, and on April 17, 1896, defendant appeared and demurred, and pleaded non-assumpsit to said two amended declarations. A jury was impaneled, the issue tried, and verdict and judgment for plaintiffs. Held, that under W. Va. Code, ch. 134, § 3, defendant, not having taken advantage of the nonsuit below, is estopped, after trial, verdict and judgment, from raising the question in this court. *Connolly v. Bruner*, 48 W. Va. 71, 35 S. E. 927.

e. To Deny Effect of Nunc Pro Tunc Orders.

Where a plea and statement of grounds of defense are offered by one of several defendants and received by the court at one term, but the order of the court at that term states that there was no appearance for the defendants, and gives judgment against all of them, and, at a subsequent term, by agreement of parties shown by the record, a nunc pro tunc order is entered showing the filing of said statement of defenses and special plea, and issues are

made up thereon and tried, treating the judgment at the former term as set aside, the plaintiff is thereafter estopped to deny that such was the effect of the nunc pro tunc order. *Rocky Mount Loan, etc., Co. v. Price*, 103 Va. 298, 49 S. E. 73.

f. To Deny That Injunction Was Providently Awarded.

One is estopped to deny in appellate court that an injunction was providently awarded, or that the bond was proper in form and substance where he has sued out and maintained the injunction for a long time, given the bond, and kept and used the property. *Wray v. Davenport*, 79 Va. 19. See also, the title INJUNCTIONS.

g. To Assert That Property Was Not Subject to Levy.

See the title FORTHCOMING AND DELIVERY BONDS. See also, the title EXECUTIONS.

h. To Deny Regularity or Validity of Forthcoming Bond.

See the title FORTHCOMING AND DELIVERY BONDS.

i. To Deny Validity of Judicial Sales.

At Solicitation of Persons Sui Juris.

—A party who is sui juris is equitably estopped from objecting to the validity of a sale made at his own solicitation. *Rhea v. Shields*, 103 Va. 305, 49 S. E. 70, citing *Fairfax v. Muse*, 4 Munf. 124; *Williamson v. Jones*, 39 W. Va. 231, 19 S. E. 436, 25 L. R. A. 222.

Lands of Persons under Disabilities.

—Although proceedings instituted under Va. Code, 1887, § 2616 (Va. Code, 1904, p. 1332), authorizing the sale of land of minors and persons under disability, are irregular, yet where the minors, after reaching majority, file amended pleadings requesting the sale of the property, they are equitably estopped from objecting to the validity of the sale. *Rhea v. Shields*, 103 Va. 305, 49 S. E. 70. See the titles INFANTS; SEPARATE ESTATE OF MARRIED WOMEN.

j. Estoppel to Appeal.

See the title APPEAL, AND ERROR, vol. 1, pp. 474, 609.

k. Estoppel to Rely on Appeal.

See the title DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 4, p. 712.

1. Invited Error—Errors Committed by Appellant.

(1) In General.

See the title APPEAL, AND ERROR, vol. 1, pp. 608, 609.

"In 3 Cyc. 242, it is said that, in general: 'The appellant or plaintiff in error will not be permitted to take advantage of errors which he, himself, committed, or invoked or induced the trial court to commit, or which were the natural consequences of his own neglect or misconduct.'" *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164.

(2) Consenting to Jurisdiction.

"While the authorities are in conflict, the better rule would seem to be that, as consent can not confer jurisdiction, a plaintiff against whom judgment is rendered is not estopped to assert, upon appeal or error, that the court to which he resorted had no jurisdiction of the subject matter of the suit, or of the person of the defendant." *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164.

A plaintiff upon whose bill there is a final decree and adjudication against him, upon matters set up in the bill, is not estopped to assert, upon appeal, that the court to which he resorted had no jurisdiction of the subject matter. *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164. See the title JURISDICTION.

(3) As to Instructions.

"A party can not invite the court to commit error by asking for an erroneous instruction, and be permitted afterwards to have the verdict set aside for the error into which the court has been thus misled. *Kimball v. Friend*, 95 Va. 125, 27 S. E. 901; *Home Life Ins. Co. v. Sibert*, 96 Va. 403, 31 S. E.

519." *Richmond Traction Co. v. Hildebrand*, 98 Va. 32, 34 S. E. 888.

Where an instruction has been asked for by a party, and is modified by the court so as to conform exactly to another instruction asked for by such party and given by the court, he can not be heard in the appellate court to object to the modification which thus conforms to what he has asked for and obtained. *Baltimore, etc., R. Co. v. Few*, 94 Va. 82, 26 S. E. 406. See the title INSTRUCTIONS.

m. To Deny Constitutionality of Law.

"It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law, he can not, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect;" citing *Ferguson v. Landram*, 5 Bush (Ky.) 230; 1 Id. 548; *Van Hook v. Whitlock*, 26 Wend. 43; *Lee v. Tilotson*, 24 Id. 337; *People v. Murray*, 5 Hill (N. Y.) 468; *City of Burlington v. Gilbert*, 31 Iowa 356; *B. C. R. & M. R. R. Co. v. Stewart*, 39 Id. 267. See also, *Cooley Const. Lim.*, marg. p. 181; *Roanoke v. Berkowitz*, 80 Va. 616, 623." *Purcell v. Conrad*, 84 Va. 557, 5 S. E. 545.

Whether an act be constitutional or not, a party, who has taken the benefit thereof and claimed under it in his bill, is estopped from contesting its validity. *Purcell v. Conrad*, 84 Va. 557, 5 S. E. 545.

n. To Deny Jurisdiction of Supreme Court over Constitutionality of Statute.

One who has restrained an oyster inspector from collecting fees and fines under Va. Code, 1887, § 2134, as amended by act of March 5, 1894, on

the ground that the act is unconstitutional, can not dispute the jurisdiction of the supreme court of appeals, to which an appeal may be taken in all cases involving the constitutionality of a statute. *Thomas v. Rawl*, 2 Va. Dec. 113, citing *Com. v. Chaffin*, 87 Va. 545, 12 S. E. 972.

D. ESTOPPEL BY CONTRACT.

1. Estoppel Not Created by Void Contract.

See ante, "Underlying Principles and Purpose of Doctrine," I, B.

A contract that is void as being against public policy can not create an estoppel. An unlawful agreement can not defeat a lawful right. *Tate v. Building Ass'n*, 97 Va. 74, 33 S. E. 382.

An agreement between two persons that one of them shall make a contract with a third person for the benefit of the other, which contract would be unlawful, can not constitute an estoppel to a claim against the intended beneficiary who has received from such third person the fruits of a lawful contract substituted for that which would have been unlawful. *Tate v. Building Ass'n*, 97 Va. 74, 33 S. E. 382.

One who has failed to carry out an unlawful contract, and has entered into a different contract which is in all respects legal, can not be defeated in an action on the valid contract on the ground that he was in *pari delicto* with the defendant in the first contract. *Tate v. Building Ass'n*, 97 Va. 74, 33 S. E. 382.

"The supreme court of Indiana, in *Mattox v. Hightshue*, 39 Ind. 95, concerning a married woman's void deed, says: 'A party can never be estopped by an act that is illegal and void.'" *Central Land Co. v. Laidley*, 32 W. Va. 134, 9 S. E. 61, 64. See ante, "Instances," V, A, 6, b, (4), (a), ee; "Married Women," V, A, 9, c.

If a deed from husband and wife conveying land of the wife be void as to her because of defective certificate of her examination and acknowledgment,

and after the death of her husband she convey the land to another with notice of the former deed, yet the second purchaser will not be affected by such notice, the former deed being void and passing no right, legal or equitable, and the second purchaser does not hold the land as trustee for the first purchaser, and equity will not compel him to convey to the first purchaser, nor will it enjoin the second purchaser from prosecuting an action of ejectment to recover the land from the first purchaser's possession or that of his vendee. Though during coverture the wife bring suit against her husband and others to assert her right to land acquired by her husband in his name with the consideration paid by such first purchaser, reciting in her pleading that she had executed such deed to such first purchaser and received the consideration, and obtained a decree giving her such land, and declaring it her separate estate, that will not estop her, or such second purchaser, from recovering the land from the first purchaser or his vendee. *Central Land Co. v. Laidley*, 32 W. Va. 184, 9 S. E. 61.

2. Contractual Estoppel by Conduct in Pais Evidenced by Record.

"In the case of *Findley v. Findley*, 42 W. Va. 372, 26 S. E. 433, an answer filed after final decree, on motion to correct the same for error, was held to be 'a contractual estoppel by conduct in pais evidenced by record.'" *Briggs v. Enslow*, 44 W. Va. 499, 29 S. E. 1008, 1010.

A personal representative who was a necessary party has not been served with original process, and a final decree without him was entered. He afterwards filed a paper called an "answer" to obviate the effect of the failure to serve him with process. It was held, that the appellants had right to complain of this error, because taking a decree against them without the presence of the administrator would not

bind the administrator, and he could sue them, and make them pay over again; but the administrator estops himself by filing the paper called an answer. The circuit court said: "It is said this error could not be waived by the administrator, and the paper could not have the effect to do away with the error. I have queried as to in what light this paper should be viewed. It is not a release of error, because, the administrator not being before the court, no error exists against him to be released, but the error was against the appellants. It is not an answer, because the case had ended. It could not be considered an answer to the motion to reverse, founded only on error of law. What is it? It is a release of any demand of recovery by the administrator, an agreement not to hold them responsible, a release of action, and an agreement that the decree may be held an estoppel against him as if a party. He says he had notice of the suit. He was a party, but not served with original process; but he waives such service. The decree is binding on him, not as *res judicata*, perhaps, but as a contractual estoppel, and by conduct in pais evidenced by record." *Findley v. Findley*, 42 W. Va. 372, 26 S. E. 433, 435.

3. Partnership Contracts.

Where partners make a valid settlement of their partnership transactions, they are concluded by such settlement as to any matters embraced therein. *Foster v. Rison*, 17 Gratt. 321. See the title PARTNERSHIP.

4. Contracts by Municipalities.

See ante, "Counties and Municipalities," II, E.

E. EQUITABLE ELECTION.

See the titles DOWER, vol. 4, p. 811; WILLS. See also, the title TRUSTS AND TRUSTEES.

F. ELECTION OF REMEDIES.

See the title ELECTION OF REMEDIES, vol. 4, p. 921.

"Judge Cooley, delivering the opinion of the court [in the case of *Barnard v. German-American Seminary*, 49 Mich. 444, 13 N. E. 811] says: 'Estoppels in pais are called equitable estoppels, not because their recognition is peculiar to equitable tribunals, but because they arise upon facts which render their application, in the protection of rights, equitable and just. Courts of equity recognize them in cases of equitable cognizance, but the courts of common law just as readily and freely. *Sebright v. Moore*, 33 Mich. 92; *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453, 2 N. W. 639; *Kid v. Mitchell*, 1 Nott & McC. 334, 9 Am. Dec. 702; *Dezell v. Odell*, 3 Hill, 215, 38 Am. Dec. 628; *Horn v. Cole*, 75 Ill. 516; and it is never necessary to go into equity for the mere purpose of obtaining the benefit of an equitable estoppel when the case is not otherwise of equitable jurisdiction.'" *Hoge v. Fidelity, etc., Co.*, 103 Va. 1, 12, 48 S. E. 494.

"The doctrine of equitable estoppel is pre-eminently the creature of equity." *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755, 859.

G. JURISDICTION OF COURTS OF LAW AND EQUITY.

The defense of equitable estoppel is, as a rule, as available in courts of law as in courts of equity, and the relief is as full and as adequate in the one as in the other, and where the two courts have concurrent jurisdiction of the subject matter, the defense must be made in that one which first acquires jurisdiction except in those cases where the jurisdiction of the law court is conferred by a statute which provides otherwise. *Hoge v. Fidelity, etc., Co.*, 103 Va. 1, 48 S. E. 494.

"This court, however, in the case of *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536, held, that equity is the proper forum in which to assert an equitable estoppel." *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755, 758. See also, *Poling v. Maddox*, 41 W. Va.

779, 24 S. E. 999, where it is held, that an assurance by a creditor which induced a surety to take no steps to secure himself, is avoidable in equity as an estoppel in pais, but not at law. *Jones v. Fox*, 20 W. Va. 370.

Ejectment.—Parol evidence to establish a case of equitable estoppel, and upon that to recover in ejectment, is inadmissible. The remedy, if any, is in equity. *Suttle v. Richmond, etc., R. Co.*, 76 Va. 284. See the title **EJECTMENT**, vol. 4, p. 871.

"In *Mills v. Graves*, 38 Ill. 455, 466, where the precise question was involved, Walker, C. J., says: 'Had the acts which were proved constituted an estoppel, it would have been simply an equitable right, incapable of assertion in a court of law. There can be no pretense that mere oral declaration can ever transfer the legal title, and equitable titles and demands are not cognizable in a court of law. * * * After careful examination of the adjudged cases, we are unable to find that such estoppels can be made available in a court of law.'" *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536.

VI. Necessity and Mode of Pleading.

A. IN GENERAL.

Where No Opportunity to Plead.—It is a well-settled principle that where there is no opportunity of pleading an estoppel, it is to be held conclusive when offered in evidence. *Carroll Co. v. Collier*, 22 Gratt. 302.

Must Be Distinctly Charged.—Where a mere equitable estoppel is set up as a defense, it must be distinctly charged. *Newport News, etc., Co. v. Lake*, 101 Va. 334, 43 S. E. 566. See also, *Vanbibber v. Beirne*, 6 W. Va. 168, 177; *Smith v. Gott*, 51 W. Va. 141, 41 S. E. 175. See ante, "Certainty Essential to All Estoppels," I, C.

Must Be Asserted Affirmatively.—The doctrine of equitable estoppel, although it appears defensive in its na-

ture, to be available at all, must be asserted affirmatively. *Miller v. Lorentz*, 39 W. Va. 160, 19 S. E. 391.

Averments Sufficient.—A bill alleged that the complainant purchased from a father a tract of land which he had previously conveyed to certain of his children; that the complainant knew nothing of the existence of the deed; that he purchased in good faith and that the purchase was made with the knowledge, acquiescence and consent of the children. It was held, that these allegations sufficiently charge an estoppel, although they do not state whether the children were adults. *Virginia Iron, etc., Co. v. Roberts*, 103 W. Va. 661, 49 S. E. 984.

B. WHEN DEFENSE IS THE GENERAL ISSUE.

Matter of estoppel may be relied on in evidence by the plaintiff when the only defense is the general issue, for the reason that the estoppel in such case can not be pleaded. *Hayer v. Mutual Protection Ass'n*, 76 Va. 225; *Pettit v. Jennings*, 2 Rob. 676. *Carroll Co. v. Collier*, 22 Gratt. 302; *Davis v. Thomas*, 5 Leigh 1; *Muhleman v. Nat. Ins. Co.*, 6 W. Va. 508, 523. See also, *Despard v. County of Pleasants*, 23 W. Va. 318.

A party can not be called on to show his estoppel until his adversary has attempted to use the improper defense. *Davis v. Thomas*, 5 Leigh 1; *Muhleman v. Nat. Ins. Co.*, 6 W. Va. 508.

"When the matter to which the estoppel applies is specially pleaded, then the estoppel must be especially replied or it can not avail." The estoppel must be set up in special replication. *Hayes v. Mutual Protection Ass'n*, 76 Va. 225; *Davis v. Thomas*, 5 Leigh 1; *Carroll Co. v. Collier*, 22 Gratt. 302; *Pettit v. Jennings*, 2 Rob. 676; *Muhleman v. Nat. Ins. Co.*, 6 W. Va. 508. See also, *Despard v. County of Pleasants*, 23 W. Va. 318; *Long v. Campbell*, 37 W. Va. 665, 17 S. E. 197.

"In the case of *Davis v. Thomas*, 5 Leigh 1, it was held that, 'Matter of estoppel can not be relied on unless it be pleaded, when the matter to be concluded appears on the record.'" *Muhleman v. Nat. Ins. Co.*, 6 W. Va. 508, 523.

In action on policy, to plea that assured exaggerated cost of property, replication was that she estimated cost, and that company's agent then and there inspected the property, was as well informed as to its cost as she was, concurred in her estimate and inserted it in her application. Held, it is a good replication in estoppel. *Fire Ins. Co. v. West*, 76 Va. 575; *Virginia Fire and Marine Ins. Co. v. Saunders*, 86 Va. 969, 11 S. E. 794.

Upon a motion by a high sheriff against a deputy and his sureties, they file a special plea; and the plaintiff replies specially, and relies on the facts therein stated and especially on the bond as an estoppel; though the replication has not the peculiar commencement and conclusion of a pleading by way of estoppel. A demurrer to the replication should not be sustained. *Cecil v. Early*, 10 Gratt. 198.

VII. Evidence and Burden of Proof.

See the title EVIDENCE.

A. ADMISSIBILITY OF PAROL EVIDENCE.

See generally, the title PAROL EVIDENCE.

Ejectment.—See ante, "Jurisdiction of Courts of Law and Equity," V, G. See the title EJECTMENT, vol. 4, p. 871.

Action on Insurance Policy.—In actions upon insurance policies it is permissible to show by parol evidence that representatives, as written in the application for the insurance, ought not to be used against the assured upon the ground of equitable estoppel. *Virginia Fire & Marine Ins. Co. v. Goode*, 95 Va. 762, 30 S. E. 370; *Lynchburg*

Fire Ins. Co. v. West, 76 Va. 575. See the titles **INSURANCE**; **PAROL EVIDENCE**.

B. WEIGHT OF EVIDENCE AND BURDEN OF PROOF.

The burden of proof rests on the party relying upon an estoppel, and it must be made to appear affirmatively by clear, precise and unequivocal evidence. *Bolling v. Petersburg*, 3 Rand. 563; *Taylor v. Cussen*, 90 Va. 40, 43, 17 S. E. 721; *Newport News, etc., Co. v. Lake*, 101 Va. 334, 43 S. E. 566. See also, *Robertson v. Breckinridge*, 98 Va. 569, 37 S. E. 8; *Jordan v. Buena Vista Co.*, 95 Va. 285, 28 S. E. 321; *Hast v. Piedmont, etc., R. Co.*, 52 W. Va. 396, 44 S. E. 155; *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267. See ante, "Certainty Essential to All Estoppels," I, C.

"As fraud is not presumed, but when charged must be strictly proven, the authorities uniformly hold that the evidence to establish an estoppel by conduct must be clear, precise, and unequivocal." *Bolling v. Petersburg*, 3 Rand. 563, 576." *Taylor v. Cussen*, 90 Va. 40, 17 S. E. 721; *Vanbibber v. Beirne*, 6 W. Va. 168; *Lorentz v. Lorentz*, 14 W. Va. 809.

The evidence in the case must clearly establish an estoppel. *Newport News, etc., Co. v. Lake*, 101 Va. 334, 43 S. E. 566; *Hast v. Piedmont, etc., R. Co.*, 52 W. Va. 396, 44 S. E. 155.

Where a party became the purchaser of a single bill, and claims that, before purchasing the same, he informed the maker of his intention, and such maker replied it was all right, and that he would as soon pay him as the original payee, which is denied by the maker, such claim must be sustained by a preponderance of testimony to constitute an estoppel. *Heavner v. Morgan*, 41 W. Va. 428, 23 S. E. 874.

Evidence Insufficient.—It was insisted "that the delay of the appellees in denying the execution of the bond,

their consent to the order for an account, their appearance before the commissioners as witnesses, and the testimony given by them estopped them from relying upon the defense of non est factum. * * * The appellees neither made nor attempted to set up any defense until they tendered their plea of non est factum." It was held, that "their consenting to a decree for an account, to which they had no right to object; their testifying before the commissioner as witnesses for the deputy treasurer that they had heard the treasurer admit that the sum due from his deputy was much less than he now claimed; their failure to make any defense until the account came in showing the balance due from the deputy, are circumstances to be considered in passing upon the plea of non est factum." *Repass v. Richmond*, 99 Va. 508, 39 S. E. 160.

An executor had borrowed money of his wife for the purpose of paying the debts of his decedent's estate. The testator's widow had induced the wife to allow the use of her money in that way. The executor, his wife and the widow expected that the wife would be reimbursed from the estate. A legatee states: "I know that he did use his wife's money in that way, as well as I could know it without just seeing it handed to the parties to whom it was paid. Somewhere between 1869 and 1871 we had frequent conferences in the family—that is, between mother, brother and myself, and in a general way including my sisters, Eliza and Emma, about the debts then due by my father's estate, and it was agreed that certain money of brother's wife amounting to something like \$1,600, to the best of my recollection, should be applied to the payment of these debts—can't say now what debts they were. Have frequently heard mother express her gratification at the safe investment which had been made of Mrs. Virginia Breckinridge's money in debts due by my father's estate, and know that we

all recognize the fact that these debts had been discharged in that way." There are other statements of like character scattered through the record. *Robertson v. Breckinridge*, 98 Va. 569, 37 S. E. 8.

On the other hand, it is shown by the deposition of Miss Eliza Breckinridge and Mrs. Robertson that, while they had heard this matter spoken of in a general way, they were not informed as to the sum advanced, nor as to the debts to which it was applied; that is was never mentioned to them except in a casual and conversational way, and never as a matter of business. It was held, there is no evidence that there was such knowledge of, and acquiescence in, the transaction upon the part of those in interest before the money was received and used by the executor, as would bind the appellants by estoppel. *Robertson v. Breckinridge*, 98 Va. 569, 575, 37 S. E. 8.

VIII. Instructions.

An addendum to a proper instruction, to the jury, in the following language: "Or unless the jury should believe from the evidence that the defendant permitted the said bond to be sent forth, or held out to the plaintiff, as his (the defendant's) deed, and thereby induced the plaintiff to act upon such representation or assurance, in which case the defendant would be estopped from showing that the bond is not his deed, and that he never executed it." Held; to be a proper instruction. Although the addendum might have been strengthened by the statement, that the defendant knowingly permitted, yet, I think, there can be no reasonable objection to it, even in the language with which it is clothed. *Black v. Campbell*, 6 W. Va. 51. See ante, "Knowledge of Facts or Gross Negligence by Person Making Representation," V, A, 6, c.

Estovers.

See the title LANDLORD AND TENANT.

Estrays.

See the titles ANIMALS, vol. 1, p. 383; SHIPS AND SHIPPING.

Estrepement.

See the title WASTE.

ET CETERA.—A special plea concluded thus, "and this, etc." It was held, that the *et cetera* can not be construed to imply a verification, or a conclusion to the country, and is bad on special demurrer. The court said: "An *et cetera* may be allowed to supply what must necessarily be inferred from what is expressed. But in this plea the words inserted will equally admit of a conclusion to the court or jury, and therefore the court can not supply the words omitted by any necessary implication; besides, this defect is specially demurred to." *Cooke v. Beale*, 1 Wash. 313.

A cause having been brought on to be heard upon the bill, answer, demurrer, exhibits, etc., it will be held, that as everything else is specified, the "etc." refers to the replication to the answer. *Coles v. Hurt*, 75 Va. 380.

In holding that the act of assembly approved February 29, 1896, to prevent pool selling, etc., had but one object, but was broader than its title, the court said: "It is claimed on behalf of the commonwealth that the defect is cured by the use of the words 'and so forth,' but in this view we can not concur. The provision of the constitution is mandatory. We think it is a wise and

salutary provision, but whether it be or not, it is the law of the land, and must be obeyed. To hold that the legislature could, by the use of such a phrase as 'and so forth' supply an omission and cure an otherwise defective title would be to fritter away the constitutional provision, and render it illusive and nugatory. See *Cooley on Const. Lim.* (6th Ed.), p. 174. These words express nothing, and amount to nothing as a compliance with this constitutional requirement." *Lacey v. Palmer*, 93 Ga. 159, 166, 24 S. E. 930.

Ether.

See the title **LANDLORD AND TENANT**.

ET SIC NON EST FACTUM.—And so it is not his act. *American, etc., Co. v. Burlack*, 35 W. Va. 647, 14 S. E. 319, 323.

As to plea of non est factum, see generally, the title **PLEADINGS**. See also, the titles **BILLS, NOTES AND CHECKS**, vol. 2, p. 489; **BONDS**, vol. 2, p. 557; **ESCROW**, ante, p. 145.

EVENING.—In *State v. Griggs*, 34 W. Va. 78, 11 S. E. 740, 741, it is said: "The word **evening** is indefinite, and when it begins is not fixed and certain by usage, and often includes a part of the afternoon. According to Webster, it in strictness, commences at sunset, and continues during twilight, and night commences with total darkness."

EVERY.—A city ordinance imposing a specific license tax "on **every** attorney at law" includes nonresident attorneys who have offices and practice their profession in the city, as well as resident attorneys. *Petersburg v. Cocke*, 94 Va. 244, 26 S. E. 576.

Eviction.

See the titles **COVENANTS**, vol. 3, p. 762; **LANDLORD AND TENANT**.

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CROSS REFERENCES.

See the titles ACCOMPLICES AND ACCESSORIES, vol. 1, p. 74; AFFIDAVITS, vol. 1, p. 227; ALIBI, vol. 1, p. 290; ANCIENT DOCUMENTS, vol. 1, p. 372; ANSWERS, vol. 1, p. 389; BEST AND SECONDARY EVIDENCE, vol. 2, p. 355; BLOOD STAINS, vol. 2, p. 501; BOUNDARIES, vol. 2, p. 579; CIRCUMSTANTIAL EVIDENCE, vol. 2, p. 817; CONFESSIONS, vol. 3, p. 79; CONFLICT OF LAWS, vol. 3, p. 100; CONSPIRACY, vol. 3, p. 132; CONTINUANCES, vol. 3, p. 270; CRIMINAL LAW, vol. 4, p. 1; DECLARATIONS AND ADMISSIONS, vol. 4, p. 325; DEMURRER TO THE EVIDENCE, vol. 4, p. 514; DEPOSITIONS, vol. 4, p. 549; DOCUMENTARY EVIDENCE, vol. 4, p. 756; DYING DECLARATIONS, vol. 4, p. 847; EXPERT AND OPINION EVIDENCE; FOREIGN LAWS; FRAUDS, STATUTE OF; HANDWRITING; HEARSAY EVIDENCE; IDENTITY; INSPECTION AND PHYSICAL EXAMINATION; INTERPRETERS; ISSUES TO THE JURY; JUDICIAL NOTICE; ORDER OF PROOF; PAROL EVIDENCE; PEDIGREE; PHOTOGRAPHS; PRESUMPTIONS AND BURDEN OF PROOF; REASONABLE DOUBT; RES GESTÆ; USAGES AND CUSTOMS; VARIANCE; WITNESSES.

As to proof of death from absence, see the title PRESUMPTIONS AND BURDEN OF PROOF. As to the powers of appellate tribunals in relation to the evidence received in the trial court, see the titles APPEAL AND ERROR, vol. 1, pp. 560, 592; EXCEPTIONS, BILL OF. As to real evidence, see the title INSPECTION AND PHYSICAL EXAMINATION. As to scintilla evidence rule, see the title VERDICT. As to what law governs the admission of evidence and rules of evidence, see the title CONFLICT OF LAWS, vol. 3, p. 122. As to character in evidence in criminal cases, see the title CRIMINAL LAW, vol. 4, p. 1. As to admissions and exclusion of evidence, see the titles APPEAL AND ERROR, vol. 1, p. 418; NEW TRIALS. As to use of affidavits as evidence, see the title AFFIDAVITS, vol. 1, p. 227. As to transactions with deceased persons, see the title WITNESSES. As to privileged communications, see the titles ATTORNEY AND CLIENT, vol. 2, p. 156; DISCOVERY, vol. 4, p. 656; HUSBAND AND WIFE; LIBEL AND SLANDER; PHYSICIANS AND SURGEONS. As to records in evidence, see generally, the title RECORDS. As to evidence at a former trial, see the title HEARSAY EVIDENCE. As to admissibility of evidence to explain ambiguities, see the title PAROL EVIDENCE. As to suppression of evidence, see the title PRESUMPTIONS AND BURDEN OF PROOF. As to evidence of market value, see the title SALES. As to exceptions and objections to the admission, exclusion, etc., of evidence, see the titles APPEAL AND ERROR, vol. 1, p. 560; EXCEPTIONS, BILL OF. As to right to open and close, see the title OPEN AND CLOSE.

I. Scope of Title and Introductory.

The scope of this title is confined to the most general principles relating to the law of evidence, because experience has abundantly demonstrated the immense advantage of breaking up this subject, and treating the particular topics of evidence under separate titles. Reference is made to the table of cross references for the precise scope of this title.

Introductory.—"All questions upon the rules of evidence are of vast importance to all orders and degrees of men. Our lives, our liberties and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now reserved from their antiquity, and the good sense in which they are founded. They are not rules depending on technical refinements, but upon good sense; and the preservation of them is the first duty of judges." Gregory v. Baugh, 4 Rand. 611, 615.

II. Definitions.

A. IN GENERAL.

"The word evidence, in legal acceptation," says Greenleaf, "includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. This term and the word proof are often used indifferently as synonymous with each other; but the latter is applied by the most accurate logicians to the effect of evidence, and not to the medium by which truth is established." Green. Ev., vol. 1, § 1.

B. CUMULATIVE EVIDENCE.

See the title NEW TRIALS.

Cumulative evidence is generally said to be additional evidence of the same kind to the same point. Halstead v. Horton, 38 W. Va. 727, 18 S. E. 953; Wynne v. Newman, 75 Va. 811; St. John v. Alderson, 32 Gratt. 140. See Preston v. Otey, 88 Va. 491, 14 S. E. 68.

But evidence of the same kind and to the same point must be additional in order to be cumulative, if it is antagonistic, although of the same kind and to the same point, it is not cumulative. Halstead v. Horton, 38 W. Va. 727, 18 S. E. 953.

Newly-Discovered Evidence.—Evidence newly discovered is said to be cumulative in its relation to the evidence on the trial, when it is of the same kind and character. If it is dissimilar in kind, it is not cumulative, in a legal sense, though it tends to prove the same proposition. Wynne v. Newman, 75 Va. 811, 812; St. John v. Alderson, 32 Gratt. 140, 143, opinion of Christian, J.

In determining whether after-discovered evidence is cumulative or not, the court must see if the kind or character of the facts offered and of those presented on the former trial be the same, and not whether they tend to produce the same effect. It is the resemblance of such facts that makes them cumulative. The new and old facts may tend to prove the same proposition, and still be so dissimilar in kind as to afford no pretense for saying the new facts are cumulative upon the old. Grogan v. Chesapeake, etc., R. Co., 39 W. Va. 415, 19 S. E. 563.

III. Relevancy, Competency and Admissibility.

A. IN GENERAL.

The rule governing the production of evidence is well settled, "that the evidence offered must correspond with the material and necessary allegations, and be confined to the point in issue." It is stated by Mr. Greenleaf (1 Greenleaf's Evid. 951a): "It is not necessary, however, that the evidence should bear directly upon the issue. It is admissible, if it tends to prove the issue, or constitutes a link in the chain of proof; although, alone, it might not justify a verdict in accordance with it." Watts v. State, 5 W. Va. 532, 535; Under-

wood *v.* McVeigh, 23 Gratt. 409; Parsons *v.* Harper, 16 Gratt. 64; Rowt *v.* Kile, 1 Leigh 216; Thompson *v.* Com., 88 Va. 45, 13 S. E. 304; McBride *v.* Com., 95 Va. 818, 30 S. E. 454; Greever *v.* Bank, 99 Va. 547, 39 S. E. 159; Alexandria, etc., R. Co. *v.* Herndon, 87 Va. 193, 12 S. E. 289.

Evidence of a fact which adds force and effect to other evidence properly in a case, is pertinent and admissible. Norfolk, etc., R. Co. *v.* Phillips, 100 Va. 362, 41 S. E. 726.

All evidence forming a link in the chain and tending to prove the issue should be admitted. Hanriot *v.* Sherwood, 82 Va. 1.

Evidence offered to the jury, and properly applying to the issue joined, ought not to be rejected on the ground of objections to the declaration. Preston *v.* Bowen, 6 Munf. 271.

But questions which have no bearing on the issue, or a very remote one, and which are calculated to prejudice the minds of the jury, ought to be excluded. Deitz *v.* Providence, etc., Ins. Co., 33 W. Va. 526, 11 S. E. 50.

Remoteness.—But it is not necessary that evidence shall bear directly upon the point in issue. If it constitutes a link in the chain of proof or tends to make the question at issue in the particular case more or less probable, it is, as a general rule, admissible. Grubb *v.* Buford, 98 Va. 553, 37 S. E. 4; Hanriot *v.* Sherwood, 82 Va. 1; Parsons *v.* Harper, 16 Gratt. 64; Firm *v.* Com., 5 Rand. 701, 710.

Right to Contradict Irrelevant Testimony.—A party to a suit who testifies in his own behalf to a fact irrelevant to the issue in support of his own testimony, and prejudicial to his opponent, can not object to its contradiction on the ground of irrelevancy. Sisler *v.* Shaffer, 48 W. Va. 469, 28 S. E. 721. See Womack *v.* Circle, 29 Gratt. 192.

Rejection of Irrelevant Evidence—Tender of Other Evidence.—After a court has rejected as irrelevant and in-

admissible, evidence tendered along a particular line, it is unnecessary to go through the formality of tendering other evidence on the same subject. Clark *v.* Sleet, 99 Va. 381, 38 S. E. 183.

Discretion of Court.—There is perhaps no question of greater difficulty in the administration of justice, than that which often arises in regard to the relevancy of evidence to the issue. It is the duty of the court, says Philips, "to confine the evidence to the points in issue, that the attention of juries may not be distracted, nor the public time needlessly consumed; but in deciding that the evidence of any particular circumstance is not receivable upon this ground, the court must impliedly determine that no presumption to be drawn from that circumstance ought properly to have an effect upon the minds of the jury." It is obvious, therefore, that a great deal must necessarily be left to the discretion of the court of trial, in determining whether evidence is relevant to the issue or not. Early *v.* Wilkinson, 9 Gratt. 68.

Error.—See the title APPEAL AND ERROR, vol. 1, p. 592.

The refusal of court to compel a witness to disclose matters not relevant to the issue; held, no error. Wytheville Ins. Co. *v.* Stultz, 87 Va. 629, 13 S. E. 77.

It is not error to refuse to admit evidence, when the matter to which it relates is not involved in the issue. Bowyer *v.* Knapp, 15 W. Va. 277.

It is not error to exclude evidence which would not have benefited the party offering it. Bartlett *v.* Patton, 32 W. Va. 71, 10 S. E. 21.

Illustrative Cases.

Personal Injuries.—Testimony as to what had been the stopping place at that station is admissible in an action for personal injuries, when defendant contends that plaintiff was injured whilst alighting from its train before it reached its usual stopping place, while in motion, and the plaintiff de-

nies such contention. "It is a settled rule of evidence, that whatever tends to prove the issue, or constitutes a link in the chain of proof, is relevant and admissible. 1 Greenleaf on Ev., § 51a." *Alexandria, etc., R. Co. v. Herndon*, 87 Va. 193, 12 S. E. 289.

In an action to recover damages for an injury inflicted by a defendant, if the injury alleged in the declaration is not alleged to be due in any way to the absence of a particular person, evidence as to his absence is not admissible. *Norfolk, etc., R. Co. v. Phillips*, 100 Va. 362, 41 S. E. 726.

Extortion.—See the title EXTORTION.

On the trial of an indictment against M. for extorting money from R. an unmarried female, by threats to prosecute her for a criminal offense, a paper signed by the witness, R., in which she stated that she had in March, 1869, given birth to a child, which she had killed, and Dr. Bass had been sent for to deliver her of the afterbirth, was introduced in evidence; which paper the witness stated she had been compelled by the accused to copy and sign and give to him, though she told him at the time it was a lie. And then the counsel for the accused proposed to ask the witness: 1st. In 1869 were you in the family way? 2d. Were you delivered of a child on the 23d of March, 1869? 3d. Was Dr. David Bass sent for to attend you? 4th. Did he deliver you of the afterbirth on the following morning? But the court excluded all the questions. Held; the questions were irrelevant to the issue, and properly excluded. Whether the female R. was virtuous or vicious, she was equally entitled to the protection of the law. *Mitchell v. Com.*, 75 Va. 856.

Subsequent Transactions.—In assumpsit, no plea being filed, it is error for the court to admit evidence of a sum of money paid since suit brought. *Johnson v. Fry*, 88 Va. 695, 12 S. E. 973.

B. COLLATERAL FACTS.

1. In General.

The general rule is that collateral facts are inadmissible in evidence, because they do not afford any reasonable presumption or inference as to the principal fact or matter in dispute, and tend to draw away the minds of the jury from the point in issue, excite prejudice, and mislead. *Whitelaw v. Whitelaw*, 96 Va. 712, 32 S. E. 458; *Moore v. Richmond*, 85 Va. 538, 8 S. E. 387.

Reasons of Rule.—"It is an elementary rule that the evidence must be confined to the point in issue, and hence evidence of collateral facts, from which no fair inferences can be drawn tending to throw light upon the fact under investigation, is excluded, the reason being, as Greenleaf says, that such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice and mislead them; and, moreover, the adverse party, having had no notice of such a course of evidence, is not prepared to rebut it. 1 Greenl. Ev., § 52." *Moore v. Richmond*, 85 Va. 538, 539, 8 S. E. 387.

"This rule excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference, as to the principal fact or matter in dispute; and the reason is, that such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice, and mislead them; and moreover, the adverse party, having had no notice of such a course of evidence, is not prepared to rebut it." These principles are maintained by other standard text writers, and seem to be sustained by undoubted authority as the rule governing the production of evidence, which is in keeping with the spirit of the federal and state constitutions. *Watts v. State*, 5 W. Va. 532, 535.

Upon the trial of an issue devisavit vel non, where the sole issue is whether or not the controverted writing is the

last will and testament of a testator, it is error to receive evidence tending to show the enhanced value of the land in controversy since its purchase from the heir of the testator. Such evidence is irrelevant and calculated to divert the minds of the jurors from the real issue. *Savage v. Bowen*, 103 Va. 540, 49 S. E. 668.

Res Gestæ.—See the title RES GESTÆ.

The declarations of a party in his own favor ought not to be received as evidence, though it be a part of the *res gestæ* of a collateral fact introduced in the case, merely to contradict a witness on the other side, but which fact is in no way otherwise connected with the material inquiry involved in the case. *Corder v. Talbott*, 14 W. Va. 277.

Rape.—On a trial for rape, the prosecutrix testified that her father hated the prisoner, who offered to prove the cause; held, the fact sought to be proved is collateral to the issue, and no reasonable inference can be drawn from it to the matter in dispute; and is inadmissible. "The fact sought to be proved was collateral to the point in issue, and one from which no reasonable inference could have been drawn as to the principal fact or matter in dispute. Consequently the evidence, if admitted, would have tended to draw away the minds of the jury from the real issue in the case, and to mislead them by a multiplicity of issues, and, moreover, was inadmissible for another reason, namely, because the commonwealth, having had no notice of such a course of evidence, was not bound to be prepared to meet it. 1 Greenl. Ev., § 52." *Mings v. Com.*, 85 Va. 638, 8 S. E. 474.

An ordinance of a city regulating the running of trains at street crossings is irrelevant, where the alleged injury did not occur at a street crossing; and is properly excluded from the evidence. *Biankenship v. Chesapeake, etc., R. Co.*, 94 Va. 449, 27 S. E. 20.

Injuries on Sidewalks.—See the title STREETS AND HIGHWAYS.

In action against a city for injuries from falling into a hole in the sidewalk, testimony that plaintiff's witness fell into the same hole the same night is collateral and inadmissible. *Moore v. Richmond*, 85 Va. 538, 8 S. E. 387.

2. Res Inter Alios Acta.

a. In Civil Cases.

(1) In General.

The general rule is that, when the issue is whether a person did a particular thing, it is inadmissible to put in evidence the fact that he did a similar thing at some other time. *Travelers' Ins. Co. v. Harvey*, 82 Va. 949, 5 S. E. 553; *Wilson v. Carpenter*, 91 Va. 183, 21 S. E. 243; *Hartman v. Evans*, 38 W. Va. 669, 18 S. E. 810; *Cole v. Com.*, 5 Gratt. 696; *Brighthope R. Co. v. Rogers*, 76 Va. 443; *Brock v. Brock*, 92 Va. 173, 23 S. E. 224.

Starkie, Ev. (9th Ed.) top p. 81, says: "The law interferes to exclude all evidence which falls within the description of *res inter alios acta*, the effect of which is, as will presently be seen, to prevent a litigant party from being concluded, or even affected, by the evidence, acts, conduct, or declarations of strangers." *Eastburn v. Norfolk, etc., R. Co.*, 34 W. Va. 681, 12 S. E. 819.

(2) Specific Applications of Rule.

Execution of Similar Contracts with Other Persons.—Except in certain cases where the knowledge, motive or intention of the party is a material fact in the case, the general rule is that no reasonable presumption can be formed as to the making or execution of a contract by a party with one person, in consequence of the mode in which he has made or executed similar contracts with other persons. Neither can parties be affected by the conduct or dealing of strangers. Transactions which fall within either of these classes are *res inter alios acta*, and evidence of this description is uniformly re-

jected. *Repass v. Richmond*, 99 Va. 508, 39 S. E. 160.

Executions in Other Suits.—So, also, the rejection of evidence offered by the defendant, of executions issued against the plaintiff in other suits, and returned "no effects," the policy whereon this suit was brought having been taken out for the benefit of a third person named in the policy, is not erroneous, the evidence being irrelevant. *Fire Ass'n v. Hogwood*, 82 Va. 342, 4 S. E. 617.

Summons in Different Court.—On the trial of an action of unlawful detainer in the circuit court of Ohio county, it was held, not error for the court to refuse to permit a summons in an action of unlawful detainer in the municipal court of the city of Wheeling, claiming the same premises, to be read to the jury. *Zink v. Wilson*, 3 W. Va. 503.

Substitution of Obligors.—"In order that one liability may be replaced by another, by agreement, it is essential that the person in whom the correlative right resides should be a party to the agreement, or should, at all events, show by some act of his own that he accedes to the substitution. If A., being indebted to B., transfers his liability to C., and B. does not assent to the transfer, his rights are wholly unaffected; he will neither acquire any right against C., nor lose his former right against A. As regards B., the agreement between A. and C. is res inter alios acta, and it does not in any way benefit or prejudice him. But if B. assents to the arrangement come to between A. and C., and adopts C. as his debtor instead of A., then A.'s liability to B. is at an end, and B. must look for payment to C., and to him alone. To apply this to cases of partnership, let it be supposed that a firm of three members, A., B., and C., is indebted to D.; that A. retires, and B. and C., either alone or together with a new partner, E., take upon themselves the liabilities of the old firm.

D.'s right to obtain payment from A. and B. and C. is not affected by the above arrangement, and A. does not cease to be liable to him for the debt in question." *Barnes v. Boyers*, 34 W. Va. 303, 12 S. E. 708.

Receipts as Evidence.—See the title RECEIPTS.

"We are not aware of any rule by which a seal can add to the authority of the receipt, or give it the character of competent evidence against parties having no connection with it. *M'Crea v. Purmort*, 16 Wend. 474. It would still be hearsay evidence, or, rather, res inter alios acta. 3 Starkie, Ev. 1300; 1 Phil. Ev. (Cow. & H. Ed.) 229, et seq., and notes 432-435." *Rogers v. Verlander*, 30 W. Va. 619, 5 S. E. 847.

Recitals in Deed.—See the title DEEDS, vol. 4, p. 364.

"I do not propose to do more than refer to these cases, as it will be seen from the opinions pronounced in this latter case that the policy of the recording statutes has exercised a large influence with those judges who have held that the recitals of the payment of the consideration by the grantee in the subsequent recorded deed was prima facie evidence against the grantee in a prior unrecorded deed. Upon this question the authorities seem to be pretty equally divided. Though in other cases the decided weight of authority seems to be that the recital in a deed of the payment of the consideration is not evidence as against a stranger, nor as against a creditor of the grantor assailing the deed as voluntary and fraudulent." *Rogers v. Verlander*, 30 W. Va. 619, 5 S. E. 847.

Agreement between Partners.—Two partners executed a promissory note as follows: \$377.00. *Palatine, W. Va.*, Mch. 27, 1877. Twelve months after date we promise to pay to the order of Thos. H. Barnes, three hundred and seventy-seven dollars, without interest, value received. *Boyers & Harden*,"—and subsequently dissolved, and the retiring member agreed with his late as-

sociate that the latter should retain the partnership property, and pay the debts of the firm, and duly notified the common creditor of this agreement, and required him to bring suit as provided in §§ 1, 2, ch. 101, W. Va. Code; but the creditor never assented to the arrangement, and did not bring suit until the remaining partner had become insolvent, when he brought this action. Held, that such agreement between the partners, so far as the common creditor was concerned, was *res inter alios acta*, and he retained unimpaired all of his rights and remedies against both partners as principals, and the said provisions in the Code for the relief of sureties do not apply to such a case. *Barnes v. Boyers*, 34 W. Va. 303, 12 S. E. 708.

Manner of Loading Car Wheels.—The mode adopted by one railroad company of loading car wheels can not be given in evidence to charge another company with negligence for not loading in the same manner, though the general practice of railroads in doing like work and the comparative safety of different methods may be shown by competent evidence. *Southern R. Co. v. Mauzy*, 98 Va. 692, ...

Carriers of Goods—Rates.—In an action against a carrier for an alleged breach of contract to carry goods at an agreed rate, the contracts for sale of the goods made by the shipper to third persons, based on the rate agreed, but to which the carrier was not a party, and of which it had no knowledge until after they were made, are not admissible in evidence. Such contracts do not tend to prove the making of the contract in suit. *Southern R. Co. v. Wilcox*, 99 Va. 394, 39 S. E. 144.

Handwriting—Genuineness.—See the title HANDWRITING.

Where it was alleged that the paper produced was the forgery of a third person, evidence that such third person had forged the defendant's signature to instruments of a similar nature, was held not to be admissible; and this

on the ground that the plaintiff could not be prepared to support the authority of the other deeds. In this case, not only the capacity to do so, but the actual forgery of other similar papers, was offered to be proved. *Rowt v. Kile*, Gilmer 202.

Records in Other Suits.—See the title RECORDS.

In a suit in chancery, the defendants are in default; yet the record or proceedings in another suit *inter alios*, is not competent evidence against them. *Frazier v. Frazier*, 2 Leigh 642.

Negligence.—See the title NEGLIGENCE.

In an action by an employee against a corporation for a personal injury, it is error to allow other employees to testify what they did after the time of the injury, and their reasons therefor. *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509.

Telephone Companies.—In an action for personal injuries received by reason of the negligence of a telephone company in permitting its wire to be stretched so low down over the public highway as to be caught by a horse's feet in passing, it is not competent to prove the condition of the wire at that point months subsequent to the time of the injury complained of. *Hannum v. Hill*, 52 W. Va. 166, 43 S. E. 223.

Street Railroads.—In an action to recover damages for personal injuries inflicted by an electric railway company, in consequence of the breaking of a trolley wire, evidence that this trolley wire had broken frequently recently theretofore is admissible. *Richmond R., etc., Co. v. Bowles*, 92 Va. 738, 24 S. E. 388.

Defective Sidewalk.—In an action against a city for injuries from falling into a hole in a sidewalk, testimony that plaintiff's witness fell into the same hole the same night was held collateral and inadmissible. *Moore v. Richmond*, 85 Va. 538, 8 S. E. 387.

Injuries to Animals by Railroads.—See the title ANIMALS, vol. 1, p. 375.

Evidence tending to prove that a colt is killed by an engine on a railroad, and to prove that the servant of the railroad company carelessly and negligently put down the fence, through which the colt escaped from the field on to the railroad track, evidence is offered to show that a cherry tree was cut at the place where the colt went through the fence, and that it could not have been cut without laying down the fence; and to prove that the agent of the railroad company cut the tree, and necessarily put down the fence, following declaration of the agent of the railroad company, made at another time and at a different place, and on the farm of another, to-wit: "The section 'boss' told him (the witness) that he had been ordered by the railroad company to cut all the trees along the line, and that they had cut all the trees from Summit Point down," is inadmissible. *Coyle v. Baltimore, etc., R. Co.*, 11 W. Va. 94.

Fires Set by Locomotives.—See the title FIRES.

In an action to recover damages of a railroad company resulting from fires communicated by its engines, where evidence has been received, without objection, of other fires communicated by the engines of the company prior and subsequent to the fire in question, it is not error to instruct the jury that they may consider such evidence for the purpose of determining whether or not there was negligence on the part of the company's employees, or defects in its engines, and also for the purpose of showing a negligent habit of the officers and agents of such company. *New York, etc., R. Co. v. Thomas*, 92 Va. 606, 24 S. E. 284, citing *Richmond, etc., R. Co. v. Medley*, 75 Va. 499; *Brighthope R. Co. v. Rogers*, 76 Va. 443.

R.'s wood, piled on line of B. railway and insured with W. F. Insurance Co., is destroyed by the railway company's negligence, and paid for by the insurance company. Testimony is ad-

missible to prove that the locomotive which fired R.'s wood, had, on other occasions, emitted sparks and set fire to property along the railway, in order to show negligence and defects of machinery. *Brighthope R. Co. v. Rogers*, 76 Va. 443.

Identity of Engine.—In an action to recover damages for a fire set by an engine of a railroad company, after the plaintiff has identified with certainty the engine alleged to have communicated the fire complained of, it is not admissible to introduce evidence of other fires communicated along the company's right of way without first showing that the other fires were set from the engine in question. If the injury complained of is shown to have been caused, or could only have been caused, by a known and identified engine, the evidence should be confined to the condition of that engine, its management and practical operation. *Norfolk, etc., R. Co. v. Briggs*, 103 Va. 105, 48 S. E. 521, citing *Brighthope R. Co. v. Rogers*, 76 Va. 445; *New York, etc., R. Co. v. Thomas*, 92 Va. 606, 24 S. E. 264; *Patteson v. Chesapeake, etc., R. Co.*, 94 Va. 16, 26 S. E. 393; *Kimball v. Borden*, 95 Va. 203, 28 S. E. 207; *White v. New York, etc., R. Co.*, 99 Va. 357, 38 S. E. 180; *Norfolk, etc., R. Co. v. Perrow*, 101 Va. 345, 43 S. E. 614.

In an action against a railroad company to recover damages for a negligent fire set out by one of its engines, evidence of other fires, in the same vicinity, set out by duly equipped engines on the lines of other railroad companies, is irrelevant. *Norfolk, etc., R. Co. v. Briggs*, 103 Va. 105, 48 S. E. 521.

Usury.—See the title USURY.

Evidence of lending, at a usurious rate of interest, to other persons, is not competent to prove a usurious rate in the case on trial. "The general rule is that, when the issue is whether the party did a particular thing, it is not admissible to put in evidence that he

did a similar thing at some other time; and nothing appears to withdraw this case from the operation of the rule. On the contrary, it is within the reason of the rule; it would be trying an irrelevant side issue, with the trial prolonged, and the real issue overridden and obscured." *Hartman v. Evans*, 38 W. Va. 669, 18 S. E. 810.

Condonation.—Where the issue is made that an officer knowing the default of his deputy, "condoned his fault by lending him money," it is not competent to show that another person loaned the deputy money about that time. That fact is immaterial. *American Bonding, etc., Co. v. Milstead*, 102 Va. 683, 684, 47 S. E. 853.

Floods.—See the title **WATERS AND WATERCOURSES**.

In an action by E. against H.'s executor to recover damages for injury to his land by the overflowing and sobbing of his land lying on a stream on which H. had built a dam in 1848, in the county of Louisa, evidence of the effect of a dam in raising the bottom of the stream and overflowing the lands lying on the streams above the dams in the county of Albemarle, is inadmissible. *Ellis v. Harris*, 32 Gratt. 684.

Accident Insurance.—See the title **ACCIDENT INSURANCE**, vol. 1, p. 71.

In an action on a policy of life insurance, insuring against injuries resulting from accidental causes, in which the defense of intoxication at the time of the accident is set up by a company, it is not error for the court to refuse to permit evidence to show that previously, and when under the influence of liquor, the deceased had attempted to jump from a window in which he was found the day of his death. *Travelers' Ins. Co. v. Harvey*, 82 Va. 949, 5 S. E. 553.

(3) Limitations and Exceptions.

Knowledge, Motive or Intention.—See the titles **HOMICIDE**; **PAROL EVIDENCE**.

In General.—But whenever the knowledge, motive or intention of a party is a material fact in issue, then collateral facts, that is, other acts and declarations of a similar character, tending to establish such intent or knowledge, are proper evidence, provided they are not too remote. *Trogdon v. Com.*, 31 Gratt. 862; *Repass v. Richmond*, 99 Va. 508, 39 S. E. 160.

In a suit to rescind a contract for false representations, evidence of similar representations to other persons, about the same time, is admissible to show the bent of mind of the party making the representation. *Wilson v. Carpenter*, 91 Va. 183, 21 S. E. 243.

In an action for slander, words spoken at different times before suit brought, though not declared on, may be given in evidence to show the intent with which the words declared on were spoken, but words spoken after suit brought can not be given in evidence, for they may be the ground of another action. *Swindell v. Harper*, 51 W. Va. 381, 41 S. E. 117.

Execution of Promissory Note.—"Four months after date I promise to pay to Wilkinson & Hunt, or order, without offset, negotiable and payable at the office of discount and deposit of the Bank of Virginia at Charleston, Kanawha, nine hundred and thirteen dollars and fifty cents, for value received. Robert H. Early (For Sam'l H. Early)." Held, upon the face of the paper it is the note of Robert H. Early. Held, proof that another note was executed by Robert H. Early to another person, about a month previous to the execution of this, with the same additional, excepting the brackets, and that the reason given by him for the addition of the words "for Sam'l H. Early" was, "that in the case of the death of either his brother or himself the note would show on what account or for whose benefit it was given," held to be competent evidence; the only question being why were these words "for Sam'l H. Early,"

written at the foot of the note? "We mean only to say, in the language of Phillips (edition of 1849, vol. 1, p. 461), that 'it may frequently be very proper, and in some cases absolutely necessary, to look beyond the transaction which is the immediate subject of inquiry into previous transactions, for the purpose of making a just inference as to the knowledge of the parties, their motives or intention;' and to say, that this case, on the supposition above made, may come within that principal." *Early v. Wilkinson*, 9 Gratt. 68.

Fraud and Deceit.—In *Piedmont Bank v. Hatcher*, 94 Va. 229, 231, 26 S. E. 505, the court lays down the following rule: "Where fraud in the sale or purchase of property is in issue, evidence of other frauds of like character, committed by the same parties, at or near the same time, is admissible. Its admissibility is placed upon the ground, that, where transactions of similar nature are executed by the same parties, and closely connected in point of time, the inference is reasonable that they proceed from the same motive. Large latitude is always given to the admission of evidence where the issue is fraud," citing *Trogdon v. Com.*, 31 Gratt. 862, and *Lincoln v. Chaffin*, 7 Wall. 132; *Butler v. Watkins*, 13 Wall. 456; *Ins. Co. v. Armstrong*, 17 U. S. 591. In *Lillienfeld v. Com.*, 92 Va. 818, 22 S. E. 882, in a proceeding to revoke a liquor license for selling liquor to minors, it was held, competent to offer in evidence a number of indictments found in the same court against the same defendant for similar offenses, and also to receive the evidence of a minor, that within twelve months prior to the time when the license sought to be revoked took effect, the said minor had purchased intoxicating liquor of the defendant, citing *Trogdon v. Com.*, 31 Gratt. 862.

False Representations.—In a suit to rescind a contract for false representations, evidence of similar representations to other persons, about the same

time, is admissible to show the bent of the mind of the party making the representations. *Wilson v. Carpenter*, 91 Va. 183, 21 S. E. 243.

But it has been held, that evidence of acts and conversations of third parties, is irrelevant and inadmissible to show that the defendant was fraudulently induced by them to execute the bond sued on, unless the plaintiff is shown to have participated in the fraud. Relevancy must always be shown by him offering the evidence. *Triplett v. Goff*, 83 Va. 784, 3 S. E. 525.

In an action to rescind a conveyance for alleged false representations, the fact that other land agents, in attempting to sell land similarly located, made similar representations to others, is immaterial. *Beckley v. Riverside Land Co.*, 2 Va. Dec. 283, citing *Wilson v. Carpenter*, 91 Va. 183, 21 S. E. 243.

Advancements.—See the title ADVANCEMENTS, vol. 1, p. 189.

Where the issue is whether a bond was delivered by a parent to a child by way of advancement, it is competent for the child to prove similar advancements by the parent to the other children. *Brock v. Brock*, 92 Va. 173, 23 S. E. 224.

Proof of Residence—Service of Process.—Testimony of an officer that since the attachment issued, he served process in other suits against the attachment debtor by leaving copies with his wife at his house and explaining purport, is admissible as evidence tending to establish residence. *Starke v. Scott*, 78 Va. 180.

Mental Condition of Testator.—If undue influence be proved to have been exercised over the testator, both before and after the execution of the will, the facts may be given in evidence to the jury, from which they may infer, if they see proper, that undue influence was exercised over the testator at the time the will was made. *Forney v. Ferrell*, 4 W. Va. 729. See *Jarrett v. Jarrett*, 11 W. Va. 584.

Insanity.—Where the defense of a

prisoner is insanity, evidence to prove insanity before the act committed is proper, without first proving the insanity at the time of its commission. *Vance v. Com.*, 2 Va. Cas. 132.

b. In Criminal Cases.

See the particular criminal titles.

(1) In General.

It frequently happens that as the evidence of circumstances must be resorted to for the purpose of proving the commission of the particular offense charged, the proof of those circumstances involves the proof of other acts, either criminal or apparently innocent. In such cases, it is proper that the chain of evidence should be unbroken. If one or more links of that chain consist of circumstances, which tend to prove that the prisoner has been guilty of other crimes than that charged, this is no reason why the court should exclude those circumstances. They are so intimately connected and blended with the main facts adduced in evidence, that they can not be departed from with propriety; and there is no reason why the criminality of such intimate and connected circumstances, should exclude them, more than other facts apparently innocent. Thus, if a man be indicted for murder, and there be proof that the instrument of death was a pistol; proof, that that instrument belonged to another man, that it was taken from his house on the night preceding the murder, that the prisoner was there on that night, and that the pistol was seen in his possession on the day of the murder, just before the fatal act committed, is undoubtedly admissible, although it has the tendency to prove the prisoner guilty of a larceny. Such circumstances constitute a part of the transaction; and whether they are perfectly innocent in themselves, or involve guilt, makes no difference, as to their bearing on the main question which they are adduced to prove. But if the circumstances have no intimate con-

nections with the main fact; if they constitute no link in the chain of evidence; then, supposing them innocent, their admission, to be sure, may do no harm, yet they ought to be excluded, because they are irrelevant; but if they denote other guilt, they are not only irrelevant, but they do injury, because they have a tendency to prejudice the minds of the jury; and for this additional reason they ought to be excluded. *Walker v. Com.*, 1 Leigh 574.

On the trial of an indictment against A, what passes between B and C is generally inadmissible against A, under the rule of *res inter alios acta*. *Payne v. Com.*, 31 Gratt. 855.

Indictment against Other Persons.—It is not error to exclude as evidence an indictment against another person for the same offense. *Taylor v. Com.*, 90 Va. 109, 17 S. E. 812.

(2) Proof of Other Crimes.

(a) In General.

And another rule, closely related to the one just stated as to the admissibility of collateral facts, is that proof of other crimes, having no connection with the one for which the accused is on trial, is irrelevant and inadmissible. *Cole v. Com.*, 5 Gratt. 696; *State v. Sheppard*, 49 W. Va. 582, 39 S. E. 676; *Watts v. State*, 5 W. Va. 532.

In public prosecutions for a specific offense, it is incumbent on the prosecution to prove that the offense which is charged has been committed; he is not allowed to go into proof of the commission of any other offense than that charged, or of the character of the prisoner, unless the prisoner himself opens the way for the admission of that evidence by putting his character in issue; and, even in that case, the prosecutor can not prove particular facts, but must content himself with evidence of general character. The reasons on which these positions are founded, are sufficiently obvious. Not only must the proof correspond with the allegation, but it is an important

principle, that the prisoner should not be taken by surprise. As he is charged with a particular offense, he has notice to be prepared to defend himself against that charge, and that alone; he can not be prepared to defend himself against other charges, not exhibited against him, or to maintain the integrity of his whole life, when that is not put in issue; and when it is, he can not be prepared to account for particular instances of misconduct, of which he is not previously informed, and as to which he is not required to defend himself. *Walker v. Com.*, 1 Leigh 574.

(b) Specific Applications of Rule.

See the titles treating the specific offenses.

Larceny.—On the trial of an indictment for the larceny of a watch, evidence of another larceny of a cloak, committed by the prisoner, the two acts being wholly distinct and unconnected, is not admissible for any purpose. *Walker v. Com.*, 1 Leigh 574.

Assault and Battery—Rape.—On an indictment for procuring persons to shoot, cut, stab, wound, etc., with intent to maim, etc., a certain other person, it is error to admit testimony of a rape committed by such person after they had broken into a dwelling, where such other person was lodging. Because the rape was a distinct, substantive offense from that charged in the indictment, and had no connection whatever with the offense charged, and because it was a total and substantial departure from that instructed, and the defendant could not be held responsible as accessory thereto. *Watts v. State*, 5 W. Va. 532.

Proof of other homicides, having no connection with the one for which the defendant is on trial, is irrelevant and inadmissible. *State v. Sheppard*, 49 W. Va. 582, 599, 39 S. E. 676.

On the trial, evidence was offered by the prisoner that several months before the homicide the deceased had

made an assault upon her with intent to commit a rape. Held, inadmissible. *Hodges v. Com.*, 89 Va. 265, 15 S. E. 513.

It is proved in an action of trespass for false arrest and imprisonment, that the plaintiff was imprisoned by the defendant, the latter acting as provost marshal for the confederate authorities, in the jail of M. county; that he was afterwards surrendered by the jailor to the provost guard and taken to Richmond, where he was held on a charge of disloyalty to the confederate government, and subsequently removed to Salisbury prison, North Carolina; that by general orders it was the duty of defendant to turn over persons charged with like offense with the plaintiff to the nearest confederate military authorities, which were at the time of the arrest at a certain place in M. county, and that the defendant had no authority to make other disposition of persons charged with like offenses with the plaintiff. The defendant moved to exclude that part of the testimony which related to the imprisonment at Richmond and Salisbury. Held, motion properly refused. *Caperton v. Martin*, 4 W. Va. 138, 6 Am. Rep. 270.

Harmless Error.—Where, on trial for murder, prisoner had been, without objection, proven to have confessed that on night of homicide certain goods had been stolen, and a witness was allowed to testify that those goods were found in prisoner's house when he was arrested for the homicide; held, as prisoner was not prejudiced by the testimony, its admission, though irregular, was not a reversible error. *Com. v. Brown*, 90 Va. 671, 19 S. E. 447.

(c) Limitations and Exceptions.

Motive, Intent or Guilty Knowledge.—There is one class of cases in which the courts have allowed the evidence of other criminal acts of the same character to be given in evidence in support of the charge; cases in which it is necessary to prove the scienter.

Thus, in prosecutions for uttering forged notes, etc., knowing them to be forged, it has been frequently permitted to prove that the prisoner has committed other utterings of forged notes, for the purpose of proving, or of enabling the jury to infer, that he knew that the note which he is charged with uttering, was a forged note. Such was *Whiley's case*, 1 New Rep. 94; 2 Leach 983, and *Ball's case*, 2 Leach 985, in note; both of which are referred to, and approved by this court in *Finn's case*, 5 Rand. 701, 710. The principle on which this species of evidence has been admitted in those cases is, that it is frequently impossible, from the isolated fact of the uttering a single forged note, to ascertain whether the accused knew it was forged or not. Knowledge exists in the mind; and it is impossible, say the courts, to become acquainted with the secret knowledge of another, without referring to his conduct or his acts on other occasions. A man perfectly honest, who is not skilled in the character of bank notes, may pass a forged note with perfect innocence; the single fact of passing does not prove his knowledge; the courts therefore say, that you may prove other utterings, and the circumstances attending them, for the purpose of proving the knowledge which constitutes the guilt. It is necessity which has driven the courts to the adoption of this rule, and some judges doubt whether it is correctly established. *Walker v. Com.*, 1 Leigh 574.

"On a criminal trial, the state can not prove any crime against the defendant which was not alleged in the indictment, as a foundation for a separate punishment, and as aiding the proof that he was guilty of the crime charged, unless such other crime tends to prove motive, intent, the absence of mistake or accident, the identity of the person charged with the commission of the crime, or a common scheme embracing the commission of two or more crimes so closely related that

proof of one tends to establish the other." *Taylor v. Com.*, 90 Va. 109, 17 S. E. 812; *Kibler v. Com.*, 94 Va. 804, 26 S. E. 858; *O'Boyle v. Com.*, 100 Va. 785, 792, 40 S. E. 121.

Homicide.—While it is true that the state, for the purpose of showing that the defendant would be likely to commit the crime charged, can not prove that he committed other like crimes against another person, it is nevertheless competent to show that the accused made previous attempts on the life of the same person. It shows animus and intent. It rebuts the theory of accident. Previous threats are undoubtedly admissible. Then, certainly, previous attempts upon the life of deceased by the accused are more pertinent to show his animus and intent. "In cases of homicide it has always been competent to show the conduct and the feelings of the prisoner toward his victim, and proof that he had made previous threats, or attempts to kill his victim, has always been received." *Nicholas v. Com.*, 91 Va. 741, 748, 21 S. E. 364.

Record of indictment in another state against prisoner at time of homicide, is admissible to show motive for resisting arrest. *Williams v. Com.*, 85 Va. 607, 8 S. E. 470.

On a trial for larceny in a hotel, it is competent for the commonwealth to prove the presence of the prisoner in the hotel on the night when the larceny was committed, and his acts and conduct there, and the circumstances attending his arrest, as a part of the whole transaction; though these acts amount to an attempt to commit a felony on another person, in another part of the hotel. *Burr v. Com.*, 4 Gratt. 534.

Malicious Shooting.—There is another class of cases in which it is held permissible to prove other offenses for the purpose of showing the guilty intent of the accused. Thus upon an indictment for maliciously shooting at the prosecutor, it has been held proper

to show that the accused had twice shot at the prosecutor the same day, for the purpose of rebutting the idea of accident, and of establishing the willful intent. *Trogdon v. Com.*, 31 Gratt. 862.

Poisoning.—And so, upon a prosecution for administering sulphuric acid to horses, with intent to kill them, evidence is admissible that the prisoner had frequently mixed sulphuric acid with horses' corn. *Trogdon v. Com.*, 31 Gratt. 862.

Upon an indictment for a libel, the publication of other libels not laid in the indictment, may be given in evidence to show the *quo animo* the defendant made the publication in question. *Trogdon v. Com.*, 31 Gratt. 862.

In prosecutions for uttering forged notes, for passing counterfeit money, and for receiving stolen goods, evidence is always admissible of other transactions of a like character, although they may amount to distinct felonies, provided they are not too far removed. What are the limits as to time and circumstances, in such cases, it is for the court in its discretion to determine. Nor is it an objection, that the offenses thus proved are the subjects of separate indictments. *Roscoe on Crim. Evidence*, 86; 3 *Russell on Crimes*, 285. The object of this evidence is simply to show the guilty knowledge of the accused. *Trogdon v. Com.*, 31 Gratt. 862.

Passing Counterfeit Money.—In indictments for passing counterfeit money, the scienter may be proved by showing that the defendant passed or attempted to pass other counterfeit money to other persons about the same time. *Martin v. Com.*, 2 Leigh 745; *Spencer v. Com.*, 2 Leigh 751; *Hendrick v. Com.*, 5 Leigh 707, 708; *Wash v. Com.*, 16 Gratt. 530, 540; *Finn v. Com.*, 5 Rand. 701.

On the trial of an indictment for passing a counterfeit bank note or check, after evidence that the prisoner passed the note, and that it was coun-

terfeit, evidence that the prisoner had in his possession and attempted to pass other counterfeit notes of the same kind to other persons, the day after he passed those in the indictment mentioned, is admissible to prove the scienter. *Hendrick v. Com.*, 5 Leigh 707.

False Pretenses.—"It has been said, that whatever may be the rule elsewhere, under our statute, obtaining goods upon false pretenses is made larceny, and upon a prosecution for larceny, it is not admissible to prove other larcenies, by way of showing the intent. Without stopping to controvert the conclusion reached by this position, it is sufficient to refer to *Anable's case*, 24 Gratt. 563, in which it was held, that whilst the statute declares that the party obtaining goods by false pretenses is guilty of larceny, it is not intended to dispense with the proof requisite to show that the goods were obtained by false pretenses. Every ingredient entering into the offense of obtaining goods by false pretenses must be shown as fully as if the statute had not been passed." *Trogdon v. Com.*, 31 Gratt. 862.

Upon the prosecution of T. for obtaining goods from M. & Co. upon false pretenses, evidence that the accused, in the same city and at or about the same time, purchased goods from other parties, B. and O., upon the same false pretenses, is admissible to show the intent of the accused in making the representations to M. & Co., but not as proof that the accused had committed other offenses not charged in the indictment. And this, though the statute has made the obtaining goods on false pretenses larceny. *Trogdon v. Com.*, 31 Gratt. 862.

Practising Medicine without License.—Where, in a prosecution against a physician for practising without a license, the offense charged was within one year and the jurisdiction of the court, it is allowable to prove that defendant treated professionally a family

other than that of the informing witness. *Whitlock v. Com.*, 89 Va. 337, 15 S. E. 893.

Sale of Intoxicating Liquors.—Wharton, in 2 Crim. Law, § 1525, speaking of illicit sales of liquors, says: "It is erroneous to admit evidence of a greater number of offenses than there are counts, unless to prove scienter or quo animo. And the court, when several sales are introduced, will compel the prosecution to elect as to the sales on which it relies." Quoted in *State v. Chisnell*, 36 W. Va. 659, 15 S. E. 412.

Under indictment of one count by giving evidence tending to show one sale, the state has not made a final election to rely on that sale which will preclude it from proving another to sustain its indictment; and it is not error for the court, in its discretion, to allow evidence of another sale. When, in such case, evidence of more than one sale is given, on the request of defendants, at the close of the state's evidence, the court should compel the state to elect the particular sale on which it will rely for conviction, and then exclude evidence of other sales. Where, in such case, there is evidence before the jury tending to prove two different sales, it is error for the court to instruct the jury, against objection, that if either sale is proven it should convict. *State v. Chisnell*, 36 W. Va. 659, 15 S. E. 412.

Res Gestæ.—See the title RES GESTÆ.

On a trial for murder, evidence that the prisoner, on the same day the deceased was killed, and shortly before the killing, shot a third person; held, admissible under the circumstances of the case, notwithstanding the evidence tends to prove a distinct felony committed by the prisoner; such shooting, and the killing of the deceased, appearing to be connected as parts of one entire transaction. *Heath v. Com.*, 1 Rob. 735.

Where the killing of two people con-

stitutes parts of the same tragedy so that a detailed statement of killing one can not be given without also relating the killing of the other, the latter evidence is admissible as evidence of the general conduct of the slayer and as part of the *res gestæ*. *Reed v. Com.*, 98 Va. 817, 36 S. E. 399.

3. Subsequent Repairs.

See generally, the title NEGLIGENCE, and references given.

In an action by a servant to recover damages for a personal injury resulting from alleged defects of machinery, evidence of repairs to the machinery after the injury is not admissible to show negligent failure to repair before the injury, but if the defendant offers evidence of good condition after the injury, the plaintiff may rebut it by evidence to disprove that fact, or may show subsequent repairs. *Virginia, etc., Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. 976.

"The first assignment of error is to the introduction of evidence showing what repairs had been made upon the alleged defective machine subsequent to the injury complained of. The question whether such evidence is admissible to show that the former condition of the machine was unsafe, and that the defendant was negligent in so maintaining it, does not seem to have been passed upon by this court. There is some conflict in the cases on the subject, but it seems now to be settled by the great weight of authority, and upon the most convincing reasons, that such evidence is not competent." *Virginia, etc., Wheel Co. v. Chalkley*, 98 Va. 62, 63, 34 S. E. 976.

In order to rebut evidence offered by defendant, the plaintiff may prove the condition of defective machinery which caused the injury complained of shortly after the injury, and also subsequent repairs. *Virginia, etc., Wheel Co. v. Harris*, 103 Va. 709, 49 S. E. 991; *Virginia, etc., Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. 976.

4. Habit.

"Evidence of habit is inadmissible for the purpose of showing that a particular person did or did not do a particular thing." Whart. Ev., § 1287. *Triplett v. Goff*, 83 Va. 784, 786, 3 S. E. 525.

"The general character and habits of Bowie are not fit subjects of inquiry in this suit for any purpose. The rules of law do not require the plaintiff to be prepared with proofs to meet such evidence, and it is never permitted unless the nature of the action involves or directly affects the general character of the party." 1 Greenl. Ev., § 54. *Triplett v. Goff*, 83 Va. 784, 787, 3 S. E. 525.

Suretyship.—It has been held, that in an action against a surety on a bond, evidence of his habit as respects becoming surety for persons, is admissible. *Triplett v. Goff*, 83 Va. 784, 3 S. E. 526. See *Dillard v. Collins*, 25 Gratt. 343. 356.

"Evidence of the habit of the maker of a note to gamble when drunk is not admissible to show that such note was given for money lost at play." *Triplett v. Goff*, 83 Va. 784, 786, 3 S. E. 525.

C. KNOWLEDGE.

Evidence as to a party's knowledge or ignorance upon any given subject is often competent, and may frequently be shown by his own testimony.

In an action against a railroad company to recover damages for killing a person while walking on defendant's track, evidence of such person's knowledge of signals intended solely to secure the safety of persons and property on the trains of the defendant is impertinent, and should be excluded. The error in admitting such evidence, or in refusing to strike it out, is not cured by instructing the jury that if they believe the signals were for the use and guidance of the employees of the defendant, and not for the public, then the deceased could not rely on them. *Chesapeake, etc., R. Co. v. Rogers*, 100 Va. 324, 41 S. E. 732.

Where, with a knowledge of the facts, the principal acquiesces in the acts of the agent, under such circumstances as would make it his duty to repudiate such acts if he would avoid them, such acquiescence is a confirmation of the acts of the agent. It is not necessary that such knowledge shall be shown by positive evidence; it may be deduced, or inferred from the circumstances and facts of the case. *Curry v. Hale*, 15 W. Va. 867.

D. CHARACTER IN EVIDENCE.

In Civil Cases.—It may be stated as a general rule that, except when the civil action is of such a nature as necessarily involves the character of the litigants, as for example, in civil actions for breach of promise of marriage, seduction, or libel and slander, and for some purposes in malicious prosecution, character is not admissible in evidence. See the titles BREACH OF PROMISE OF MARRIAGE, vol. 2, p. 614; LIBEL AND SLANDER; MALICIOUS PROSECUTION; SEDUCTION.

As to the impeachment of witnesses, see the title WITNESSES.

In an action of assumpsit to recover a sum of money in gold which had been delivered by the plaintiff to the defendant for safekeeping, the only plea in the case was nonassumpsit. There was no question as to the delivery of the gold to the defendant, but the defense was that he had been robbed of it, and the effort of the plaintiff was to prove a fraudulent appropriation of it by the defendant conspiring with another person. Held, evidence of the general character of the defendant by him is not admissible, and therefore the failure to produce it is not any ground for an inference unfavorable to his integrity. The counsel for the plaintiff, in his argument before the jury, having relied on the fact that the defendant had introduced no proof of his character, after the argument was concluded the court properly, of its own motion, instructed the jury that the

character of the defendant as a party to the suit was not involved in the issue to be tried; that he had no right to introduce proof of his general character, and that the jury should disregard all argument made before them by the plaintiff's counsel, based on the failure of the defendant to introduce such evidence. *Danville Bank v. Waddill*, 31 Gratt. 469.

On the plea of *non est factum*, it being proved that a son of the plaintiff said he could counterfeit the land of the defendant, evidence may be given to show the infamy of the son's character, circumstances existing to render the execution of the instrument doubtful. *Rowt v. Kile*, Gilmer 202.

In Criminal Prosecutions.—As to character in criminal prosecutions, see the title CRIMINAL LAW, vol. 4, pp. 87, 92.

E. VALUE.

For words and phrases related to this question, see PRICE; VALUE. As to market value, see the titles EMINENT DOMAIN, ante, p. 66; SALES.

1. In General.

The courts generally regard, as the value of a thing, the price it will bring. Value admits of no precise standard. This rule is especially applicable to public sales. *Bradford v. McConihay*, 15 W. Va. 732, 763.

2. Of Personalty.

It seems that inventories and appraisements are *prima facie* evidence of the value only of the property inventoried and appraised; being no evidence, against any person, other than the executor or administrator, that such property belonged to the decedent. *Carr v. Anderson*, 2 Hen. & M. 361.

In a suit by the personal representative of the testator to recover for chattels converted, such personal property book itself would not be admissible to show the value of the personal estate of the testator or the legatee for life. *Bartlett v. Patton*, 33 W. Va. 71, 10 S. E. 21.

Va. Code, § 3709, providing that in a prosecution for larceny the money due on, or secured by, the writing, and "remaining unsatisfied," shall be deemed the value of the article stolen, held, merely to prescribe a rule for estimating the value of the paper, and not a part of the necessary description of the offense. As the law presumes that the face value of the writing is its actual value, held, no proof of its actual value is required. *Whalen v. Com.*, 90 Va. 544, 19 S. E. 182.

In an action to recover the value of a stock of goods destroyed by fire, it is not error to allow the owner, in the absence of better evidence of value, to give to the jury an estimate of the total amount of his purchases since he occupied the location at which he was at the time of the fire, and his annual sales from the same date; nor to allow a witness to give his valuation of the stock destroyed, based upon a cursory view the day before the fire, not made with any purpose of valuation, nor any expectation of being thereafter called on to estimate their worth; nor is it error to allow a witness to state his estimate of the value of the stock seen at the store two days before the fire. While such evidence is of little value, still it is admissible. The owner is often unable to produce direct evidence of value, and he can only be required to prove value by the best evidence attainable. *Norfolk, etc., R. Co. v. Briggs*, 103 Va. 105, 48 S. E. 521.

Remoteness in Time.—In an action for killing a horse the plaintiff as a witness for himself stated, that he had bought the horse four or five years before it was killed, and that it was worth when killed a certain price; on cross-examination, the defendant asked him, what he paid for the horse, which question, on objection by the plaintiff, was excluded by the court. This was not error to the prejudice of plaintiff in error under the circumstances of this case. "The time here was so great between the date of the purchase of

the horses and that at which their value is sought to be proved, that any answer given by the witness would have furnished very little, if any, information as to their value at the latter date. If the price paid could in any case be proper evidence of the value at a subsequent time, it would certainly not be proper where the intervening time was so long as it was in this instance. The price paid is not necessarily the market value of a horse, but rather the value placed upon it by the seller and the purchaser at the time. It will not be contended that the value placed upon the horse by the owner fixed by the estimate of what it is worth to him would be proper evidence. The evidence excluded was of this nature. In four or five years the intrinsic value of a horse would almost certainly change very materially; and not only so the market value of a horse of the same intrinsic value would probably be very much altered in that time." *Johnson v. Baltimore, etc., R. Co.*, 25 W. Va. 570.

In ascertaining what is the market value of personal property on the day of delivery at a certain place, it is proper to hear evidence of the market value thereof within a reasonable time both before and after such day, if not too remote therefrom to aid in determining. *Boyd v. Gunnison*, 14 W. Va. 1.

Collateral Facts.—In an action on a working contract to perform work on a certain house on Q street at full plaster's prices, it was held, that the defendant had a right to prove what was the price agreed on for the outside work, or work done other than on the Q street house. *Brodie v. Clator*, 8 W. Va. 599.

3. Of Realty.

Price Paid.—In eminent domain proceedings, the price paid for land may be admitted as evidence of its value provided the purchase was not too remote from the appropriation in point of

time. *Guyandotte Val. R. Co. v. Buskirk* (W. Va.), 50 S. E. 521.

The highest bid made at an open judicial sale, fairly conducted, after full notice, in the face of such competition as can be attracted, is a fair and just criterion of the value of the property at that time. After-stated opinions, affidavits of under value, and the like, are regarded with little favor, and are entitled to little weight in comparison with the fact established by the auction and its results. *Nitro-Phosphate Syndicate v. Johnson*, 100 Va. 774, 42 S. E. 995.

Price and Value.—Defendant agrees to assign, transfer and deliver a title bond to plaintiff; the agreement is part of the consideration given by defendant for land bought of plaintiff. Held, the value of this land is a proper subject of inquiry at the trial of an action of assumpsit for breach of the agreement; and a witness, who had owned the land, having been examined by both parties as to its value, evidence offered to prove the price at which the witness had himself offered it for sale, is proper and competent. *Daniels v. Conrad*, 4 Leigh 401.

Rental Value.—See the title LANDLORD AND TENANT.

In an action brought to recover damages under § 9, art. 3, of the constitution, as compensation for permanent injury to real estate by the construction of a railroad upon a street adjacent to such property, in estimating the permanent damage, the jury may inquire into the value of the property, and, as a guide or assistance in so doing, it is not improper to hear evidence of its rental value or of an offer to purchase, which the plaintiff has refused. *Fox v. Baltimore, etc., R. Co.*, 34 W. Va. 466, 12 S. E. 757, citing *Mason v. Bridge Co.*, 20 W. Va. 223.

Fraud in Sale of Land.—At trial of issue, whether vendee was induced to buy by vendor's misrepresentations as to boundaries, evidence of the value of

the land at time of sale and since, is admissible, as tending to disprove imposition. *Snouffer v. Hansbrough*, 79 Va. 166.

F. TITLE, OWNERSHIP AND POSSESSION.

1. Of Personality.

In General.—The doctrine is well settled that the possession of personal property is prima facie evidence of title and ownership. *Tefft v. Marsh*, 1 W. Va. 38.

Letters are personal property, and the possession of them is prima facie evidence of title and ownership in the possessor. *Tefft v. Marsh*, 1 W. Va. 38.

The possession of a bill or note which is payable to bearer, or indorsed in blank, is prima facie evidence of ownership, and also that the holder received it upon a valuable consideration, paid therefor in the usual course of trade or business. *Bank v. Simmons*, 43 W. Va. 79, 27 S. E. 299.

Running Trains on Sunday.—See the title SUNDAYS AND HOLIDAYS.

In an indictment against a railroad company for being found laboring at its trade and calling on the Sabbath day, it is not necessary in such a case to prove by positive affirmative evidence that the cars, run over the track of the defendant, belonged to, or were under the control of, the defendant; this may be legitimately inferred from their being run over the railroad of the defendant. *State v. Baltimore, etc., R. Co.*, 15 W. Va. 362.

But the mere possession of a bond is not such an evidence of property as will justify a payment to the holder, without authority, express or implied, from the owner to collect the same. *Brown v. Taylor*, 32 Gratt. 135.

2. Of Realty.

In General.—Actual possession, being an element of complete legal title to real estate, is prima facie evidence of such title in the possessor. One in such possession may maintain trespass or trespass on the case for damage

thereto, without further proof of his title. *Wilson v. Phoenix, etc., Mfg. Co.*, 40 W. Va. 413, 21 S. E. 1035.

Actual possession of land is prima facie evidence of ownership in fee, and such owner is prima facie entitled to such possession. *Teass v. St. Albans*, 38 W. Va. 1, 17 S. E. 400.

G. MOTIVE AND INTENT.

See ante, "Res Inter Alios Acta," III, B, 2.

1. In General.

Where the motives of a party are a material enquiry in a cause, any evidence which tends in any degree to throw light upon them, is not to be rejected, though the court may think it not entitled to much weight with the jury. *Parsons v. Harper*, 16 Gratt. 64; *Jackson v. Com.*, 96 Va. 107, 30 S. E. 452.

2. In Criminal Cases.

See the titles CRIMINAL LAW, vol. 4, p. 78; FALSE PRETENSES AND CHEATS; HOMICIDE; etc.

When the motive for the crime appears to have been robbery and there is evidence tending to show that the prisoner was practically without money just before the murder and had considerable money immediately afterwards, but claims that it was his own, it is proper to ask him on cross-examination if he did not, shortly before the murder, deposit for drinks at a saloon, pay checks representing wages due him. *State v. Henry*, 51 W. Va. 283, 41 S. E. 439.

Homicide.—In 3 Russell on Crimes (9th Ed.) 288, it is said: "On the trial of an indictment for murder, former grudges and antecedent menaces are admitted to be given in evidence as proof of the prisoner's malice against the deceased." And, in a note to that sentence, it is said: "In many cases evidence of previous violence has been given in cases of murder without objection, and such evidence clearly tends to prove ill will." In 2 Bishop on Criminal Procedure, § 630: "On a

charge against the husband for murdering his wife, it may be shown that they quarreled, or that he illtreated her * * *. A prior difficulty, yet not irrelevant particulars, between any defendant and the deceased, may be shown." *O'Boyle v. Com.*, 100 Va. 785, 791, 40 S. E. 121.

On a trial for murder, testimony that about three weeks before the homicide the bed of the deceased was fired into, held, admissible, where prisoner several times mentioned the firing in a manner indicating he had done it himself, or procured it to be done. *Taylor v. Com.*, 90 Va. 109, 17 S. E. 812.

Upon an indictment against A for feloniously shooting B with intent to kill, the state may introduce evidence to show an assault or attack made by A upon B some two years prior to the offense charged in the indictment, for the purpose of showing malice on the part of A. "Although where a relevant fact has greater or less weight in proportion to its proximity or remoteness in point of time, place and circumstances, it is sometimes held, that the court may, in its discretion, fix the limit beyond which it becomes of inappreciable weight and reject it as immaterial though relevant, it is a practice liable to abuse, and therefore, unless the court can clearly see that it is too remote to be material, the safer and more satisfactory rule is for the court to admit whatever is relevant and leave the question of its weight to the jury." *State v. Yates*, 21 W. Va. 761, 765.

On the trial of W. for procuring certain persons to cut, shoot, stab, wound, etc., with intent, etc., one S., it is held, not to be error in the court below to admit as evidence a statement that on the evening of the day the offense was committed, W. and S. had an altercation, and W. struck at S. with a knife, whereupon S. threw a stone at W., to show the existence of a motive likely to instigate the defendant to the commission of the offense charged. "It

seems to me that the evidence was properly admissible to show 'the existence of a motive likely to instigate the defendant to the commission of the offense in question. (1 Wharton's *Crim. Law*, § 635.)'" *Watts v. State*, 5 W. Va. 532.

On a trial of Sullivan for maliciously shooting White, a warrant for the arrest of Sullivan, sworn out by White, is admissible evidence for the state to show grudge and malice on the part of Sullivan. *State v. Sullivan*, 55 W. Va. 597, 47 S. E. 267.

3. In Civil Cases.

The general rule is, that where a party is competent to prove the motives and intentions which have governed his own conduct, he may state in general terms that he did or refrained from doing a particular thing, material to the issue, on account of information received from a third person; but he can not go into details, or give conversations with third persons, held not in the hearing of the opposite party. *Lawson v. Conaway*, 37 W. Va. 159, 16 S. E. 564.

In an action of slander, the defendant was put upon the stand, and a number of questions put in various forms as to his feelings and motives in making the charge, whether with any ill will against the plaintiff, or only for the protection of his own rights and interests. The court did not err in rejecting these questions and answers. What boots it, that a man may come forward after he is sued for damages for slander and say that what he said was not maliciously said. What have his feelings and motives to do with the controversy? Can a man who has charged another with a crime, punishable with death, come forward and say, "I made this charge, but I had no unkind feelings against the plaintiff; I was not actuated by malice." To allow this mode of proof, would be to say that while the law imputes malice to the party who utters words actionable

in themselves, he may absolve himself from the commands of justice if he will say at the trial that he had no unkind feelings against the plaintiff, and that what he said was not said maliciously, but only confidentially, with a view to protect his own interests. The law will not tolerate such a subterfuge, and the court below was right in rejecting such evidence. *Dillard v. Collins*, 25 Gratt. 343, 356.

Weight and Sufficiency.—A writing solemnly signed, sealed, acknowledged before a magistrate, and delivered, by a person, is evidence of his intent, so convincing and conclusive, that, at common law, generally, no evidence will be received to contradict it. *Western Mining, etc., Co. v. Peytona Coal, etc., Co.*, 8 W. Va. 406.

In a court of equity, however, it may sometimes be proved that the deed was executed in mistake, and that, in fact, it embodies provisions different from those which the parties intended it to embody. But, even in this court, the deed is regarded as evidence so strong, that only other unequivocal evidence irresistibly conclusive, is sufficient to overthrow it. *Western Mining, etc., Co. v. Peytona, Coal, etc., Co.*, 8 W. Va. 406.

H. PECUNIARY CIRCUMSTANCES OF PARTIES.

In General.—When the pecuniary circumstances and condition of a party is relevant and germane to the issue, it may be shown in evidence. *McDowell v. Crawford*, 11 Gratt. 377. See the title ALIMONY, vol. 1, p. 300.

Defense of Arson in Fire Insurance.—In an action on an insurance policy, the defendant company, to make out the charge of arson against the plaintiff, can not show that "the plaintiff was during said three years, and ever since has been in very poor and very needy circumstances pecuniarily." *Deitz v. Providence, etc., Ins. Co.*, 33 W. Va. 526, 11 S. E. 50.

Forgery.—Upon the trial of an in-

dictment for uttering, and attempting to employ as true, a forged receipt for money, knowing it to be forged, it is proper to inquire into the pecuniary condition of the person in whose favor the alleged forged receipt purports to have been given, at or about the date of such receipt. *State v. Henderson*, 29 W. Va. 147, 1 S. E. 225.

Contracts of Employment.—On the trial of an issue under the plea of non-assumpsit, C., the plaintiff, introduces evidence tending to prove that a contract was made by the defendant, L., to pay him \$1,000 per annum for wages, and that said contract was agreed to be kept secret, that others in the employment of defendant might not be incited to demand an advance in their wages; that plaintiff continued under said contract for about three years, and had received \$2,340; that defendant introduced evidence tending to prove that no such contract was made, but that plaintiff was to receive \$15 per week during said three years, and that that amount per week was paid him during that time, and that a few days before said three years expired, plaintiff made a claim for \$1,000 per year as being their contract but which was denied by the defendant, and nothing further said at that time; that it was further proved that no other claim was made by plaintiff until about six months afterwards, when suit was brought, and, thereupon, the defendant offered to give evidence to the jury as follows, to-wit: "That the plaintiff was, during said three years and ever since, has been in very poor and very needy circumstances, pecuniarily." Held, that the evidence is inadmissible. *Campbell v. Lynn*, 7 W. Va. 665.

Action of Debt for Money Loaned.—In an action of debt upon a bond for two thousand dollars, purporting to be for money loaned, the issue is made upon the plea of non est factum. On the trial the plaintiff introduces ten intelligent and credible witnesses, well acquainted with the handwriting of the

obligor, all of whom express a confident opinion that the signature to the bond is his. The defendant, to support his plea, introduces evidence of the circumstances of the obligor, the relations and conduct of the parties, and the ability of the plaintiff to lend the money. To rebut the evidence on the last ground, the plaintiff, who was a merchant, introduced a witness, C., who had been his bookkeeper, who professed to speak from memoranda taken by him on a recent examination of the plaintiff's books; and he stated that the plaintiff had a large amount of cash notes and accounts not known to the defendant's witnesses, and that he had the control of a large estate of S., of which he was the executor. When the cross-examination of this witness, and the examination of witnesses to rebut his testimony, was ended, which was late in the evening, the defendant's counsel announced that they had no other witnesses to examine, but would on the next day introduce some documentary testimony. On the next day they offered in evidence the settled accounts of the plaintiff as executor of S. to show that he could not have from that source united with his own means, sufficient to enable him to make the loan. To this evidence the plaintiff objected, and the court excluded it; and in doing so, remarked that the evidence previously introduced by the defendant without objection, as well as that then offered, was too vague, remote and indefinite in its character, to sustain the plea of non est factum against such evidence of factum as the plaintiff had introduced; and would have been excluded if objected to. The defendant then asked that the witness C. might be recalled, and that they might be permitted to re-examine him, and test the accuracy of his statements, by requiring the production of the books, which were near and might be obtained in a few minutes. But the court refused to permit the witness to be recalled, or to require the books to

be produced; because the evidence was irrelevant and because the defendants had announced on the day before, that they had concluded the examination of witnesses. Held, the settlements of the plaintiff as executor of S. were competent and relevant testimony, and should have been admitted. *McDowell v. Crawford*, 11 Gratt. 377.

Personal Injuries.—By the weight of authority, the fact that the plaintiff in personal injury cases is in a helpless condition, that persons are dependent on her for support, that she is a widow, the dependence shown, is immaterial and irrelevant to the issue. *Moore v. Huntington*, 31 W. Va. 842, 8 S. E. 512.

It is not reversible error to admit in evidence the fact that the plaintiff's two children who were with her at the time of her injury were still living. *Barker v. Ohio River R. Co.*, 51 W. Va. 423, 424, 41 S. E. 148, citing *Moore v. Huntington*, 31 W. Va. 842, 8 S. E. 512.

As Affecting Damages.—It has been held repeatedly in cases where exemplary damages may be awarded, that the financial standing of the defendant may be given in evidence as affecting the measure of damages, for a verdict absolutely ruinous to a man in moderate circumstances, would scarcely be felt by a man of large fortune. Evidence of the pecuniary circumstances of the defendant has been received in actions for breach of promise of marriage, in actions by a father for the seduction of his daughter, in action for slander, and in actions for malicious prosecution and false imprisonment. *Dent v. Pickens*, 34 W. Va. 240, 12 S. E. 698 (breach of marriage promise); *Clem v. Holmes*, 33 Gratt. 722, 36 Am. Rep. 793; *Riddle v. McGinnis*, 22 W. Va. 253 (actions for seduction); *Womack v. Circle*, 29 Gratt. 192; *Harman v. Cundiff*, 82 Va. 239 (actions for slander); *Womack v. Circle*, 29 Gratt. 192 (malicious prosecution and false imprisonment).

Slander—It is not improper to instruct the jury that if, from the evidence, they believe the defendant uttered the slander from actual malice, they may find exemplary damages, and that in estimating the damages they shall consider the standing of the parties, and the wealth of the defendant is only to be considered so far as it tends to show his rank and influence in society. *Harman v. Cundiff*, 82 Va. 239, citing and approving *Womack v. Circle*, 29 Gratt. 192.

I. CONSENT TO ADMISSION OF INCOMPETENT EVIDENCE.

In *McDowell v. Crawford*, 11 Gratt. 377, 386, Lee, J., in delivering his opinion, said: "One party's consenting to the admission of incompetent testimony for his adversary, is no reason for admitting other incompetent testimony in favor of the party so consenting, where objected to on the other side, even although the latter might serve to explain or contradict the former. *Wilkinson v. Jett*, 7 Leigh 115; *Charlton v. Unis*, 4 Gratt. 58; *Stringer v. Young*, 3 Peters' R. 320."

In *assumpsit* by J., a subcontractor, against W., a contractor, for carrying the mail of United States, for J.'s proportion of the compensation received from the postoffice department, a letter of the postmaster general is offered in evidence by defendant, and read without objection, to prove defaults committed by plaintiff in executing that part of the contract which was underlet to him; to repel which evidence, plaintiff offered a certificate of the postmaster general showing the defaults, and the times and places where they occurred; and defendant objects to the reading of this certificate; held, the certificate was not competent evidence for any purpose. *Wilkinson v. Jett*, 7 Leigh 115.

J. INCRIMINATING CONDUCT.

See the title CRIMINAL LAW, vol. 4, p. 86.

1. Opportunity to Escape.

In *Underhill on Criminal Evidence*, § 119, page 151, it is said: "Evidence to show that the accused had an opportunity to escape, or to break jail of which he did not avail himself; * * * is inadmissible." Quoted in *State v. Bickle*, 53 W. Va. 597, 45 S. E. 917.

Evidence that the defendant while confined in jail had an opportunity to escape and declined to do so, is not admissible. *State v. Bickle*, 53 W. Va. 597, 45 S. E. 917.

2. Attempts to Escape.

The offer of the prisoner to bribe the person who has him in custody, to permit him to escape, and his attempts to escape, may be given in evidence against him; though the offer and the attempts were made when the prisoner had been committed for a different offense from that for which he was tried; both offenses being founded on the same fact. *Dean v. Com.*, 4 Gratt. 541.

General talk in the community that if certain persons found prisoner they would kill him without attempting to arrest him, held, inadmissible on trial for murder to rebut the fact of his immediate flight and concealment and endeavor to leave the state. *Taylor v. Com.*, 90 Va. 109, 17 S. E. 812.

3. Evading Arrest.

Evidence that after the homicide prisoner evaded arrest, and after arrest broke jail and resisted rearrest, is competent. *Williams v. Com.*, 85 Va. 607, 608, 8 S. E. 470.

4. Possession of Incriminating Articles.

See the particular titles such as LARCENY; RECEIVING STOLEN GOODS; ROBBERY.

Where it is shown that a crime has been committed by the use of certain tools and instruments, it is always pertinent to show, as one element connecting the accused with the crime charged, that he possessed such tools

and instruments. *Nicholas v. Com.*, 91 Va. 741, 21 S. E. 364.

The presumption of guilt arising from the unexplained possession of the fruits of crime recently after its commission, is a presumption of fact, not of law. Standing alone it constitutes a *prima facie* case which will warrant conviction for larceny. But to incorporate this proposition into an instruction in a case of homicide tends to mislead the jury, and to prejudice the prisoner. The mere possession of the pocketbook of the deceased by the prisoner, who lived under the same roof with him, as a member of his family, though unexplained, can not be said to create a strong and reasonable presumption that he murdered the deceased. It is for the jury to say what weight, under all circumstances of the case, should be given to the fact of such possession. *Kibler v. Com.*, 94 Va. 804, 26 S. E. 888.

K. HEARING AND DETERMINATION AS TO ADMISSIBILITY.

In General.—When a question occurs before a court of law, whether certain evidence is competent or not, the determination of which depends on certain preliminary facts, those preliminary facts must be decided by the court. Thus, whether the declarations of a confederate be competent, depends on the previous fact of a combination, or confederacy between the witness and the party, and the court must decide that fact, to enable it to judge whether the evidence be admissible or not. By the same judges. *Claytor v. Anthony*, 6 Rand. 285.

If a party has doubt about the admissibility of his proof when objected to, he may bring the question before the court, and have it decided before going to a hearing. *Winston v. Starke*, 12 Gratt. 317.

It is not the duty of the court to advise a party as to the sufficiency of his evidence; as to that he must judge for himself, before going to a

hearing of his cause. *Winston v. Starke*, 12 Gratt. 317.

If the preliminary evidence offered to show the admissibility of other evidence tends to prove such admissibility, it is not the province of the court to pass upon the sufficiency of such evidence; this is a question for the jury. *Edgell v. Conaway*, 24 W. Va. 747.

Fact of Relevancy.—It is not necessary that the relevancy of evidence should appear at the time when it is offered. It is the usual course to receive at any proper and convenient stage of the trial, in the discretion of the judge, any evidence which the counsel shows will be rendered material by other evidence, which he undertakes to produce. If it is not subsequently thus connected with the issue, it is to be laid out of the case. *Watts v. State*, 5 W. Va. 532, 535.

Questions which, standing isolated, are irrelevant, ought to be excluded; but if counsel, on their responsibility as such, should state that they expect to follow them up by testimony of the same witness or others, which will connect them with the case, and show them to be relevant, the court, in its discretion, may allow them to be asked, subject to being ruled out if not so connected. Where there is no promise or intimation by counsel that such further and connecting testimony will be adduced, there is no error in excluding such irrelevant questions. *Deitz v. Providence, etc., Ins. Co.*, 33 W. Va. 526, 11 S. E. 50.

If a paper offered in evidence, is unobjectionable on its face, and the only objection is as to the time it should be introduced, its relevancy not then being apparent, it is not error to admit it, if other evidence is subsequently introduced, showing its relevancy. The court will not control a party in the mere order of introducing his evidence. *Winkler v. Chesapeake, etc., R. Co.*, 12 W. Va. 699. See the title ORDER OF PROOF.

IV. Weight and Sufficiency.

A. MEASURE OF PROOF.

1. Introductory.

The distinction we will attempt to make in regard to the measure of proof is much the same as exists between civil and criminal cases; the distinction may be characterized as fair preponderance of evidence, and full proof.

For the weight and sufficiency of evidence of particular facts and in particular proceedings the various specific titles should be consulted: ADULTERATION, vol. 1, p. 184; ADVERSE POSSESSION, vol. 1, p. 199; ANIMALS, vol. 1, p. 381; ANSWERS, vol. 1, p. 413; ARSON, vol. 1, p. 726; ASSAULT AND BATTERY, vol. 1, p. 729; ASSUMPSIT, vol. 2, p. 68; AUCTIONS AND AUCTIONEERS, vol. 2, p. 179; BAILMENTS, vol. 2, p. 229; BENEFICIAL AND BENEVOLENT ASSOCIATIONS, vol. 2, p. 350; BEST AND SECONDARY EVIDENCE, vol. 2, p. 367; BIGAMY, vol. 2, p. 373; BILLS, NOTES AND CHECKS, vol. 2, p. 495; BLOOD STAINES, vol. 2, p. 501; BOUNDARIES, vol. 2, p. 602; BREACH OF PROMISE OF MARRIAGE, vol. 2, p. 614; BRIDGES, vol. 2, p. 626; BURGLARY AND HOUSEBREAKING, vol. 2, p. 662; CARRIERS, vol. 2, pp. 717, 720, 725; CHARITIES, vol. 2, p. 797; CIRCUMSTANTIAL EVIDENCE, vol. 2, p. 817; COMMON LAW, vol. 3, p. 29; COMPROMISE, vol. 3, p. 46; CONFESSIONS, vol. 3, p. 97; CONFLICT OF LAWS, vol. 3, p. 115; CONSPIRACY, vol. 3, p. 139; CONTEMPT, vol. 3, p. 266; CONTINUANCES, vol. 3, p. 286; CONTRACTS, vol. 3, p. 459; COVENANT, ACTION OF, vol. 3, p. 739; COVENANTS, vol. 3, p. 774; CRIMINAL LAW, vol. 4, p. 90; DEATH BY WRONGFUL ACT, vol. 4, p. 257; DECLARATIONS AND ADMIS- SIONS, vol. 4, p. 348; DETINUE AND REPLEVIN, vol. 4, p. 649;

DIVORCE, vol. 4, p. 745; DOCUMENTARY EVIDENCE, vol. 4, p. 777; EJECTMENT, vol. 4, p. 910.

2. Terms Defined.

The terms "clear and satisfactory proof" or clear and convincing proof "when used in an instruction in a civil case, do not ordinarily mean proof beyond all reasonable doubt." But as we shall see further on, those terms may bear that interpretation. *State v. Hobbs*, 37 W. Va. 812, 17 S. E. 380.

Full Proof.—Evidence which satisfies the minds of the jury of the truth of the fact in dispute, to the entire exclusion of reasonable doubt, constitutes full proof of the fact. *Simmons v. Insurance Co.*, 8 W. Va. 474. See the title REASONABLE DOUBT.

3. Preponderance of Evidence.

a. In General.

The ordinary rule of evidence in civil actions is that the facts must be proved by a preponderance of evidence. The proof shall go far enough to be satisfactory to the jury, but this it might perhaps do, without being perfectly clear. *Fudge v. Payne*, 86 Va. 303, 308, 10 S. E. 7; *Sigler v. Beebe*, 44 W. Va. 587, 30 S. E. 76.

"In civil cases an honest belief, a belief which results from a careful, diligent investigation of the proof, is all that is to be expected, and such belief must be satisfactory if courts of justice are to accomplish anything in the trial of causes." *Simmons v. Insurance Co.*, 8 W. Va. 474.

In civil cases where the mischief of an erroneous conclusion is not deemed remediless, it is not necessary that the minds of the jurors be freed from all doubt; it is their duty to decide in favor of the party on whose side the weight of evidence preponderates, and according to the reasonable probability of truth. But in criminal cases, because of the more serious and irreparable nature of the consequences of a wrong decision, the jurors are required to be satisfied beyond any rea-

sonable doubt of the guilt of the accused or it is their duty to acquit him—the charge not being proved by that higher degree of evidence which the law demands. In civil cases it is sufficient if the evidence, on the whole, agrees with and supports the hypothesis which it is adduced to prove; but in criminal cases it must exclude every other hypothesis but that of the guilt of the party. *Simmons v. Insurance Co.*, 8 W. Va. 474.

Instructions in Criminal Cases.—"The state's instruction No. 1 is criticised because the term 'preponderance of evidence' is used. This is a common term in treating of evidence, and was used, no doubt, to avoid misapprehension, and distinguish it from 'evidence proving guilt beyond reasonable doubt,' as used in instruction No. 1, given for the prisoner. It was, no doubt, understood, conveyed the idea intended in this particular case correctly, and could not have confused or misled the jury." *State v. Hobbs*, 37 W. Va. 812, 17 S. E. 380.

b. Establishment of Debt.

Evidence offered to establish an alleged debt should do more than produce a suspicion of the fact—it should be sufficiently clear and definite in its character to satisfy the mind of the court of the fact, to a reasonable certainty. *Sims v. Bank*, 8 W. Va. 274.

c. Fraud.

See generally, the title FRAUD AND DECEIT.

(1) In General.

As to the degree of proof to establish fraud, the general rule undoubtedly is, that it must be clearly and distinctly, or satisfactorily proven. *Hord v. Colbert*, 28 Gratt. 49; *Virginia-Carolina Chemical Co. v. Carpenter*, 99 Va. 292, 38 S. E. 143; *Wheby v. Meir*, 102 Va. 878, 47 S. E. 1005; *Alsop v. Catlett*, 97 Va. 364, 34 S. E. 48; *American, etc., Co. v. Mayor*, 97 Va. 182, 33 S. E. 523; *Goshorn v. Snodgrass*, 17 W. Va. 717; *Hickman v. Trout*, 83 Va.

478, 490, 3 S. E. 131; *Todd v. Sykes*, 97 Va. 143, 33 S. E. 517; *Francis v. Cline*, 96 Va. 201, 31 S. E. 10; *Board of Trustees v. Blair*, 45 W. Va. 812, 32 S. E. 203; *Armstrong v. Bailey*, 43 W. Va. 778, 28 S. E. 766; *Calwell v. Caperton*, 27 W. Va. 397; *Harden v. Wagner*, 22 W. Va. 356; *Gibson v. Randolph*, 2 Munf. 310; *Matthews v. Crockett*, 82 Va. 394; *Jones v. Degge*, 84 Va. 685, 5 S. E. 799; *Vanbibber v. Beirne*, 6 W. Va. 168.

And in West Virginia it has been held, repeatedly that to entitle a party to relief on the ground of fraud, the fraud must be clearly proved. *Vanbibber v. Beirne*, 6 W. Va. 168; *Whittaker v. Southwest Va. Imp. Co.*, 34 W. Va. 217, 12 S. E. 507; *Board of Trustees v. Blair*, 45 W. Va. 812, 32 S. E. 203; *First Nat. Bank v. Bowman*, 36 W. Va. 649, 14 S. E. 989; *Sigler v. Beebe*, 44 W. Va. 587, 30 S. E. 76 (full, clear and satisfactory proof).

It is impossible to lay down any arbitrary rule to show just how much evidence is necessary to establish fraud, but perhaps the most satisfactory general rule that can be laid down on the subject is that the quantity of evidence must be sufficient to satisfy the conscience of the court. Thus where the facts and circumstances of a case, which have been distinctly proven, are such as will lead a reasonable man to the conclusion that fraud exists, this is all the proof thereof which the law requires. *Moore v. Ullman*, 80 Va. 307, 311; *White v. Perry*, 14 W. Va. 66; *Hord v. Colbert*, 28 Gratt. 49; *Herring v. Wickham*, 29 Gratt. 628; *Lockhard v. Beckley*, 10 W. Va. 87.

Fraud Must Be Distinctly Proved.—

Neither in courts of law nor in courts of equity will any relief be afforded from fraud, unless the allegations be clearly and distinctly proven. *Terry v. Fontaine*, 83 Va. 451, 2 S. E. 743; *Whittaker v. Southwest Va. Imp. Co.*, 34 W. Va. 217, 12 S. E. 507; *White v.*

Jones, 4 Call 253, 2 Am. Dec. 564; Vanbibber v. Beirne, 6 W. Va. 168; New York Life Ins. Co. v. Davis, 96 Va. 737, 32 S. E. 475; Engleby v. Harvey, 93 Va. 440, 25 S. E. 225.

Loose Declarations.—When an answer under oath emphatically denies the charge of fraud as alleged in the bill, fraud is not proven, when all the evidence adduced by the plaintiff consists in loose declarations. Terry v. Fontaine, 83 Va. 451, 2 S. E. 743.

To Rebut Presumption.—A positive statement by a vendor on his own knowledge of a tract of land, that it contains a certain number of acres, when in fact it contains a smaller number, is prima facie fraudulent, and the testimony of the vendor that he believed such unqualified representation to be true will not rebut the presumption of fraud. Crislip v. Cain, 19 W. Va. 438.

Dealings between Attorney and Client.—All dealings between attorney and client for the benefit of the former are presumptively invalid on the ground of constructive fraud. Such a presumption can be overcome only by the clearest and most satisfactory evidence, and the burden of proof is upon the attorney to show that the contract was fair and free from fraud. Thomas v. Turner, 87 Va. 1, 12 S. E. 149, 668.

Justice Taking Acknowledgment.—The complainant alleges that a deed which she executed to her deceased nephew was obtained by fraud, she intending to convey to deceased another. The complainant being incompetent to testify, the only evidence was that of the justice who took the acknowledgment, to the effect that she said she knew what she was signing, her interest in the estate to the deceased. It was held that there was no fraud established. Curlett v. Newman, 30 W. Va. 182, 3 S. E. 578.

Evidence Evenly Balanced.—In the case of Pennybacker v. Laidley, 33 W. Va. 624, 11 S. E. 39, it is said in the

opinion of the court (page 635): "The rule is that he who alleges fraud must prove it. The supposed exceptions to this rule are more apparent than real. There may be prima facie fraud, or the evidence may be circumstantial. Goshorn v. Snodgrass, 17 W. Va. 717. Nevertheless, so long as the scales are evenly balanced, the defendant against whom fraud is alleged must prevail. Harden v. Wagner, 22 W. Va. 356." Greer v. O'Brien, 36 W. Va. 277, 13 S. E. 74.

Terms Defined and Explained.—To dismiss this subject without some explanation of the meaning of the terms used would be very confusing. Clear and satisfactory proof in cases involving fraud or false swearing may be defined to be a preponderance of evidence sufficient to overcome the presumption of innocence of moral turpitude or crime. Virginia Fire, etc., Ins. Co. v. Hogue (Va.), 54 S. E. 8.

(2) Circumstantial Evidence.

But there can be no doubt that it is not necessary that fraud shall be proven by direct and positive proof, but like any other fact it may be proved by circumstantial evidence, and from the very nature of the subject this kind of evidence is generally the only proof that can be adduced in reference to it. Todd v. Sykes, 97 Va. 143, 33 S. E. 517; Engleby v. Harvey, 93 Va. 440, 25 S. E. 225; Armstrong v. Lachman, 84 Va. 728, 6 S. E. 129; Moore v. Ullman, 80 Va. 307; Saunders v. Parrish, 86 Va. 592, 10 S. E. 748; Ferguson v. Daughtrey, 94 Va. 308, 26 S. E. 822; Hazlewood v. Forrer, 94 Va. 703, 27 S. E. 507; New York Life Ins. Co. v. Davis, 96 Va. 737, 32 S. E. 475; Francis v. Cline, 96 Va. 201, 31 S. E. 10; Hickman v. Trout, 83 Va. 478, 491, 3 S. E. 131; White v. Perry, 14 W. Va. 66; Hord v. Colbert, 28 Gratt. 49; Herring v. Wickham, 29 Gratt. 628; Lockhard v. Beckley, 10 W. Va. 87; Bronson v. Vaughn, 44 W. Va. 406, 29 S. E. 1022; Parker

v. Valentine, 27 W. Va. 677; *Farley v. Bateman*, 40 W. Va. 540, 22 S. E. 72; *Reynolds v. Gawthrop*, 37 W. Va. 3, 16 S. E. 384; *Frank v. Ziegler*, 46 W. Va. 614, 33 S. E. 761.

The law does not presume fraud; and it is not to be assumed on doubtful evidence, or circumstances of mere suspicion; but it must be distinctly proven. It need not, however, be proven by direct and positive proof; but like any other fact it may be proven by circumstantial evidence; and if the facts and circumstances of the case are such as to lead a reasonable man to the conclusion that fraud in fact existed, and was known to the grantee, the conveyance affected thereby should be declared void in toto as to creditors of the grantor. *White v. Perry*, 14 W. Va. 66.

"The law in this state, as to how fraud may be proved, and the quantity of proof necessary to sustain the charge of fraud, is well settled. It may be proved, like anything else is proved, by facts and circumstances. The evidence may be either positive or circumstantial, and it often occurs that the circumstantial evidence to sustain the charge will sweep away the positive testimony of many witnesses who swear that no fraud was intended. The rules of law, as laid down in our court, from *Lockhard v. Beckley*, 10 W. Va. 87, and *Hunter v. Hunter*, 10 W. Va. 321, to *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780 (decided at this term)." *Davis v. Dunbar*, 29 W. Va. 617, 2 S. E. 91.

d. Gifts.

See the title GIFTS.

In establishing a gift inter vivos, it is essential to clearly establish the delivery to the donee. *Board v. Callihan*, 33 W. Va. 209, 10 S. E. 382.

e. Insurance.

See the title FIRE INSURANCE.

An action on a policy of insurance is a civil action, and though the defense set up be that the plaintiff set

fire to the building insured, the rule of evidence is the same as in other civil actions, and the jury may find the issue upon the weight or preponderance of evidence. *Simmons v. Insurance Co.*, 8 W. Va. 474.

"Where, in an action against an insurer for loss by fire, the defense is that the assured himself set fire to the premises, the evidence for the defense is not required to be as full and conclusive as would be necessary to support an indictment for arson." *Simmons v. Insurance Co.*, 8 W. Va. 474.

Evidence having been given to the jury in this action, which is based on a policy of insurance against loss and damages by fire, tending to prove that the plaintiff intentionally and fraudulently caused the insured property to be set on fire and destroyed, and that the loss or damage claimed in plaintiff's declaration was occasioned by such act of the plaintiff, and the plaintiff having given evidence to the jury tending to rebut such evidence of the defendant, and tending to prove the contrary, it was error in the court—under the issue joined in the case—to refuse to give to the jury the following instruction, asked by the defendant, viz: "It is not necessary, in order to prevent the plaintiff's recovery that the plaintiff should be proved beyond a reasonable doubt to have intentionally and fraudulently caused or permitted the said insured property to be set on fire, but if the weight or preponderance of evidence be to that effect the jury should find for the defendant." *Simmons v. Insurance Co.*, 8 W. Va. 474.

f. Libel and Slander.

See the titles LIBEL AND SLANDER; REASONABLE DOUBT.

"In actions of slander, where the words charged impute crime, and the defendant pleads the truth in justification, he must prove the actual offense charged—that is, he must prove the same matters or facts that would be

requisite to convict the plaintiff on trial upon indictment for the crime. But it is not necessary to prove the facts to the exclusion of all reasonable doubt, as in criminal cases. It is sufficient if the defendant leaves a fair preponderance in the minds of the jury in his favor, notwithstanding the plaintiff's evidence and the presumption of innocence." *Simmons v. Insurance Co.*, 8 W. Va. 474.

g. Negligence.

See generally, the title NEGLIGENCE.

In an action to recover damages for an injury inflicted through the alleged negligence of the defendant, the burden is on the plaintiff to prove the negligence alleged, and the evidence must show more than a mere probability of negligence. It is not sufficient that the evidence is consistent equally with the existence or nonexistence of negligence. There must be affirmative and prepondering proof of the defendant's negligence. *Norfolk, etc., R. Co. v. Cromer*, 99 Va. 763, 764, 40 S. E. 54.

The party alleging negligence must establish it by proof sufficient to satisfy reasonable and well-balanced minds. The evidence must show more than a probability of a negligent act. The facts from which the jury can determine whether or not there was negligence must be shown by competent evidence, and the jury should not be left to mere conjecture or random judgment. *Norfolk, etc., R. Co. v. Briggs*, 103 Va. 105, 48 S. E. 521.

Where damages are claimed for injuries inflicted through the alleged negligence of the defendant, the burden of showing negligence by a preponderance of the evidence is on the plaintiff, and if the injury may have resulted from one of two causes, for one of which the defendant is responsible but not for the other, the plaintiff can not recover; neither can he recover if it is just as probable that the damage

was caused by the one as by the other. *Norfolk, etc., R. Co. v. Poole*, 100 Va. 148, 40 S. E. 627, citing *Chesapeake, etc., R. Co. v. Sparrow*, 98 Va. 630, 640, 31 S. E. 302.

h. Best and Secondary Evidence.

As to the degree of proof required of the loss or destruction of an original document, to lay the foundation for the introduction of secondary evidence of its contents, see the title BEST AND SECONDARY EVIDENCE, vol. 2, p. 367.

i. Escrow.

See the title ESCROW, ante, p. 145.

A bond, signed by a principal obligor and sureties, apparently perfect and complete, may be avoided by parol proof that the obligee, at the time he received it from the principal obligor, had notice that other persons were to sign it, in order to make the instrument effectual as to those who did sign it. But in such a case the evidence ought to be very clear and satisfactory. *Nash v. Fugate*, 32 Gratt. 595.

4. Full Proof.

See the title REASONABLE DOUBT.

a. In General.

"Evidence which satisfies the minds of the jury of the truth of the fact in dispute, to the entire exclusion of reasonable doubt, constitutes full proof of the fact. From the highest degree it may decline by an indefinite number or gradations, until it produces in the mind nothing more than a mere preponderance of assent in favor of the particular fact. The distinction between full proof and mere preponderance of evidence is in its application very important. In many cases of a civil nature, where the right is dubious and the claims of the contesting parties are supported by evidence nearly equipoised, a mere preponderance of evidence on either side may be sufficient to turn the scale." *Simmons v. Insurance Co.*, 8 W. Va. 474.

b. *Corpus Delicti*.

See *CORPUS DELICTI*, vol. 3, p. 603, and see the title *CRIMINAL LAW*, vol. 4, p. 77.

There should be no conviction where the corpus delicti is not proved with particular clearness and certainty. *Brown v. Com.*, 89 Va. 379, 16 S. E. 250.

c. *Extraordinary Conduct*.

Where an agreement on the part of a judgment creditor is set up, to accept payment of his judgment in confederate notes, instead of enforcing his lien against the land, such agreement must be proved beyond all reasonable doubt, because such agreement, unless explained by extrinsic facts, is contrary to the ordinary conduct of men in the affairs of life. *Poague v. Spriggs*, 21 Gratt. 220.

d. *Lost Instruments and Records*.

See generally, the title *LOST INSTRUMENTS AND RECORDS*.

Distinguished from Measure under Secondary Evidence Rule.—There is, as there should be, in reason, a great difference between the degree of proof necessary to establish the loss of an instrument in writing, so as to lay the foundation for the admission of parol testimony of its contents, and the degree of proof necessary to prove its existence and loss for the purpose of setting up title under it when both are denied, and thus become the very issue in the case; for while it is, in a certain sense, true that any proof going to show the loss of an instrument must involve to some extent the fact of its existence at one time, and tend to prove such existence, yet in the two cases the chief inquiry is directed to different questions—in the first case, to ascertaining whether the party has used such diligence in his search for the paper as to justify parol testimony of its contents; in the second case, to the ascertaining, as a fact in issue, whether it ever existed. In the one case we are dealing with the admissi-

bility of testimony; in the other, with the weight of testimony. In the first case the issue is collateral to the merits of the case; in the second, it is the very issue itself upon which the parties have joined—the merits of the case. A striking illustration of this distinction may be found in the case of *Ben v. Peete*, 2 Rand. (Va.) 539. *Thomas v. Ribble*, 2 Va. Dec. 321.

Statement of Rule.—Courts of equity, in exercising their jurisdiction to set up a lost instrument which is to constitute a muniment of title, require strong and conclusive proof of its former existence, its loss and its contents. *Thomas v. Ribble*, 2 Va. Dec. 321; *Barley v. Byrd*, 95 Va. 316, 28 S. E. 329.

In order to maintain a suit to enforce the collection of an obligation claimed to be lost, it is essential not only that the loss be proven, but that the terms of the contract be clearly and definitely established. *Board v. Callihan*, 33 W. Va. 209, 10 S. E. 382.

Ancient Transactions.—The substitution of a lost record should be made only on clear and satisfactory evidence of the former existence, contents and loss of the record proposed to be substituted. But the law does not require that an ancient transaction shall be proved with such fullness of detail as if it had been of recent date. *Whitney v. Jasper Land Co.*, 119 Ala. 497, 24 Southern 259.

Nature of Instrument as Affecting Rule.—Even in those cases where the proof of loss of a writing is presented only for the purpose of admitting parol testimony of its contents, the doctrine is well settled that the degree of proof necessary depends upon the character and value of the instrument in question; less being required where it is of little value, and reasonably not carefully preserved, and more where its value would suggest the propriety of its careful preservation. So, a fortiori, where the issue involves the existence and contents of the written instrument, the doctrine would seem to be equally

well founded, in principle, that the greater the value of the instrument the more conclusive should be the proof of its existence and contents. And, where the instrument rises to the dignity and importance of a muniment of title, every principle of public policy demands that the proof of its former existence, its loss, and its contents, should be strong and conclusive, before the courts will establish a title by parol testimony to property which the law requires shall pass only by deed or will. *Thomas v. Ribble*, 2 Va. Dec. 321.

Interest.—Where the witnesses testifying to an alleged lost instrument, are themselves, or through their immediate families, the beneficiaries of the instrument they are endeavoring to set up, this is an important factor in weighing their evidence. *Thomas v. Ribble*, 2 Va. Dec. 321.

Lost Deed.—To establish title to land under an alleged lost deed, on parol testimony, proof that it existed, and of its contents, must be clear and conclusive, or to express it differently, must be of the clearest and most stringent character. *Thomas v. Ribble*, 2 Va. Dec. 321.

A Suspicious Circumstance.—The fact that no attempt is made to set up a lost deed until after the parties to its preparation, execution and acknowledgment, are all dead, is suspicious, and prepares the mind to scrutinize the testimony by which it is sought under the circumstances, to establish title adverse to the recorded title by parol evidence of the existence and contents of an alleged lost deed. *Thomas v. Ribble*, 2 Va. Dec. 321.

"A Memory for Dates."—In a proceeding to set up a lost deed, it was held, that the fact that the witness, who can recall the date of no deed which was important to him, can, after the lapse of twelve years, recall with positiveness after but one sight of it the date of a deed not then important

to him, presents a most unusual mental phenomenon. *Thomas v. Ribble*, 2 Va. Dec. 321.

Lost Bond.—A suit is brought upon an alleged lost bond, which is claimed to have been executed by C. and delivered to L., his granddaughter, for \$1,500, dated in June, 1855, and payable after his death, with interest from date, which execution, delivery, and loss are denied. The proof is considered insufficient to establish the same. *Board v. Callihan*, 33 W. Va. 209, 10 S. E. 382.

Lost Will.—It is well settled that the testimony to set up a lost will must be strong and conclusive, or as it has been expressed, it can not be set up except upon the clearest and most stringent proof. *Thomas v. Ribble*, 2 Va. Dec. 321.

"If the record is lost, after proof of the loss, its contents may be proved like any other document, by any secondary evidence, when the case does not, from its nature, disclose the existence of other and better evidence. It must, however, be kept in view that while the best evidence the nature of the case will admit of is admissible, and so when no other is to be had, the evidence of the contents of a lost will, dependent upon the recollection of a witness, may be held to be admissible, but the weight of this sort of evidence is quite another question, wherein we must consider the means of knowledge of the witness, the power of recollection necessary, and the character of the question at issue." *Apperson v. Dowdy*, 82 Va. 776, 779, 1 S. E. 105.

Recollection of Witness.—"For example, if perfect knowledge, a reasonable time, and a simple fact be the question, and the witness reasonably intelligent, the contents might be satisfactorily proved by the recollection of the witness. Thus, an intelligent witness, called upon to prove the contents of a will recently read by the witness, which devised a known tract

of land to Peter Duncan, would not risk the miscarriage of justice. But in a case where a title and possession have been long enjoyed unchallenged, when such title is assailed only after the destruction of the records, by a witness who testifies to the contents of a paper she has never read, and of which she has never read an authenticated copy, and bases her knowledge upon having heard the will read by an indifferent person, sixty-eight years before, when she was an infant, and so testifies when she is an octogenarian, not to the devise to Peter Duncan simply, but as to the degree of estate so devised, and crowns the whole by making her (x) mark instead of signing her name, we may well hesitate before we disturb an old title and possession upon such evidence. In this case there are many difficulties in the question as to the weight of this evidence. In 1880, could any person be expected to retain a perfect or a safe recollection of the contents of a paper read in her hearing in 1812? But when this is claimed for a young girl, who heard the paper read by a neighbor, and never heard it again for so many years, we might admit that the neighbor read the will correctly (a fact which she can not prove), and then that she heard correctly, and yet we may well question whether her recollection is correct." *Apperson v. Dowdy*, 82 Va. 776, 779, 1 S. E. 105.

Ten years after destruction of record, effort to assail for first time a title and possession long enjoyed, is made by proceedings to set up lost will upon evidence of its contents, by witness then eighty-five years old testifying that sixty-eight years before she had heard the will read, and stating the testamentary disposition of the testator's property. Held, the testimony, though admissible, is insufficient. *Apperson v. Dowdy*, 82 Va. 776, 1 S. E. 105, approved in *Board v. Callihan*, 33 W. Va. 209, 10 S. E. 382.

Lost Promissory Note.—In an action

at law upon a note alleged to have been destroyed, the evidence should satisfy the jury beyond any reasonable doubt that the note has been destroyed. "It is true that when the evidence of the destruction is merely presumptive, the maker is exposed to the danger of the reappearance of the instrument in the hands of a bona fide holder. This, however, only manifests the importance of clear and satisfactory proof of the destruction. The degree of evidence necessary to constitute such proof can never be previously defined. It is impracticable, in the nature of things, to lay down any rule on the subject. The only legal test in this, as in other cases, is the sufficiency of the evidence to satisfy the jury beyond reasonable doubt, that the note is no longer in existence." *Moses v. Trice*, 21 Gratt. 556, 8 Am. Rep. 609.

In order to maintain a suit in equity, setting up a lost negotiable note or bond and praying for a decree for the payment thereof, it is indispensable, when the loss of such note or bond, is controverted by the answer of the defendants, that the loss should at the hearing of the cause be established by competent and satisfactory proofs. If, therefore, the plaintiff in such bill fails at the hearing to establish the loss of the instrument, in such case the suit will be dismissed. *Exchange Bank v. Morrall*, 16 W. Va. 546, citing 1 Story's Eq. Jur., § 85.

Where a witness eighty years old, who claims to remember in its entire details the contents of a lost note, although more than twenty-three years had elapsed since he claims to have seen and read it, is to be regarded with suspicion, and the circumstance that he was acquainted with the fact that the plaintiff was in search of witnesses and offered half of the recovery if he could prove the execution and delivery of the note, does not in any manner detract from the suspicion which should attach to his character, which is impeached by some witnesses. *Board*

v. Callihan, 33 W. Va. 209, 10 S. E. 382, citing *Apperson v. Dowdy*, 82 Va. 776, 1 S. E. 108.

e. Oral Waiver of Contract.

An oral waiver of a contract, oral or written, to defeat specific performance sought by the purchaser, must be clear, positive, and above suspicion, and, besides, can not be proven by mere loose, casual conversations. *Cunningham v. Cunningham*, 46 W. Va. 1, 32 S. E. 998.

f. Purchases by Married Women.

See the titles FRAUDULENT AND VOLUNTARY CONVEYANCES; HUSBAND AND WIFE.

Where property is alleged to have been purchased by a wife, the burden is upon her to prove clearly and distinctly that she paid for it with means not derived from her husband; and in the absence of such proof it will be liable for his debts, because of the presumption that it was acquired with his means. *Rose v. Brown*, 11 W. Va. 122; *McMasters v. Edgar*, 22 W. Va. 673; *Walker v. Peck*, 39 W. Va. 325, 19 S. E. 411.

When a wife purchases land or other property, the burden is upon her to prove distinctly that she paid for the lands or other property with funds not furnished by her husband. Evidence that she purchased amounts to nothing, unless it is accompanied with clear and full proof that she paid for it with funds furnished by some one other than her husband. In the absence of such proof, the presumption is that her husband furnished the means of payment. See *Stockdale v. Harris*, 23 W. Va. 499; *McMasters v. Edgar*, 22 W. Va. 673; *Rose v. Brown*, 11 W. Va. 122; *Core v. Cunningham*, 27 W. Va. 206; *Herzog v. Weiler*, 24 W. Va. 199; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780.

g. Reformation and Rescission of Written Instruments.

See generally, the title RESCIS-

SION, CANCELLATION AND REFORMATION.

(1) In General.

The general, well-settled rule is that mistake, to be ground for reforming or rescinding a written instrument, must be established by a very high degree of proof; but the various expressions of the courts, in denoting this degree of proof, will be set out below, as conducive to a better understanding of some such statements as that the proof must be "clear and satisfactory," which, as we have seen, may mean a preponderance of evidence, but when used in suits to reform or rescind contracts or other written instruments, is equivalent to proof beyond a reasonable doubt.

(2) Reformation.

"Beyond Reasonable Doubt."—The ordinary rule of evidence in civil actions, that the fact must be proved by a preponderance of evidence, does not apply in suits to reform written instruments on the ground of mutual mistake. The proof that both parties intended to have the precise agreement set forth inserted in the deed, and omitted to do so by mistake, must be made beyond a reasonable doubt. *Fudge v. Payne*, 86 Va. 303, 308, 10 S. E. 7.

"I have not pretended to refer to all the evidence but only to the strongest parts of it; and I must say that to my mind the preponderance of the evidence is, that there was a mistake in the deed. But we can not decide this case on a preponderance of evidence. No weight of preponderant evidence would be sufficient; the mistake would have to be proved beyond a reasonable doubt. It would have to be proved beyond a reasonable doubt, that Leftridge Jarrell bought of John Jarrell only so much of the farm, as was situated above the cross fence; that that was the contract between the parties, and the deed by mistake was made to in-

clude the whole farm. The proof must be such as will strike all minds alike as being unanswerable and free from reasonable doubt. The distinction here attempted to be made in regard to the measure of proof is much the same, as exists between civil and criminal cases; or that distinction which is expressed by a fair preponderance of evidence and full proof. (1 Sto. Eq. Jur., § 157.) The evidence in this cause does not leave the case free from reasonable doubt. It would be exceedingly unsafe to disturb the solemn acts of the parties, as they appear in their title deeds, by even as strong evidence as appears in this record. Better that injustice be done in a single instance, than that a rule be relaxed, which is the very foundation and only safeguard to the rights of property." *Jarrell v. Jarrell*, 27 W. Va. 743.

"A mistake in the execution of a writing will not, in equity, be corrected, unless it appears that it does not contain the intention of the parties thereto at the time it was made; and the proof of this, either parol, written, or both, must not be loose, equivocal, or contradictory, or in its texture open to reasonable doubt or opposing presumptions, for the writing itself is regarded as evidence so strong that only other unequivocal evidence, irresistibly conclusive, is sufficient to reform it." *Jarrell v. Jarrell*, 27 W. Va. 743. Likewise, *Western Mining, etc., Co. v. Peytona Coal, etc., Co.*, 8 W. Va. 406 (Syl., point 7); *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39 (Syl., point 6); *Allen v. Yeater*, 17 W. Va. 128; *Maxwell Land Grant Case*, 121 U. S. 381, 7 Sup. Ct. 1015, 30 L. Ed. 949. I refer to *Southard v. Curley* (N. Y. App.) 31 N. E. 330, 30 Am. St. Rep. 642, and note, 13 L. R. A. 561, as fully sustaining the doctrine here stated. "To justify the reformation of an instrument for mistake, it is necessary: First, that the mistake should be one of fact, not of law; second, that the

mistake should be proved by clear and convincing evidence; third, that the mistake should be mutual and common to both parties to the instrument." *Purvines v. Harrison*, 1 Am. & Eng. Dec. Eq. 232; *Robinson v. Braiden*, 44 W. Va. 183, 28 S. E. 798. *Koen v. Kerns*, 47 W. Va. 575, 35 S. E. 902.

"**Clearly Proved.**"—While courts of equity will correct instruments on the ground of mistake, it must be clearly proved. *Fudge v. Payne*, 86 Va. 303, 10 S. E. 7.

"**Clear and Satisfactory.**"—Mistakes in deeds and other writings may be corrected upon parol evidence, but the mistake must have been mutual, or, if on one side only, accompanied by fraud or other inequitable conduct on the other side, and the evidence of mistake must be clear and satisfactory, leaving but little doubt of the mistake. *French v. Chapman*, 88 Va. 317, 13 S. E. 479.

"**Clearest and Most Satisfactory.**"—While courts of equity have jurisdiction to reform written instruments on the ground of mutual mistake, yet the presumption is that the writing speaks the final agreement of the parties, and the burden is on the complainant to overcome this presumption, and to do so the mistake must be plain, and established by the clearest and most satisfactory proof. *Donaldson v. Levine*, 93 Va. 472, 25 S. E. 541, citing *Shenandoah Valley R. Co. v. Dunlop*, 86 Va. 346, 10 S. E. 239; *Fudge v. Payne*, 86 Va. 303, 10 S. E. 7; *Major v. Ficklin*, 85 Va. 732, 8 S. E. 715; *Morgan v. Fisher*, 82 Va. 417; *Perkins v. Lane*, 82 Va. 59; *Carter v. McArtor*, 28 Gratt. 356; *Leas v. Eidson*, 9 Gratt. 277; *Mauzy v. Sellers*, 26 Gratt. 641; *Donaldson v. Levine*, 93 Va. 472, 25 S. E. 541; *Fudge v. Payne*, 86 Va. 303, 10 S. E. 7; *Fishack v. Ball*, 34 W. Va. 644, 12 S. E. 856; *Deitz v. Providence, etc., Ins. Co.*, 33 W. Va. 526, 11 S. E. 50.

In a bill filed for the reformation of a contract, the burden of proof is

throughout on the complainant, who must rebut the presumption that the writing speaks the final agreement, by the clearest and most satisfactory evidence. *Donaldson v. Levine*, 93 Va. 472, 25 S. E. 541.

"Entire Satisfaction of Court."—The evidence to show a mistake in a written instrument which equity will relieve against, must be clear and strong, so as to establish the mistake to the entire satisfaction of the court. *Allen v. Yeater*, 17 W. Va. 128, citing *Western Mining, etc., Co. v. Peytona Coal, etc., Co.*, 8 W. Va. 406; *Fishack v. Ball*, 34 W. Va. 644, 12 S. E. 856.

"Proofs Entirely Satisfactory."—Judge Story, in § 152, 1 Eq. Jur., says: "In all such cases, if the mistake is clearly made out by proofs entirely satisfactory, equity will reform the contract so as to make it conformable to the precise intent of the parties. But if the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief, upon the ground that the written paper ought to be treated as a full and complete exposure of the intent, until the contrary is established beyond reasonable controversy." *Jarrell v. Jarrell*, 27 W. Va. 743.

"Clear, Convincing," etc.—In a suit to reform a deed for mistake, the evidence of such mistake must be clear, convincing, free from unreasonable doubt, and not conflicting. *Koen v. Kerns*, 47 W. Va. 575, 35 S. E. 902.

"Strong, Clear, Preponderating."—There is no doubt that courts of equity will correct mistakes of the scrivener in drawing a deed, when he has not drawn it in accordance with the clearly established directions and instructions of the parties; but before a court of chancery will consent to correct a mistake in the terms of a deed, participated in by only one of the parties thereto, where no fraud or deception is practiced, and where a party of ordinary intelligence, who can read, has deliberately executed said deed, the proof of

mistake, where admitted at all, must be strong, clear, preponderating, and convincing to the mind of the court. *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39.

"Strong, Clear and Convincing."—Where a court of chancery will consent to correct a mistake in the terms of a deed, participated in by one party only, where no fraud or deception is practiced, and where a party of ordinary intelligence, who can read, has deliberately executed said instrument, the proof of mistake, where admitted at all, must be strong, clear, and convincing to the mind of the court. *Allen v. Yeater*, 17 W. Va. 128; *Korne v. Korne*, 30 W. Va. 1, 3 S. E. 17; *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39.

"Strongest Possible."—"The authorities all require that parol evidence of the mistake, and of the alleged modifications, must be most clear and convincing—in the language of some of the judges, 'the strongest possible'—or else the mistake must be admitted by the opposite party; the resulting proof must be established beyond a reasonable doubt. Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a mere preponderance of evidence, but only upon a certainty of the error." *Fudge v. Payne*, 86 Va. 303, 308, 10 S. E. 7.

"Unequivocal Evidence Irresistibly Conclusive."—A mistake in the execution of a writing will not in equity be corrected, unless it appears that the writing does not contain the intention of the parties thereto at the time it was made; and the proof of this either parol, written or both must not be loose, equivocal or contradictory nor in its texture open to reasonable doubt or opposing presumptions; for the writing itself is regarded as evidence so strong, that only other unequivocal evidence irresistibly conclusive is sufficient to reform it. *Jarrell v. Jarrell*, 27 W. Va. 743.

(3) Rescission.

"Clear and Strong."—The evidence which will justify rescission on the ground of mistake in a written instrument, must be clear and strong, so as to establish the mistake to the entire satisfaction of the court. *Allen v. Yeater*, 17 W. Va. 128; *Jarrell v. Jarrell*, 27 W. Va. 743.

"The answer of the defendant is so responsive to the bill as to the misapprehension and mistake of the draftsman of the deed, that the onus is thrown upon the plaintiff to make out his case by satisfactory evidence, which 'must be strong and clear.' *McMahon v. Spangler*, 4 Rand. 51. Lord Hardwicke said the proof proper in such a case ought to be the strongest possible. In the language of Judge Carr: 'The solemn acts of the parties under their hands and seals, are not to be blown away by loose and vague conversations.'" *Weidebusch v. Hartenstein*, 12 W. Va. 760.

In *Western Mining, etc., Co. v. Peytona, etc., Co.*, 8 W. Va. 406, the rule is laid down in the following strong language: "In a court of equity it may sometimes be proved, that the deed was executed in mistake, and that in fact it embodies provisions different from those which the parties intended. But even in this court the deed is regarded as evidence so strong, that only other unequivocal evidence irresistibly conclusive is sufficient to overthrow it." *Jarrell v. Jarrell*, 27 W. Va. 743.

Where a scrivener, through mistake, drew a deed instead of a will, and on that ground the grantor seeks to have the deed rescinded, and the proof is weak, uncertain and vague, and insufficient to establish the alleged mistake, the relief sought should not be granted. *Weidebusch v. Hartenstein*, 12 W. Va. 760.

On the 24th day of December, 1850, W. made a deed to Z. J., by which he settled on Z. J. a certain house and lot for the use and benefit of W. and T.,

his then wife, during their joint lives, and to the survivor of them, and then to the three children of said T. by a former husband, and to such children as might be born to said W. and T. Afterwards T. and Z. J. and one of the children died, and said W. again married; and on the — day of July, 1872, W. filed his bill in chancery against the two surviving children and their husbands, and the widow of Z. J., to have the deed rescinded upon the ground that the scrivener, who was the said Z. J., "through misapprehension and mistake," drew up a deed instead of a will, when it was intended and desired to make a will instead of a deed. Held: To rescind a deed under such circumstances, the proof must be very strong and clear, that the scrivener did, through misapprehension and mistake, draw a deed instead of a will. The great lapse of time since the drawing of the deed and before the institution of the suit to rescind it, coupled with the fact that the wife, the scrivener and one of the children had died long before the bringing of the suit, and the second marriage of W., should demand the strongest proof of the scrivener's mistake, to justify a court of equity in rescinding the deed. The proof in this case is vague, weak and uncertain, and not sufficient to establish the pretended mistake, and therefore the deed should not be rescinded. *Weidebusch v. Hartenstein*, 12 W. Va. 760.

Insanity.—Shortly after his liberation from a lunatic asylum, as restored, the grantor, a childless man, granted his entire property to his wife, to whom he attributed his success, and was much attached, according to his previously declared intentions and subsequent references. Ten years afterwards, he committed suicide. The evidence as to his mental condition was conflicting, but there was no evidence of incompetency to execute a deed. He was eccentric, but, by evidence of many witnesses he was sane. Held, evidence did not prove insanity at the

time the deed was executed. *Cropp v. Cropp*, 88 Va. 753, 14 S. E. 529.

h. Resulting Trusts.

See generally, the title **TRUSTS AND TRUSTEES**.

In General.—The courts have been very cautious in the reception of mere parol evidence to set up a resulting trust against the letter of a deed, and require that the evidence to establish such a claim should be clear and unquestionable, or such as to leave no doubt as to the character of the transaction, especially after a long lapse of time. *Bank v. Carrington*, 7 Leigh 566; *Phelps v. Seely*, 22 Gratt. 573; *Miller v. Blose*, 30 Gratt. 744; *Donaghe v. Tams*, 81 Va. 132; *Parker v. Logan* 82 Va. 376, 4 S. E. 613; *Woodward v. Sibert*, 82 Va. 441; *Throckmorton v. Throckmorton*, 91 Va. 42, 22 S. E. 162; *Moorman v. Arthur*, 90 Va. 455, 18 S. E. 869; *Page v. Lindsay*, 86 Va. 169, 9 S. E. 993; *Smith v. Patton*, 12 W. Va. 541; *Troll v. Carter*, 15 W. Va. 567 (in this case the court said the evidence must be full, clear, and satisfactory); *Smith v. Turley*, 32 W. Va. 14, 9 S. E. 46; *Bright v. Knight*, 35 W. Va. 40, 13 S. E. 63; *Armstrong v. Bailey*, 43 W. Va. 778, 28 S. E. 766; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664.

"Clear and Distinct."—The proof required to establish a resulting trust, must be clear and distinct. *Phelps v. Seely*, 22 Gratt. 573; *Borst v. Nalle*, 28 Gratt. 423; *Miller v. Blose*, 30 Gratt. 744; *Bank v. Carrington*, 7 Leigh 566; *Kane v. O'Connors*, 78 Va. 76; *Sinclair v. Sinclair*, 79 Va. 40; *Donaghe v. Tams*, 81 Va. 132; *Parker v. Logan*, 82 Va. 376, 4 S. E. 613.

"Clear."—When land is purchased and paid for by two persons, and the conveyance is made to one of them only, the law will raise a resulting trust for the benefit of the other to the extent of his interest. And such joint purchase and part payment may be proven by parol evidence, but to estab-

lish such a resulting trust, the evidence should be clear. *Smith v. Patton*, 12 W. Va. 541.

"Clear, Full and Satisfactory."—The general rule is well settled that to establish a resulting trust by parol testimony, to override a deed absolute on its face, the property must be described with particularity in the pleadings, and the evidence must be clear, full and satisfactory, and must correspond with the allegations. *Leath v. Watson*, 89 Va. 722, 17 S. E. 4.

"Full, Clear and Convincing."—In order that a resulting trust may arise in favor of a party claiming to be the cestui que trust, against the grantee in a clear fee simple deed of conveyance, he must not only state his case in his bill clearly and with particularity as to when, how, and with what he paid the purchase money, but the case stated must be supported by full, clear, and convincing proof. *Donaghe v. Tams*, 81 Va. 132.

"Great Clearness and Certainty."—Plaintiff, claiming to be cestui que trust against grantee in a fee simple deed of conveyance, must not only state his case in his bill with particularity and perspicuity as to when, how, and with what he paid the purchase money, but must also support his statement by proof of great clearness and certainty. *Donaghe v. Tams*, 81 Va. 132.

Illustrative Cases.—In *Jennings v. Shacklett*, 30 Gratt. 765, an attempt was made to enforce a resulting trust, resting on parol evidence, thirty-three years after the transaction by which it was alleged to have been raised. The alleged cestui que trust was in possession of the premises to the time of her death, which occurred five years before the commencement of the action. Neither she nor her heirs made any attempt to set up the trust until creditors of the alienee undertook to subject the land to the payment of his debts. It was held, that the delay was

not a bar to the setting up of the trust, but that, owing to the great lapse of time, the testimony to establish the trust must be such as to leave no doubt as to the character of the transaction.

In *Woods v. Ward*, 48 W. Va. 652, 37 S. E. 520, a third party verbally agreed with the defendant, against whom a judgment for the recovery of land had been rendered, that he would pay one-half the costs of the appeal in consideration of receiving one-half of the benefits derived by the defendant therefrom. It was held that such agreement was insufficient to establish a trust in the land in favor of such third party, as it was within the statute of frauds.

i. Specific Performance.

See generally, the title SPECIFIC PERFORMANCE.

"Clear and Distinct Evidence."—In a suit for the specific performance of a contract the burden is on the plaintiff who alleges its existence, to prove the same by clear and distinct evidence. *Rockecharlie v. Rockecharlie*, 2 Va. Dec. 582; *McCulley v. McLean*, 48 W. Va. 625, 37 S. E. 559; *Augsburg Land, etc., Co. v. Pepper*, 95 Va. 92, 27 S. E. 807.

In suit for the specific performance of a contract, the contract must be distinctly proved, and its material terms clearly established. *Pennybacker v. Maupin*, 96 Va. 461, 31 S. E. 607, citing *Darling v. Cummins*, 92 Va. 521, 23 S. E. 880.

And where the evidence is not only unsatisfactory and insufficient, but the agreement is one the defendant was unlikely to make, the bill should be dismissed. *Rockecharlie v. Rockecharlie*, 2 Va. Dec. 582.

"Competent Proof."—In order that a parol contract for the sale of real estate may be specifically enforced, the contract must be established by competent proof to be clear, definite, and unequivocal in all its terms, and the contract proved must be that charged in the bill. *McCulley v. McLean*, 48

W. Va. 625, 37 S. E. 559, citing *Patrick v. Horton*, 3 W. Va. 23; *Gillaspie v. James*, 48 W. Va. 284, 37 S. E. 598; *Pigg v. Corder*, 12 Leigh 69; *Anthony v. Leftwich*, 3 Rand. 238.

"Certainty and Definiteness."—*Board v. Callihan*, 33 W. Va. 209, 10 S. E. 382.

The evidence must be clear, full, and free from suspicion to enable a court of equity to enforce an oral contract for the sale of land. *Harris v. Elliott*, 45 W. Va. 245, 32 S. E. 176.

"Clear Preponderance."—"The truth is there is no certain, definite, evidence of a definite contract of sale. Chancery does sometimes enforce oral contracts for the sale of land, but does so with great caution, as it ought to do. It requires the proof to establish the contract by a clear preponderance of evidence, and if the evidence is conflicting, and it is not clear that a contract was made in fact, the court should dismiss the bill." *Sturm v. McGuffin*, 48 W. Va. 599, 37 S. E. 561.

Exchange of Property.—See the title EXCHANGE OF PROPERTY.

A parol contract for the exchange of lands will not be specifically enforced, unless it is proven that the parties have good titles to their respective lands; and if the validity of the plaintiff's title is dependent on the question whether he had ten years' adverse possession of the land, he must, before he can enforce such contract, specifically establish by clear evidence that he had such adversary possession for ten years; and, if he has declined to defend an action of ejectment brought by a stranger to test his title, this will be regarded as showing that his title is so doubtful that the court ought not to require it to be received as a good title by the other party to such contract for the exchange of land; and, being unable to make the other party a good title, the contract for the exchange of lands ought to be rescinded. *Boggs v. Bodkin*, 32 W. Va. 566, 9 S. E. 891.

Either party to a written contract for the sale or exchange of lands may have the same specifically enforced in a court of equity, with such corrections in it as parol proof may show to be necessary, to correct a mistake made in reducing the contract to writing. Before such correction and enforcement can be made, the proof must be strong, clear, and preponderating, and, in the absence of fraud, must prove that the mistake was mutual. *Fishack v. Ball*, 34 W. Va. 644, 12 S. E. 856.

A court of equity will not enforce a parol contract for the sale or exchange of land, unless the terms of the contract are admitted or clearly proven. *Boggs v. Bodkin*, 32 W. Va. 566, 9 S. E. 891.

A parol agreement between father and son, that on condition the son will enter upon certain tract of land and improve it, the father will make him a deed for the same, and in pursuance and on faith of such agreement, the son enters upon the land and occupies and improves it, is sustained by a sufficient consideration, and should be specifically performed. Such contracts, before they can be enforced in a court of equity, must be established by competent and satisfactory proof, which must be clear, definite and certain. *Lorentz v. Lorentz*, 14 W. Va. 761.

Proof of Contract by Agent.—It is settled that in a case where the plaintiff sues for specific execution of the purchase of land alleged to have been made from the agent of the owner, he must show, by evidence which is clear, competent, direct and satisfactory, both the terms of the contract and the authority of the agent, or a ratification of the principal. *Simmons v. Kramer*, 88 Va. 411, 13 S. E. 902; *Blair v. Sheridan*, 86 Va. 527, 10 S. E. 414.

Proof of Gift of Land Held Insufficient.—An agreement by a decedent to give to the plaintiff, a negro, and his natural child, \$10,000 and 20 acres of land, in consideration that the plain-

tiff should keep house for him during his life, is not sufficiently shown by the testimony of the plaintiff, corroborated by that of two negro witnesses to the alleged agreement, who at the time of the agreement were only thirteen and fifteen years old, and by the testimony of a negro, that the decedent, when he returned with plaintiff told him of the agreement; where the other evidence showed that the decedent paid regular wages to the plaintiff while she worked for him; that the plaintiff during the twenty-three years she lived with decedent, never mentioned the agreement to any one, and that after decedent's death she spoke of her luck as having received from decedent, before his death, a deed to a small house and lot, as otherwise she would have received nothing; and that a negro man and woman who were present at the time of the alleged agreement, and who were shown to have been of good character, were not called as witnesses. *Hannah v. Woodson*, 2 Va. Dec. 442.

Proof Held Sufficient to Support Bill.—Plaintiff, being indebted to a building and loan association under a deed of trust, agreed orally that the association should take the property under the deed in satisfaction of the debt. Plaintiff vacated the premises shortly thereafter, and left the state, making no claim to the premises or to the rents, and paying no taxes thereon for a period of five years. In the meantime the association took possession, and sold the property, with the knowledge of the plaintiff, who made no objection. The association made no demand on the plaintiff for dues or interest or payments on the debt, but removed his name from the roll of stockholders. Held, that the evidence was sufficient to support a decree against the plaintiff for specific performance of the contract of sale to the association. *Franklin v. Salem Bldg. Ass'n*, 2 Va. Dec. 395.

Proof Held Sufficient.—In a suit by

a railroad company to compel specific performance of a contract to convey a right of way over defendant's farm, defendant testified that the contract exhibited with plaintiff's bill was not a true copy of that actually made, in that it had reference to a later survey, wherein the right of way to be granted was fixed in the original by a former one, which, by his own testimony, consisted merely in the engineer's walking over the land, and suggesting a line, which defendant marked on the fence with his knife. Plaintiff's engineer testified that but one survey was made, which was that specified in the contract exhibited by plaintiff, and that, after defendant had examined the survey, he signed a contract of which by the testimony of the notary who acknowledged it and the clerk who copied it, the contract exhibited by the plaintiff was a literal copy. It was further proved that the original contract had been lost after it was copied. The court held, upon the above facts, that the correctness of the contract exhibited by the plaintiff was sufficiently shown, and that specific performance should be decreed according to its terms. *Ohio River R. Co. v. Sehon*, 33 W. Va. 559, 11 S. E. 18.

j. Transactions between Close Relations.

See the particular titles.

"Transactions between father and child, brother and sister, husband and wife, and many others between whom there exists a natural and strong motive to provide for a dependent at the expense of honest creditors, if such transactions are impeached as fraudulent, may be shown to be fraudulent by less proof; and the party claiming the benefit of such a transaction is held to a fuller and stricter proof of its justice and the fairness of the transaction, after it has been shown to be prima facie fraudulent, than would be required if the transaction was between strangers. *Knight v. Capito*, 23 W. Va.

644, 645, and numerous authorities cited by Bump on *Fraudulent Conveyances* (3d Ed.) 57-59." *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 710.

k. Usury.

See the title USURY.

Since the defense of usury involves the charge of violation of law visited by penalties, the proof of the usury must be clear and satisfactory. *Ware v. Building, etc., Ass'n*, 95 Va. 680, 29 S. E. 744, 64 Am. St. Rep. 826.

5. Proving Negatives.

See the title PRESUMPTIONS AND BURDEN OF PROOF.

The burden of proving the want of probable cause in malicious prosecution is in the first place on the plaintiff, but it being a negative proposition and sometimes for that reason difficult to prove, in such case but little is required to prove it. *Vinal v. Core*, 18 W. Va. 1.

6. Evidence Evenly Balanced.

The party on whom lies the burden of proof must make out his case by a preponderance of the evidence. If the evidence is evenly balanced between the parties there can be no recovery. *Norfolk, etc., R. Co. v. Poole*, 100 Va. 148, 40 S. E. 627; *Harden v. Wagner*, 22 W. Va. 356; *Greer v. O'Brien*, 36 W. Va. 277, 15 S. E. 74.

B. WEIGHT AND CREDIBILITY OF EVIDENCE.

1. In General.

Evidence is always indefinite and inconclusive when it raises no more than a limited probability in favor of the fact, as compared with some definite probability against it, whether the precise proposition can, or can not be ascertained. It is, on the other hand, of a conclusive nature and tendency, when the probability in favor of the hypothesis exceeds all limits of an arithmetical or moral nature. Such evidence is always insufficient where, assuming all to be proved which the evidence tends to prove, some other

hypothesis may still be true; for it is the actual exclusion of every other hypothesis, which invests mere circumstances with the force of proof. Whenever, therefore, the evidence leaves it indifferent which of several hypotheses is true, or merely establishes some finite probability in favor of one hypothesis rather than another, such evidence can not amount to proof, however great the probability may be. *State v. Flanagan*, 26 W. Va. 116.

2. Positive and Negative Testimony.

In General.—It is consonant with reason and human experience that the positive testimony of a single witness, whose credibility is unimpeached, that he saw or heard a particular thing at particular time and place, ought ordinarily to outweigh that of a number of equally credible witnesses, who, with the same opportunities, testify that they did not see nor hear it. The particular thing might have taken place, and yet from inattention they may not have seen, nor heard it, or, though conscious of seeing or hearing it at the moment of its occurrence, may have afterwards forgotten it from lapse of time or defective memory. In such case, the evidence of the one witness is positive, while that of the many is merely negative. But where a witness, who denies a fact in question, had as good opportunity to see or hear it as he who affirms it, and his attention, because of special circumstances, was equally drawn to the matter controverted, the general rule that the witness who affirms a fact is to be believed rather than he who denies it does not hold good. The denial of the one in such case constitutes positive evidence as well as the affirmance of the other, and produces a conflict of testimony. *Southern R. Co. v. Bryant*, 95 Va. 215, 28 S. E. 183.

Sounding Locomotive Whistle.—The testimony of a witness who denies that a railroad whistle was sounded on a given occasion, is as positive evidence

as the testimony of another who affirms the fact, where each has equal opportunity of hearing, and the attention of the former, because of special circumstances, is equally drawn with that of the latter to the sounding of the whistle. The denial of the one and the affirmance of the other produces a conflict of evidence which it is the province of a jury to determine. *Southern R. Co. v. Bryant*, 95 Va. 215, 28 S. E. 183.

3. Falsus in Uno, Falsus in Omnibus.

See the title WITNESSES.

In *Davis v. Dunbar*, 29 W. Va. 617, 2 S. E. 91, the court applied the maxim falsus in uno, falsus in omnibus; i. e., where a witness knowingly and willfully swears falsely in a material matter, his testimony should be rejected entirely, unless it be corroborated by the facts and circumstances of the case, or by other credible testimony.

But it is reversible error, as an unwarranted invasion of the province of the jury, to so instruct the jury. *State v. Thompson*, 21 W. Va. 741, 758; *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813; *Hash v. Com.*, 88 Va. 172, 199, 13 S. E. 398.

An instruction which tells the jury that, if they believe any witness has testified falsely in the case as to the material matters, they may disregard such false testimony or give to it and all the evidence of such witness such weight as they believe it entitled to, is improper in failing to inform the jury that they may disregard all the evidence of such witness. *Ward v. Brown*, 53 W. Va. 227, 44 S. E. 488.

4. Number of Witnesses.

Because one witness swears to facts which if true prove the matter in evidence, the case does not fail because two or three witnesses depose to a contrary state of facts which is to be believed depends on the other facts and circumstances in the case. "The law in this state, as to how fraud may be proved, and the quantity of proof

necessary to sustain the charge of fraud, is well settled. It may be proved, like anything else is proved, by facts and circumstances. The evidence may be either positive or circumstantial, and it often occurs that the circumstantial evidence to sustain the charge will sweep away the positive testimony of many witnesses who swear that no fraud was intended. The rules of law, as laid down in our court, from *Lockard v. Beckley*, 10 W. Va. 87, and *Hunter v. Hunter*, 10 W. Va. 321, to *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780 (decided at this term)." *Davis v. Dunbar*, 29 W. Va. 617, 2 S. E. 91; *Cropp v. Cropp*, 88 Va. 759, 14 S. E. 529.

An evasive answer (though not expected to as such), may be outweighed by the testimony of one witness, and circumstances. See *Maupin v. Whiting*, 1 Call 224; and *Pryor v. Adams*, 1 Call 382, 390. *Wilkins v. Woodfin*, 5 Munf. 183.

5. Testimony of Children.

The weight to be given to the testimony of children depends largely on their age and intelligence. *State v. Cain*, 9 W. Va. 559. See also, *Thomas v. Ribble*, 2 Va. Dec. 321.

6. Officers Taking Acknowledgments.

The evidence of an officer taking the acknowledgment to a deed, or of a person present at its execution, is entitled to peculiar weight, in considering the grantor's capacity. *Delaplain v. Grubb*, 44 W. Va. 612, 30 S. E. 201.

7. Negroes.

Formerly the fact that a witness was of negro descent, though not so near as to render him incompetent as a witness, was not competent evidence to impeach his credibility. *Dean v. Com.*, 4 Gratt. 541. See the title CIVIL RIGHTS, vol. 2, p. 830.

8. Attesting Witnesses to Wills.

See the title WILLS.

A person who signs his name as a witness to a will, by his act of attestation, solemnly testifies to the sanity of

the testator. If he should afterwards attempt to impeach the will upon the ground of want of sufficient capacity, his evidence will not be positively rejected, but it is received with the utmost caution. *Lamberts v. Cooper*, 29 Gratt. 61; *Ward v. Brown*, 53 W. Va. 227, 44 S. E. 488.

Attesting witnesses of a will who are introduced to impeach the will on the grounds of want of proper execution, unsoundness of mind or undue influence, will not be excluded; but their evidence will be viewed with much suspicion; and it is proper to so instruct the jury. *Ward v. Brown*, 53 W. Va. 227, 44 S. E. 488.

When part of the attesting witnesses testify against the will, it is error to instruct the jury that the evidence of the witnesses present at the execution of the will is entitled to peculiar weight. *Ward v. Brown*, 53 W. Va. 227, 44 S. E. 488.

In *Dudleys v. Dudleys*, 3 Leigh 436, it was held, that where the testimony of one of the attesting witnesses is directly contradicted by another, and the county and circuit courts both give credit to the witnesses for the will, this court, upon a mere question of credibility, will always presume that the inferior courts which saw and heard the witnesses examined, decided correctly. Cited in *Lamberts v. Cooper*, 29 Gratt. 61.

9. Execution of Deeds.

See the titles DEEDS, vol. 4, p. 364; EXECUTION AND PROOF OF DOCUMENTS.

The evidence of witnesses present at the execution of the deed is entitled to peculiar weight. The evidence of physicians, especially those who attended the grantor, and were with him considerably during the time it is charged he was of unsound mind, is entitled to great weight. Next to physicians and those who were present at the time the deed was executed, either as attesting witnesses or otherwise, are those whose

intimacy in the family has given them an opportunity of seeing the party at all times, and watching the operations of his mind. *Jarrett v. Jarrett*, 11 W. Va. 584.

10. Proof of Age of Persons.

On the trial of an indictment founded upon the third section of ch. 99 of the acts of the legislature of 1872-3, charging that C. on the first day of December, A. D., 1873, in Wood county, unlawfully did sell intoxicating liquors to one Michael Toole, a minor, under the age of twenty-one years, it is competent and not improper for the minor to state on his examination as a witness on behalf of the state, upon his oath, his age to the jury, with the view of proving that he was a minor at the time of the sale of the intoxicating liquors in the indictment mentioned, to him by the defendant, and such statement may go to the jury as evidence to be considered by them, notwithstanding there is evidence given to the jury tending to show that his father and mother are living. And in such case, it is not error for the court to refuse to instruct the jury that "Unless it is proved beyond reasonable doubt, by the best evidence of which the case will admit, and the evidence of the minor himself is not such evidence, that the minor was at the time of the alleged selling to him of intoxicating liquor by defendant, under the age of twenty-one years, they must find the defendant not guilty." *State v. Cain*, 9 W. Va. 559.

"At this day of general intelligence, I think it is not improper, in a case like this, to allow the minor to testify as to his age. It is perhaps true, that the evidence of the minor may not be so satisfactory, as to the fact, as the evidence of the father or mother, or some other person present at his birth—still, his statement on oath as to his age, should be received and permitted to go to the jury as evidence, to have such weight as it is entitled to have, under

the circumstances. The weight to be given to it, by the jury, should, in some degree, depend on the age and intelligence of the witness. It is true, it is a rule of evidence, that the best evidence of which the case, in its nature, is susceptible, should be required. But still, when there is no substitution of evidence, but only a selection of the weaker instead of the stronger proofs, or an omission to supply all the proofs capable of being produced, the rule is not infringed." *State v. Cain*, 9 W. Va. 559.

11. Circumstantial Evidence.

See the title CIRCUMSTANTIAL EVIDENCE, vol. 2, p. 817.

It not unfrequently happens, that evidence arising from the circumstances is stronger even than the testimony of any single witness. And this evidence has been held sufficient to outweigh the answer even of a defendant who answers on his own knowledge in the absence of a positive witness; and has likewise been held sufficient to establish fraud. *Moore v. Ullman*, 80 Va. 307.

12. Considerations Affecting the Weight of Evidence.

a. Appearance of Witness, Manner of Testifying, etc.

The jury should determine the weight and credibility of the evidence from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor, fairness and intelligence, and all the other surrounding circumstances appearing on the trial. *Horton v. Com.*, 99 Va. 848, 849, 38 S. E. 184; *Sigler v. Beebe*, 44 W. Va. 587, 30 S. E. 76; *Cropp v. Cropp*, 88 Va. 759, 14 S. E. 529.

A witness need not be positive, excluding all doubt, in his statement. He may state facts to the best of his knowledge, or his best impressions even, and the weight of his evidence is a matter for the jury. 1 Greenl. Ev., § 440; Whart. Crim. Ev., § 462. Taylor

v. Baltimore, etc., R. Co., 33 W. Va. 39, 10 S. E. 29.

"But on whom does the law place the duty of weighing his testimony with the facts and circumstances surrounding the case, and determining his credibility? Not upon the court, but upon the jury. If the jury could say that the facts and circumstances are such, including the appearance of the witness and his manner of testifying, as to rebut his testimony, and render it unworthy of belief, then the court should not have sustained the demurrer; for the credibility of witnesses is not for the court to pass upon, but is wholly with the jury. *Scott v. Railroad Co.*, 43 W. Va. 484, 27 S. E. 211; *Akers v. De Witt*, 41 W. Va. 229, 23 S. E. 669; *Johnson v. Burns*, 39 W. Va. 658, 669, 20 S. E. 686; *Young v. West Va., etc., R. Co.*, 44 W. Va. 218, 28 S. E. 932." *Couch v. Chesapeake, etc., R. Co.*, 45 W. Va. 51, 30 S. E. 147. See *Thomas v. Ribble*, 2 Va. Dec. 321.

b. Inconsistent Conduct.

In an action for money paid for defendant, he filed a set-off for keeping cattle at four cents a pound for increased weight, yet admitted that they were not weighed when delivered. Plaintiff claimed that defendant agreed to purchase cattle at their cost, and at end of the year sell them back at four cents a pound. Held, defendant's admission was so inconsistent with his contention, that the verdict in his favor should have been set aside as against the evidence. "Conceding that the witnesses on both sides were equally entitled to credit, there was unquestionably a clear preponderance of evidence in favor of the plaintiff as to the contract between the parties. For while the defendant, Otey, relies on his own statement only, that the contract was that he was to keep the cattle, as the property of the plaintiff, Preston, and was to receive from him four cents per pound for the increase weight he could put on them, Preston and his

agent, Ledgewood, both testify that the proposition made to Otey was that he should take the cattle at cost, and redeliver them to Preston the next fall at four cents per pound; and it was proved by Preston that the cattle cost him \$30 per head, and that Otey agreed to take them at that price, and to resell them to Preston at four cents per pound." *Preston v. Otey*, 88 Va. 491, 14 S. E. 68.

Debts of Decedents.—Where in a suit by A to set up a claim against the estate of B, which alleged debt was evidenced by two bonds, it appears that A permitted B to keep and use these bonds for so long a period as eight years and finally to exchange them for a new bond payable to B, when A must have been aware that B was utterly unable to repay him for them and by reason of his increasing infirmities of body, was becoming less likely to be able to do so in the future, and further where the testimony of two witnesses is explicit upon the point that these parties had had a settlement, that neither owed the other; it was held, that the weight of the evidence warranted the rejection of the claims. The contention of the claimant that he is the rightful owner of this claim is irreconcilable with his conduct. *Blakemore v. Oder*, 85 Va. 426, 7 S. E. 465. See also, *Sanaker v. Cushwa*, 3 W. Va. 20.

c. Bias and Interest.

See the title WITNESSES.

In General.—Although the common-law incompetency of parties and persons interested in the event of the suit to testify has been removed by statute, this interest may be considered by the jury in weighing their testimony and determining what force it shall have. *Thomas v. Ribble*, 2 Va. Dec. 312; *Ferguson v. Daughtrey*, 94 Va. 308, 26 S. E. 822.

The testimony of witnesses, who are either interested parties, or so connected with the transaction as to be

in danger of being strongly biased in giving an account of it, however honest they may be, is almost sure to be highly, though it may be insensibly, colored in favor of the side on which it is offered, and therefore is a very unsafe foundation for the judgment of a court. "A mistake as to a date, or a single word, may cause a wrong decision and produce the grossest injustice. And it would be dangerous to found a decree on such testimony, however express, and positive, and uncontradicted by other evidence it might be. But when it is denied by the testimony of the opposite party (who is also examined as a witness), and is inconsistent with clearly established facts in the case, it is certainly insufficient to warrant a court in rendering a decree which would adjudge that party to have given up for nothing, seven-eighths of an admitted and undeniable debt, secured by the best possible security. How does the case stand upon the evidence?" *Poague v. Spriggs*, 21 Gratt. 220, 228.

When evidence is introduced to show interest on the part of a witness for the purpose of discrediting him, it is improper to refuse to admit evidence to show the extent of such interest or to disprove its existence; and any person who is conversant with the facts may testify as to them, although the alleged contract is between the witness and a municipal corporation. *Ward v. Brown*, 53 W. Va. 227, 44 S. E. 488.

A party is entitled to have the fact shown in evidence that the witness under examination was summoned by the other party to the cause, as tending to show that the latter thought the witness worthy of credit. *Richmond, etc., R. Co. v. Rubin*, 102 Va. 809, 810, 47 S. E. 834.

Lost Deed.—While it may be admitted that interest does not of necessity, destroy the credibility of witnesses, yet it must be conceded that courts should move with the utmost caution in the exercise of their juris-

diction to overthrow a title established by the records and existing muniments, and to set up in its place a title under a lost deed established by parol testimony, where that is solely the evidence of parties personally and pecuniarily interested under such alleged lost deed. And in considering such testimony the difference between a direct pecuniary interest in the witness, and the interest of love and affection growing out of the closest family ties between the witness and the party pecuniarily interested, while theoretically wide, is not, in the majority of cases, of real importance; for the assertion may be ventured that the majority of men would falsify almost as readily to protect the interests of those dearest to them as to protect their own. *Thomas v. Ribble*, 2 Va. Dec. 321.

Hostility.—It is proper to ask a witness if he has an ill feeling towards the prisoner, but not to introduce evidence of collateral facts, such as the pendency of a suit between them, and the like; and if he deny it, he may be contradicted by evidence of his own statements or acts, to which, however, his attention must first be specially drawn. *Langhorne v. Com.*, 76 Va. 1012.

An attorney, who is examined as a witness for his client, may be properly asked what his fee is, to show his interest in the suit and to go to his credibility. *Moats v. Rymer*, 18 W. Va. 642.

Testimony of Employees.—An instruction to the jury, that in considering the weight to be given to the evidence of the witness in the case, they may consider the question as to whether or not any of them are in the employ of the defendant, and whether or not they or any of them are influenced by their relations to it, and to what extent, is not open to the objection that the court in effect assumed that the mere fact that they were in the service of the defendant rendered their evidence less worthy of credence, "yet as

the jury is the sole judge of the credibility of witnesses, and as it is of the utmost importance that the judge, in giving instructions involving that question should not trench upon their province, it would have been better to have said to the jury generally, without going into details, that, in passing upon the testimony of all the witnesses, they had the right to take into consideration their relation, if any, to the parties, or to either of them." *Norfolk, etc., R. Co. v. Poole*, 100 Va. 148, 40 S. E. 627.

d. Sequestration of Witnesses.

See the title WITNESSES.

Where a witness has been sworn and sent out, and by accident or design comes into the court room during the progress of the trial, he is not, for that reason, to be excluded, but it is a matter going to his credit with the jury, of which they should be the sole judges, under the circumstances. *Gregg v. State*, 3 W. Va. 705.

e. Power of Perception.

An objection to the evidence of a witness on the ground that he could not tell the speed at which a car was running at his distance from, or position relative to, the car, goes to its weight with the jury, and not to its relevancy. *Portsmouth St. R. Co. v. Peed*, 102 Va. 662, 47 S. E. 850.

f. Proximity and Remoteness.

In General.—Although where a relevant fact has greater or less weight in proportion to its proximity or remoteness in point of time, place and circumstances, it is sometimes held, that the court may, in its discretion, fix the limit beyond which it becomes of inappreciable weight and reject it as immaterial though relevant, it is a practice liable to abuse, and therefore, unless the court can clearly see that it is too remote to be material, the safer and more satisfactory rule is for the court to admit whatever is relevant and leave the question of its weight to the jury. *State v. Yates*, 21 W. Va. 761;

Johnson v. Baltimore, etc., R. Co., 25 W. Va. 570.

It was held, in an early case, that minute and remote circumstances may be given in evidence. *Mendum v. Com.*, 6 Rand. 704.

By defendant's bill of exceptions No. 2, it appears, that on the trial of the issue in the case, the defendant, in order to sustain his plea, offered to prove by witness, Hendricks, that the plaintiff, at a date subsequent to the date of the note in controversy, to-wit; in the year 1870, and since, had purchased large quantities of wheat from the defendant's testator, and had made payment of moneys to him, the said witness, as agent of the said testator; and at the time of such payments, no allusion was made by the plaintiff, or the said witness to the subject of indebtedness, and the plaintiff made no claim of any indebtedness of said testator to plaintiff; to the introduction of which evidence the plaintiff objected, and the court sustained the objection. "This evidence, I think, tends to prove facts too remote from the question at issue to be admissible as evidence, and affords no reasonable inference as to the principal matter in dispute in this case. The time when said conversation occurred, was too recent after the note in suit was due, to authorize any presumption, from the lapse of time, and the circumstances and facts offered to be proved that the debt had been paid or settled. *Wells v. Washington*, 6 Munf. 532; *Tomlinson v. How*, Gilmer 8; *Hunt v. Bridgman*, 2 Pick.; *Jackson v. Pierce*, 10 Johns. 414, referred to in 1 Rob. (new) Pr. 461. The evidence would, if admitted, tend to mislead and confuse the jury instead of aiding them in arriving at the truth upon the issue; and the adverse party having had no notice of such a course of evidence, and no reason to anticipate it, is not expected to be prepared to rebut it. 1 Greenl. on Evidence, §§ 49, 52 and 448; 1 Starkie on Ev., with references by Metcalf, § 22, page 39; *Campbell v.*

Lynn, 7 W. Va. 665. The evidence so offered does not appear to have been offered in connection with any other fact proven, or intended to be proven, or in connection with other evidence tending to prove another fact, or other facts bearing on the issue, which might make the offered evidence material and proper." *Hunter v. Snyder*, 11 W. Va. 198.

Negligent Fires.—In an action to recover damages for a fire set out by an engine of a railroad company, evidence as to the speed of the train at a point a mile and a half or two miles from the place at which the fire is alleged to have been set out by the engine, is irrelevant. *Norfolk, etc., R. Co. v. Briggs*, 103 Va. 105, 48 S. E. 521.

At a trial for robbery occurring at 10.30 p. m., half a mile from a depot, evidence on behalf of the accused that a negro was seen at 3 a. m. on the following morning, is irrelevant and properly excluded. *Thompson v. Com.*, 88 Va. 45, 13 S. E. 304.

Vendor and Purchaser.—In an action by a vendee against his vendor to recover damages for a breach of a contract for the sale of growing trees, evidence that five years after breach the vendor conveyed a portion of the land on which the trees were standing to a third person, is irrelevant, and should be excluded. *Stuart v. Pennis*, 100 Va. 612, 42 S. E. 667.

Elder Patents.—In a writ of right, where the mise is joined upon the mere right, if no actual seizin by the demandants is proved, the tenants may give in evidence an older patent than that under which the demandants claim, with which the title of the tenants is in no way connected, to show a better outstanding title in a third person, which is evidence to be weighed by the jury, but not conclusive against the demandants. (*Dawson v. Watkins*, 2 Rob. 259—accord.) *Breathed v. Smith*, 1 Pat. & H. 301.

Carrying Weapons.—Evidence tend-

ing to show that the prisoner had the legal right to carry a revolver ten months before the killing is not admissible to establish such right at the time of the killing. *State v. Kohne*, 48 W. Va. 335, 37 S. E. 553.

Testamentary Capacity.—Evidence of the acts and conduct of the testator tending to show soundness of mind at or near the time of the execution of the will is entitled to more weight than the opinions of witnesses based upon the erratic conduct and essentricities of the party of whom they speak. *Ward v. Brown*, 53 W. Va. 227, 44 S. E. 488.

Suit to Set Up Lost Deed.—"With every desire to deal gently with this latter witness, the court is constrained to say that the testimony of this witness regarding this alleged lost deed is almost incredible. Here is a young man, not even yet familiar with legal papers, who at the age of fifteen or sixteen reads a deed over once or twice, with no special object in view, but merely from casual curiosity, and undertakes eleven years afterwards to testify as to its specific contents, and even appearance, and even as to whether it bore the clerk's certificate of record—a certificate in a form which must have been, if he had seen one, as unintelligible to him as a series of hieroglyphics." *Thomas v. Ribble*, 2 Va. Dec. 321.

g. Memory of Witness.

While improbability alone, where no impossibility is shown, is not alone sufficient to discredit an unimpeached witness, still it may very materially weaken the force of the evidence. For example, because of the high degree of proof required to set up a lost record, the testimony of a witness eighty-five years old, that sixty-eight years before she heard the lost will read, and stating the testamentary disposition of the testator, is insufficient. *Apperson v. Dowdy*, 82 Va. 776, 1 S. E. 105, cited with approval in *Board v. Callihan*, 33 W. Va. 209, 10 S. E. 382.

h. Intelligence of Witness.

"If the degree of intelligence of the witness is to be any criterion in estimating the weight of the testimony, what degree of importance can we attach to the testimony of Samuel Crislip, who appears to have detailed his evidence with a determination to know nothing about any other note save the one in controversy, and to remember that in its entire details, although more than twenty-three years had elapsed since he claims to have seen and read it?" *Board v. Callihan*, 33 W. Va. 209, 10 S. E. 382, citing *Apperson v. Dowdy*, 82 Va. 776, 1 S. E. 105. See *Cropp v. Cropp*, 88 Va. 759, 14 S. E. 529.

i Opportunity and Power of Knowing Truth.

It is error to classify witnesses in respect to the weight and value of their evidence by an instruction to the jury, unless the classification is based upon a well-defined distinction as to the opportunities and powers of the witnesses to know the truth. *Ward v. Brown*, 53 W. Va. 227, 44 S. E. 488. See *Cropp v. Cropp*, 88 Va. 759, 14 S. E. 529.

IV. Withdrawing and Striking Out Evidence.**A. WITHDRAWING EVIDENCE.**

The general rule is that if improper evidence has been given to a jury, and is afterwards withdrawn by the court from the consideration of the jury, that cures any error committed by its introduction; but there may be instances where such a strong impression has been made upon the minds of the jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its withdrawal, and then the error will call for a new trial. *State v. Hill*, 52 W. Va. 296, 43 S. E. 160.

It is not error to permit an irrelevant question to be withdrawn before it is answered. *Reed v. Com.*, 98 Va. 817, 36 S. E. 399.

B. STRIKING OUT OR EXCLUDING EVIDENCE.

See the title **DEMURRER TO THE EVIDENCE**, vol. 4, p. 517.

1. Grounds of Motion.**a. Insufficiency of Evidence.**

When Motion Sustained.—Where all the evidence introduced by the plaintiff on the trial of his action, is clearly insufficient to sustain a verdict in his favor, should such verdict be rendered, it is error in the court to overrule the defendant's motion to exclude such evidence from the jury, if made before any evidence be offered on behalf of the defendant. *Wandling v. Straw*, 25 W. Va. 692; *Hoge v. Ohio River R. Co.*, 35 W. Va. 562, 14 S. E. 152; *Woolwine v. Chesapeake, etc., R. Co.*, 35 W. Va. 329, 15 S. E. 81.

When the evidence is so clearly deficient as to give no support to a verdict for the plaintiff, if so rendered, the court should exclude the evidence from the jury. *Klinkler v. Wheeling, etc., Co.*, 43 W. Va. 219, 27 S. E. 237, approved in *Ritz v. Wheeling*, 45 W. Va. 262, 21 S. E. 993.

Where the evidence offered by the defendant does not tend to prove any legal defense to the action, the court on the motion of the plaintiff, should exclude it from the jury; and if it refuses to do so, this court will reverse the judgment on account of such refusal. *Spence v. Rose*, 28 W. Va. 333.

If the facts are unambiguous, and there is no room for two honest and apparently reasonable conclusions, the court should not be compelled to submit the question to the jury as one in dispute. *Johnson v. Baltimore, etc., R. Co.*, 25 W. Va. 570; *Hoge v. Ohio River R. Co.*, 35 W. Va. 562, 14 S. E. 152.

Negligence.—If the defendant demur to the plaintiff's evidence, and the evidence fails to show that the defendant was as a legal proposition guilty of negligence, but shows a case in which the negligence of the defendant was

properly a mixed question of law and fact, and the jury could not unreasonably infer from the evidence that the defendant was guilty of negligence, which caused the plaintiff's injury, but this evidence of the plaintiff is such that it would obviously require the jury, if they should find there was any negligence in the case, to find that it was mutual, the proof of the negligence of the defendant being exactly the same facts and circumstances which necessarily establish the contributory negligence of the plaintiff, if they establish the negligence of the defendant upon such a case, the court should sustain the defendant's demurrer to the plaintiff's evidence; and in such case, if asked by the defendant, the court should exclude all the plaintiff's evidence from the jury. *Gerity v. Haley*, 29 W. Va. 98, 11 S. E. 901. See *Hoge v. Ohio River R. Co.*, 35 W. Va. 562, 14 S. E. 152.

In the trial of an indictment, when the prosecuting attorney has introduced all his evidence and rests the state's case, on a motion by the defendant to exclude the evidence from the jury, as not being sufficient to sustain the indictment against him, if it clearly appear that the evidence is so insufficient, such motion should be sustained. *State v. Flanagan*, 48 W. Va. 115, 35 S. E. 862.

When Motion Overruled.—Where, on a jury trial, there is any evidence tending to sustain the plaintiff's demand, the court ought not to strike out that evidence. *Powell v. Love*, 36 W. Va. 96, 14 S. E. 405; *Coulter v. Blatchley*, 51 W. Va. 163, 41 S. E. 133.

Where the plaintiff's evidence appreciably tends to sustain the action, the court ought not to strike it out. *Yeager v. Bluefield*, 40 W. Va. 484, 21 S. E. 752, citing *Powell v. Love*, 36 W. Va. 96, 14 S. E. 405.

When the evidence tends in a fairly appreciable degree to sustain the plaintiff's action, the court must not strike out his evidence or direct a verdict for

the defendant. *Henry v. Ohio River R. Co.*, 40 W. Va. 234, 21 S. E. 863, citing *Powell v. Love*, 36 W. Va. 96, 14 S. E. 405.

A motion by the defendant to exclude the plaintiff's evidence upon the ground that it is not sufficient to warrant a verdict in his favor will not be granted, if there be any evidence which tends in any degree, however slight, to prove the plaintiff's case. *Guinn v. Bowers*, 44 W. Va. 507, 29 S. E. 1027.

This court has held, in the case of *Carrico v. West Virginia Cent., etc., R. Co.*, 35 W. Va. 389, 14 S. E. 12 (point 3 of syllabus), that: "A motion by the defendant to exclude the plaintiff's evidence, upon the ground that it is not sufficient to warrant a verdict in his favor, will not be granted if there be any evidence that tends in any degree, however slight, to prove the plaintiff's case. If it tend to prove the plaintiff's case in any degree whatever, the case can not be withdrawn from the jury. The motion can never prevail or be sustained merely because the court may think the weight of evidence is against the plaintiff." See also, *Henry v. Ohio River R. Co.*, 40 W. Va. 234, 235, 21 S. E. 863 (point 9 of syllabus). *Guinn v. Bowers*, 44 W. Va. 507, 29 S. E. 1027, 1028.

In an action against a city for injuries caused by a defective sidewalk, it appeared that the plaintiff knew that the sidewalk was out of repair and dangerous; and it also appeared that the injury to the plaintiff was not necessarily caused by the open and apparent defects in the sidewalk, or any want of due care on her part, but may have been caused by a latent defect, for which the city was responsible, and which the plaintiff could not have detected by any reasonable prudence or care. Held, it was proper to submit the plaintiff's evidence showing these facts to the jury, and to refuse the motion of the defendant to strike out said evidence. *Moore v. Huntington*, 31 W. Va. 842, 8 S. E. 512.

In an action of ejectment, on a motion to exclude all of the plaintiff's evidence, the motion should be overruled if any of that evidence tends in an appreciable degree to show in the plaintiff a right to recover the land claimed. *Bowman v. Dewing*, 37 W. Va. 117, 16 S. E. 440.

b. Irrelevancy of Evidence.

The only mode of taking away from the jury the determination of the weight to be given to evidence is by demurring. A motion to exclude or strike out applies only to irrelevant or inadmissible evidence. *Southern R. Co. v. Cooper*, 98 Va. 299, 36 S. E. 388.

If a witness, in giving the statement of another, introduces irrelevant statements, the proper course to pursue is to ask the court to exclude so much of the statement as is not admissible. *Flick v. Com.*, 97 Va. 766, 767, 34 S. E. 39.

The courts decide, if evidence is pertinent and proper, before it is submitted to a jury; and if it be impertinent or too remote from the question involved in the issue, they will reject it. *Sadler v. Kennedy*, 11 W. Va. 187.

Relevancy Not Apparent When Admitted.—It frequently happens that the relevancy of evidence is not apparent at the time it is offered, but the court often admits it upon the statement of counsel that evidence subsequently introduced will show its relevancy and connect it with the case; should they fail to do this, it will be excluded on motion. *Watts v. State*, 5 W. Va. 532, 535; *Winkler v. Chesapeake, etc.*, R. Co., 12 W. Va. 699; *Deitz v. Providence, etc., Ins. Co.*, 33 W. Va. 526, 11 S. E. 50.

c. Objections to Declaration.

Evidence offered to the jury, and properly applying to the issue joined, ought not to be rejected on the ground of objections to the declaration. *Preston v. Bowen*, 6 Munf. 271.

d. Variance.

See the title VARIANCE.

In an action at law, where the defendant appears and pleads the general issue, and the plaintiff introduces all his evidence in chief to the jury, and then rests his case, and the defendant moves the court to exclude the evidence from the jury upon the ground that there is a material variation between the declaration and the proof, if, from the whole evidence, it clearly appears to the court that the plaintiff's said evidence fails to support the issue on the part of the plaintiff, the court should exclude the evidence from the jury. In such case the court should regard the party moving to exclude the evidence in the light of a demurrant, and the party adducing the evidence in the light of a demurree, although there is in fact no demurrer. The court should consider, upon such motion, the plaintiff's evidence with all the favor, and give it all the force and draw therefrom all the inferences, it would be entitled to if there was a demurrer filed thereto by the party making the motion to exclude the evidence. And in such case, if, in the judgment of the court, according to the rules governing demurrers to evidence, the party offering the evidence would, on a demurrer thereto by the opposite party, be entitled to judgment thereon in his favor, then the court should not exclude the evidence from the jury. *Dresser v. Transportation Co.*, 8 W. Va. 553. See *Harris v. Lewis*, 5 W. Va. 575.

e. Evidence to Impeach Witnesses.

Where the answer of a witness is in itself admissible evidence, it is not error to refuse to strike the answer from the evidence in the case, merely because it was elicited in response to a question which appears to have been asked with a view to laying the foundation for the impeachment of the witness by another witness who is not thereafter introduced. *Kibler v. Com.*, 94 Va. 804, 26 S. E. 858.

f. Weight and Sufficiency of Evidence.

Motions to exclude the plaintiff's

evidence, or to set aside a verdict, on the ground that it is contrary to the evidence, ought to be overruled where the court can not grant the same without usurping the functions of the jury. *Wheeling Bridge Co. v. Wheeling, etc., Bridge Co.*, 34 W. Va. 155, 11 S. E. 1009; *Wooddell v. West Virginia Imp. Co.*, 38 W. Va. 23, 17 S. E. 386.

Where the case turns on the weight and effect of the evidence in proving or not proving facts necessary to support the action, and the evidence appreciably goes to prove such facts, it ought to go to the jury, as a verdict upon such evidence gives it a force which it might not have with the judge before verdict, and fortifies his case more against the action of the court, as the court can not set the verdict aside unless plainly and decidedly contrary to or without evidence; but where the case is not such, but one of undisputed or indisputable facts, leaving it only a matter of law whether the facts show a liability on the defendant, the court should take the case from the jury, and direct a verdict, if the evidence shows no case for the plaintiff, because, if there were a verdict for him, it would be a finding against law, and the court always annuls a verdict against law upon conceded or indisputable facts. It is different, then, from a motion for a new trial, where the verdict rests on the credibility of witnesses or the weight and effect of evidence. *Grayson's Case*, 6 Gratt. 712; *Poling v. Ohio River R. Co.*, 38 W. Va. 645, 18 S. E. 782 (Syl. point 8). Likely this distinction is not always thought of. Plainly, if the court does right in excluding the evidence, it commits no error in directing a verdict, as such a verdict is the inevitable consequence of such exclusion. There can not then be any different verdict. *Ritz v. Wheeling*, 45 W. Va. 262, 21 S. E. 993.

g. Waiver of Objections.

Illegal Evidence.—Where trial court rules that certain admitted evidence

was illegal and promised to hear later, a motion to exclude it, and no exception was taken, and there was a failure to call the court's attention before verdict, such failure amounts to a waiver of the objection. *Norfolk, etc. R. Co. v. Anderson*, 90 Va. 1, 17 S. E. 757.

Irrelevant Evidence.—Where evidence is introduced, which appears proper at the time, and the court admits it and refuses to exclude it on motion of counsel with the remark: "It will be excluded, if it hereafter appears that it is irrelevant," and the record shows, that it afterwards appeared that it was irrelevant, but no motion was afterwards made by counsel to exclude it, the objection to its admission is waived. *Hargreaves v. Kimberly*, 26 W. Va. 787.

Insufficient Evidence.—A motion to exclude the plaintiff's evidence for insufficiency is waived by the defendant after such motion is made introducing his evidence, as his evidence may cure the defects in the plaintiff's. *Trump v. Tidewater Coal, etc., Co.*, 46 W. Va. 238, 32 S. E. 1035, citing *Core v. Ohio R. Co.*, 38 W. Va. 456, 18 S. E. 596.

2. The Motion.

a. Nature of Motion.

"Under the Virginia practice, the only mode of taking away from the jury the determination of the weight to be given to evidence is by demurring to it. A motion to strike out is not equivalent to a demurrer to the evidence, as counsel for plaintiff in error contends, citing *Fowlkes v. Southern R. Co.*, 96 Va. 742. The decision in that case only recognized and applied the universally admitted law that the court determines whether evidence is admissible or not, and, in the exercise of this function, admits or excludes it, on objection to it when offered, or on motion to strike it out, if it has been improperly admitted." *Southern R. Co. v. Cooper*, 98 Va. 299, 36 S. E. 388.

And in West Virginia, too, a motion to exclude or strike out evidence is not in all cases the equivalent of a demurrer, and should not in practice, without modification, be permitted to supersede and replace such demurrer. *Bon Aqua Imp. Co. v. Standard Fire Ins. Co.*, 34 W. Va. 764, 12 S. E. 771.

However, it has been held, repeatedly, in West Virginia that a party who moves the court to exclude the evidence of the opposite side, must be treated as a demurrant to such evidence, at least, as to the effect which is to be given to it. *James v. Adams*, 8 W. Va. 568; *Johnson v. Baltimore*, etc., R. Co., 25 W. Va. 570; *Smith v. County Court*, 33 W. Va. 713, 11 S. E. 1. See the title DEMURRER TO THE EVIDENCE, vol. 4, p. 517.

b. Time of Motion.

After the defendant has given in his own evidence, or a material part thereof, his motion to strike out all the evidence or plaintiff's evidence, on the ground that it is not sufficient to sustain the issue on plaintiff's part, should not be granted, but he should be left to his demurrer to the evidence. *Wooddell v. West Virginia Imp. Co.*, 38 W. Va. 23, 17 S. E. 386; *Wandling v. Straw*, 25 W. Va. 692.

After the defendant has given in his own evidence, a motion to strike out all the evidence, on the ground that it is insufficient to sustain the issue on the part of the plaintiff, should not be granted. *Carrico v. West Virginia Cent.*, etc., R. Co., 35 W. Va. 389, 14 S. E. 12.

A motion to strike out the plaintiff's evidence will not be entertained after the defendant has given in his evidence, on the ground that it is insufficient to sustain the issue on the part of the plaintiff. *Overby v. Chesapeake*, etc., R. Co., 37 W. Va. 524, 16 S. E. 813.

"After the defendant has given in his own evidence, a motion to strike out all the evidence on the ground that it is insufficient to sustain the issue on

the part of the plaintiff should not be granted." *Carrico v. West Virginia Cent. R. Co.*, 35 W. Va. 389, 14 S. E. 12. Such motion is equivalent to a direction to the jury to find for the defendant on the ground that the evidence of plaintiff is clearly insufficient to warrant the finding of a verdict for plaintiff. *Wooddell v. West Virginia Imp. Co.*, 38 W. Va. 23, 17 S. E. 386.

3. In Criminal Cases.

The accused may move to exclude the evidence, or in a misdemeanor case by agreement or consent a jury may be waived, and the facts submitted to the court for determination. *State v. Alderton*, 50 W. Va. 101, 40 S. E. 350.

4. Hearing and Determination.

A party who moves the court to exclude the evidence of the opposite side, must be treated as a demurrant to such evidence, at least as to the effect which is to be given to it. *Johnson v. Baltimore*, etc., R. Co., 25 W. Va. 570.

A court ought not to exclude all the plaintiff's evidence from the jury on the defendant's motion, unless regarding the defendant as though he was a demurrant to the plaintiff's evidence, the court would find for the demurrant. *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622.

5. Exceptions and Objections.

See the title EXCEPTIONS, BILL OF.

When a party moves the court to exclude evidence, he should specify the evidence to which he objects; and where the motion is to exclude a mass of evidence, some of which is proper to be received, the motion may be properly overruled on account of its generality. For this proposition, *Friend v. Wilkinson*, 9 Gratt. 31, is cited and approved in *Washington*, etc., R. Co. v. Lacey, 94 Va. 460, 463, 26 S. E. 834; *Norfolk*, etc., R. Co. v. Ampey, 93 Va. 108, 126, 25 S. E. 226; *Trogon v. Com.*, 31 Gratt. 862, 881. See, in accord, *Parsons v. Harper*, 16 Gratt. 64; *Kincheloe v. Tracewells*, 11 Gratt. 587; *Harriman*

v. Brown, 8 Leigh 697; *Buster v. Wallace*, 4 Hen. & M. 82.

Where a deed, though it may be invalid to pass the title it purports to convey, is yet admissible in evidence as a link in the plaintiff's chain of title to show the bounds of the land claimed by him, and the extent of his possession, it was held, that a motion to exclude the deed altogether, and not merely as evidence of a valid transfer of title, is properly overruled, because the deed was admissible for some purpose. *Olinger v. Shepherd*, 12 Gratt. 462.

A party who asks to have evidence excluded, which has been admitted without objection, must recall and point out distinctly the objectionable answers or statements, or the court may properly overrule the motion to exclude. *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226.

6. Bill of Exceptions.

This court will not review the ruling of the trial court on a motion to reject or admit evidence, unless a bill of exceptions is duly taken, clearly and distinctly pointing out each erroneous ruling complained of. *Longley v. Com.*, 99 Va. 807, 37 S. E. 339; *Hughes v. Kelly*, 2 Va. Dec. 588.

VI. Questions of Law and Fact.

See the various particular titles and consult the cross references made from this heading.

A. IN GENERAL.

It is elementary, and is firmly settled in Virginia, that the court responds to questions of law and the jury to questions of fact. The court must decide on the admissibility of evidence, that being a question of law; but not as to its weight after it is admitted, that being a question of fact. The decided cases evince a jealous care to watch over and protect the legitimate powers of a jury. They show that the court must be very careful not to overstep the line which separates law from fact.

They establish the fact that when evidence is parol, any opinion as to the weight, effect, or sufficiency of the evidence submitted to the jury, any assumption of a fact as proved, will be an invasion of the province of the jury. To this effect, *Whitacre v. M'Ilhaney*, 4 Munf. 310, is cited in *Brooke v. Young*, 3 Rand. 106, 114; *Cornett v. Rhudy*, 80 Va. 710, 716; *Richmond, etc., R. Co. v. Noell*, 86 Va. 19, 24, 9 S. E. 473; *Tyler v. Chesapeake, etc., R. Co.*, 88 Va. 389, 394, 13 S. E. 975; *McCue v. Com.*, 103 Va. 870, 49 S. E. 623; *Bogle v. Sullivant*, 1 Call 651.

As it is the province of the jury to consider what degree of credit ought to be given to evidence, so it is for the court alone to determine, whether a witness is competent, or the evidence is admissible. Whether there is any evidence is a question for the judge; whether it is sufficient is for the jury. And whatever antecedent facts are necessary to be ascertained, for the purpose of deciding the question of competency, as for example, whether a child understands the nature of an oath, or whether the confession of a prisoner was voluntary, or whether declarations offered in evidence as dying declarations, were made under the immediate apprehension of death; these and other facts of the same kind, are to be determined by the court, and not by the jury. *Vass v. Com.*, 3 Leigh 786, quoting these words, cites 1 Phil. L. Ev. 13 (Edi. 1816); *Claytor v. Anthony*, 6 Rand. 285, 299; *Chany v. Saunders*, 3 Munf. 51. To the same point, *Claytor v. Anthony*, 6 Rand. 285, is cited in *Snooks v. Wingfield*, 52 W. Va. 441, 44 S. E. 277, 280.

B. QUESTIONS OF LAW.

1. In General.

The court responds to questions of law, such as the admissibility of testimony and the competency of witnesses. *Tyler v. Chesapeake, etc., R. Co.*, 88 Va. 389, 394, 13 S. E. 975; *McCue v. Com.*, 103 Va. 870, 49 S. E. 623; *Bogle*

v. Sullivant, 1 Call 561; *Vass v. Com.*, 3 Leigh 786.

In criminal cases the jury are not judges of the law. *Brown v. Com.*, 86 Va. 466, 10 S. E. 745.

2. Admissibility of Evidence.

It is the province of the court to decide on the admissibility of testimony. *Bogle v. Sullivant*, 1 Call 561; *Vass v. Com.*, 3 Leigh 786; *Hill v. Com.*, 2 Gratt. 594; *Bull v. Com.*, 14 Gratt. 613; *McCue v. Com.*, 103 Va. 870, 49 S. E. 623.

It is elementary, and is firmly settled in Virginia, that the court responds to questions of law, and the jury to questions of fact. The court must decide on the admissibility of evidence, that being a question of law; but not as to its weight after it is admitted, that being a question of fact. *McDowell v. Crawford*, 11 Gratt. 377; *Tyler v. Chesapeake, etc.*, R. Co., 88 Va. 389, 13 S. E. 975.

3. Competency of Witnesses.

See the title WITNESSES.

The question of the competency of a witness is for the court, because it is a question of legal ascertainment, requiring wisdom, knowledge and experience. *Coleman v. Com.*, 25 Gratt. 865, 18 Am. Rep. 711; *State v. Michael*, 37 W. Va. 565, 16 S. E. 803.

C. QUESTIONS OF FACT.

1. In General.

Questions of fact are for the jury, and the court can not invade its province. *Swindell v. Harper*, 51 W. Va. 381, 385, 41 S. E. 117; *Tyler v. Chesapeake, etc.*, R. Co., 88 Va. 389, 13 S. E. 975.

2. Weight and Sufficiency of Evidence.

The jury are the sole judges of the weight and sufficiency of evidence. *Ross v. Gill*, 1 Wash. 87; *Bogle v. Sullivant*, 1 Call 561; *Keel v. Herbert*, 1 Wash. 263; *Whitacre v. M'Ilhaney*, 4 Munf. 310; *State v. Greer*, 22 W. Va. 800; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493; *Fisher v. Duncan*, 1 Hen. & M. 563, 3 Am. Dec. 605; *Vass v.*

Com., 3 Leigh 786; *M'Kinley v. Ensell*, 2 Gratt. 333; *Coleman v. Com.*, 25 Gratt. 865; *Underwood v. McVeigh*, 23 Gratt. 409; *State v. Perry*, 41 W. Va. 641, 24 S. E. 634; *McCue v. Com.*, 103 Va. 870, 49 S. E. 623; *Moore v. Strickling*, 46 W. Va. 515, 33 S. E. 274; *Scott v. Railroad Co.*, 43 W. Va. 484, 27 S. E. 211; *McDonald v. Cole*, 46 W. Va. 186, 32 S. E. 186, 32 S. E. 1033; *Martin v. Stover*, 2 Call 514, cited in *Brooke v. Young*, 3 Rand. 106; *Fitzhugh v. Fitzhugh*, 11 Gratt. 300; *Dabney v. Taliaferro*, 4 Rand. 256; *McVeigh v. Allen*, 29 Gratt. 588; *Lloyd v. Scott*, Fed. Cas. No. 8, 434, 15 Fed. Cas. 726; *Blincoe v. Berkeley*, 1 Call 405; *Crabtree v. Horton*, 4 Munf. 59; *Fowler v. Lee*, 4 Munf. 373; *Moore v. Chapman*, 3 Hen. & M. 260; footnote to *Grayson v. Com.*, 6 Gratt. 712; footnote to *M'Dowell v. Crawford*, 11 Gratt. 377; *Whitelaw v. Whitelaw*, 83 Va. 40, 1 S. E. 407; *State v. Hurst*, 11 W. Va. 54; *Nicholas v. Kershner*, 20 W. Va. 251; *State v. Thompson*, 21 W. Va. 741; *State v. Heaton*, 23 W. Va. 773; *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. 880; *State v. Morgan*, 35 W. Va. 273, 13 S. E. 385; *Neill v. Rogers Bros. Produce Co.*, 38 W. Va. 228, 18 S. E. 563; *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813; *Austin v. Richardson*, 3 Call 201.

The jury are the sole judges of the credibility of testimony. *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813.

If the question depends on the weight of testimony, or inferences or deductions from facts proven, the jury are exclusively and uncontrollably the judges. The court can not interfere in a doubtful case. The court must be satisfied that the evidence is plainly insufficient. *State v. Cooper*, 26 W. Va. 338; *State v. Donohoo*, 22 W. Va. 761; *Vaiden's Case*, 12 Gratt. 717; *State v. Sullivan*, 55 W. Va. 597, 47 S. E. 267.

If evidence offered to be introduced on the trial of a cause is relevant to the issue, it should be admitted. It is for the jury to determine what effect

it shall have. *Underwood v. McVeigh*, 23 Gratt. 409.

In trials at law, where the evidence exhibited is legally admissible, but contradictory, it is most proper to be left to the consideration of the jury. *Shanks v. Fenwick*, 2 Munf. 478.

The weight of testimony to establish any fact (though it be a fact upon which a question of law arises), is a question belonging exclusively to the jury, unless it be withdrawn from their determination by a demurrer to evidence. See, to the same effect, *Fisher v. Duncan*, 1 Hen. & M. 563. *Hardaway v. Manson*, 2 Munf. 230.

If a new trial depends upon the weight of testimony, or inferences from it, the jury are exclusively and almost uncontrollably the judges. *State v. Sullivan*, 55 W. Va. 597, 47 S. E. 267.

In the trial of criminal cases especially, the court should leave to the jury, exclusively, the consideration of the facts, and no remarks which have a tendency to intimate the bias of the court on the character or weight of the testimony should be indulged in by it. *Dejarnette v. Com.*, 75 Va. 867.

Where a record is offered as evidence on a trial in ejectment, the court ought not to admit it to go to the jury, "to prove that the land in dispute was assigned to the plaintiff;" for this would be undertaking to decide not only the legality and relevancy of the evidence, but also its weight and effect. It should be admitted, only, as legal testimony in relation to the subject in controversy, leaving the jury to determine what facts are proved by it. See *Keel v. Herbert*, 1 Wash. 203. *Whitacre v. M'Ilhanev*, 4 Munf. 310.

Recent Possession of Fruits of Crime—The weight and value to be attached to the fact of possession of the fruits of crime recently after its commission, is to be determined by the jury in connection with the other facts proved. *Kibler v. Com.*, 94 Va. 804, 26 S. E. 858.

Invasion of Province of Jury.—From the earliest times in Virginia and West Virginia, the courts have always guarded with jealous care the province of the jury, and any opinion as to the weight, effect or a sufficiency of the evidence submitted to the jury, will be an invasion of the province of the jury. *Ross v. Gill*, 1 Wash. 87; *McDowell v. Crawford*, 11 Gratt. 377; *State v. Hurst*, 11 W. Va. 54; *State v. Thompson*, 21 W. Va. 741.

Several late Virginia cases cite *Moore v. Chapman*, 3 Hen. & M. 260, to support the proposition that when the evidence is parol, any opinion given by the court as to the weight, effect or sufficiency of the evidence submitted to the jury, or any assumption of fact as proved, is an invasion of the province of the jury. *Cornett v. Rhudy*, 80 Va. 710, 716; *Richmond, etc., R. Co. v. Noell*, 86 Va. 19, 24, 9 S. E. 473; *Tyler v. Chesapeake, etc., R. Co.*, 88 Va. 389, 394, 13 S. E. 975. See foot-notes to *Fisher v. Duncan*, 1 Hen. & M. 563; *Ross v. Gill*, 1 Wash. 87; *Davis v. Miller*, 14 Gratt. 1, 3.

In Virginia questions of law, such as the admissibility of evidence, are for the court. Questions of fact, such as the weight of evidence, are for the jury. When evidence is parol, any expression of opinion by the court as to weight, effect, or sufficiency of the evidence, or any assumption of a fact as proved, will be an invasion of the province of the jury, for which a verdict will be set aside, and a new trial awarded. *Tyler v. Chesapeake, etc., R. Co.*, 88 Va. 389, 13 S. E. 975.

The decided cases evince a jealous care to watch over and protect the legitimate powers of a jury. They show that the court must be very careful not to overstep the line which separates law from fact. They establish the fact that when evidence is parol, any opinion as to the weight, effect, or sufficiency of the evidence submitted to the jury, any assumption of a fact as

proved, will be an invasion of the province of the jury. *Baring v. Reeder*, 1 Hen. & M. 154, 174; *Moore v. Chapman*, 3 Hen. & M. 260, 266; *Fisher v. Duncan*, 1 Hen. & M. 563; *Whitacre v. M'Ilhanev*, 4 Munf. 310; *McCrae v. Scott*, 4 Rand. 463; *Cornett v. Rhudy*, 80 Va. 710; *Tyler v. Chesapeake, etc.*, R. Co., 88 Va. 389, 394, 13 S. E. 975.

Instructions.—It is error for the court to undertake to instruct the jury as to the weight, or sufficiency of the evidence offered. *Moore v. Chapman*, 3 Hen. & Mn. 260, citing *Fisher v. Duncan* 1 Hen. & M. 563. To the same effect, *Fisher v. Duncan*, 1 Hen. & M. 563, was cited in *Brooke v. Young*, 3 Rand. 106, 114; note to *Gay v. Moseley*, 2 Munf. 543, 546; note to *Christy v. Minor*, 4 Munf. 431, 435; *Davis v. Miller*, 14 Gratt. 1, 3; *McVeigh v. Allen*, 29 Gratt. 588, 593; foot-note to *Bogle v. Sullivan*, 1 Call 561; *Cornett v. Rhudy*, 80 Va. 710, 716; *Tyler v. Chesapeake, etc.*, R. Co., 88 Va. 389, 394, 13 S. E. 975; *Hickman v. Jones*, 9 Wall, 202, 76 U. S. 551, 19 L. Ed. 553; *State v. Sutfin*, 22 W. Va. 771; *Keel v. Herbert*, 1 Wash. 203; *Fisher v. Duncan*, 1 Hen. & M. 563; *Moore v. Chapman*, 3 Hen. & Munf. 260; *M'Crae v. Scott*, 4 Rand. 463; *Cornett v. Rhudy*, 80 Va. 710.

For making observations or instructions to the jury as to the weight to be given by them to any part of the testimony or the whole evidence, the cause may be reversed and a new trial awarded. *Davis v. Miller*, 14 Gratt. 1; *Hopkins v. Richardson*, 9 Gratt. 485, 486; *Tyler v. Chesapeake, etc.*, R. Co., 88 Va. 389, 394, 13 S. E. 975.

The courts of this state are peculiarly jealous of any encroachment by the court on the province of the jury, and it is error for a court in the trial of a case, to intimate any opinion in reference to matters of fact, which might in any degree influence the verdict nor can the court instruct the jury as to the weight to be given by them to the

evidence of any witness, whether the witness be impeached or not, or whether he is contradicted as to material facts or not. The jury are the exclusive judges of the weight to be attached to the evidence of any witness, and the court would err in influencing them in any way in determining this weight, either by instruction as to the proper manner of ascertaining such weight, or otherwise. *State v. Thompson*, 21 W. Va. 741.

The sufficiency of the evidence ought to be left wholly to the consideration of the jury; and, in this case, the county court having instructed the jury, that, "from the whole testimony before them the demand of the plaintiffs was not barred by the act of limitations," it was determined that the said opinion of the county court was erroneous. *Fisher v. Duncan*, 1 Hen. & M. 563.

If there is any evidence tending to prove a fact in issue before a jury, it is proper for the court to give an instruction applicable thereto, if requested so to do, even though it is so slight as to be insufficient to support a verdict founded upon it. If the opposing party desires the court to pass on the sufficiency of the evidence, this must be done either by a demurrer to the evidence before verdict, or, after verdict, by a motion to set aside the verdict. *Southern R. Co. v. Wilcox*, 99 Va. 394, 395, 39 S. E. 144.

Directing Verdict.—See the title VERDICT.

In *White v. Brewing Co.*, 51 W. Va. 259, 41 S. E. 180, 181, it is said: "The learning of the early courts of Virginia has been towards the 'scintilla of evidence' rule, although in following it repeated verdicts may have to be set aside as contrary to the decided weight and plain preponderance of the evidence. *Keel v. Herbert*, 1 Wash. 203; *Hollingsworth v. Dunbar*, 5 Munf. 199; *Fisher v. Duncan*, 1 Hen. & M. 563, 3 Am. Dec. 605; *Martin v. Stover*, 2 Call 514." In this case (*White v.*

Brewing Co., 51 W. Va. 259, 41 S. E. 180), it was held, that a trial court commits no reversible error in instructing a jury to find for the party in whose favor the evidence plainly and decidedly preponderates; but, if the material facts are doubtful, and a verdict for either party would be sustained, the court should not instruct the jury to find against such party.

The court can not be called on to instruct the jury to find a verdict for the defendants, although some of the evidence is written testimony. *Martin v. Stover*, 2 Call 514.

But when the evidence given at a trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court may direct a verdict for the defendant. *Woolwine v. Chesapeake, etc., R. Co.*, 35 W. Va. 329, 15 S. E. 81. See *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. 999.

3. Credibility of Witnesses.

See the title WITNESSES.

The jury and not the court are the judges of the credibility of witnesses. *Harrison v. Brock*, 1 Munf. 22; *McCue v. Com.*, 103 Va. 870, 49 S. E. 623; *Akers v. DeWitt*, 41 W. Va. 229, 23 S. E. 669; *Lyles v. Com.*, 88 Va. 396, 13 S. E. 802; *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813; *Hash v. Com.*, 88 Va. 172, 13 S. E. 398; *Swindell v. Harper*, 51 W. Va. 381, 385, 41 S. E. 117; *Moore v. Strickling*, 46 W. Va. 515, 33 S. E. 274.

The credibility of witnesses is a matter peculiarly within the province of the jury, who should be left free in each case to determine, in view of all the circumstances, what witnesses, or what parts of the evidence of any witness, they will credit, untrammelled, as far as possible, by inflexible rules. *Norfolk, etc., R. Co. v. Poole*, 100 Va. 148, 40 S. E. 627.

"This evidence is apparently sufficient to overcome Trump's. but the

jury saw the witnesses, and for some reason gave the weight and credibility to Trump. This was their province, with which this court is powerless to interfere, without disregarding the constitutional guaranty of right of jury trial. *Young v. West Va., etc., R. Co.*, 44 W. Va. 218, 28 S. E. 932; *Sisler v. Shaffer*, 43 W. Va. 469, 28 S. E. 721; *Akers v. DeWitt*, 41 W. Va. 229, 23 S. E. 669." *Trump v. Tidewater Coal, etc., Co.*, 46 W. Va. 238, 32 S. E. 1035, 1037.

VII. Rebuttal—Rebutting Evidence.

Definition.—Rebutting evidence is that evidence which is given by a party in the cause to explain, repel, counteract, or disprove facts given in evidence on the other side. The term rebutting evidence is more particularly applied to that evidence given by the plaintiff to explain or repel the evidence given by the defendant. *Bouv. L. Dic.*, vol. 2, p. 830.

Rule Stated.—It is a general rule that anything may be given as rebutting evidence which is a direct reply to that produced on the other. *Bouv. L. Dic.*, vol. 2, p. 830.

Whether a party shall introduce further evidence after that of the adverse party has been heard, is a matter within the sound discretion of the court, and its exercise will rarely, if ever, be the cause of reversal. Clearly, he is entitled to introduce evidence to rebut that of the other party. *State v. Williams*, 49 W. Va. 220, 38 S. E. 495.

Effect of Failure to Object.—Plaintiff introduces a witness who is examined, but the court, after hearing the evidence, excludes it, without objection by the plaintiff. The defendant can not introduce evidence to rebut the evidence so excluded. *Womack v. Circle*, 29 Gratt. 192.

A party can not by his own omission to take an objection to the admission

of improper evidence, brought out on a cross examination, found a right to introduce testimony in chief to rebut it or explain it. *State v. Hatfield*, 48 W. Va. 561, 37 S. E. 626.

If evidence, in an action of ejectment by the female plaintiff, that she did not sign or acknowledge the deed under which the defendant claims title, be admitted without objection, the defendant may rebut, by evidence, that she received a part of the consideration for the deed. *Blair v. Sayre*, 29 W. Va. 604, 2 S. E. 97.

On the trial of a writ of ejectment, the plaintiff, to connect his title with the patent under which he claims, offered in evidence a deed bearing date January 13th, 1791, from a prior holder, to whom he traced title from the patentee, to a person from whom plaintiff traced the title by regular conveyances to himself. This deed was not proved, but the plaintiff introduced parol proof for the purpose of showing possession in conformity with the deed; but the proofs did not show the possession farther back than the date of the deed from this grantee to a purchaser from him, which was fifteen years after the date of the deed offered in evidence. The tenant also offered evidence to rebut and disprove the parol proof of the plaintiff, but the court excluded the evidence of the tenant and admitted the deed. Held, it was error to exclude tenant's evidence. *Shanks v. Lancaster*, 5 Gratt. 110.

VIII. Power of Congress to Provide Rules of Evidence for State Courts.

In General.—Congress has no power to declare by law what shall or shall not be evidence in a state court. *Crews v. Farmers Bank*, 31 Gratt. 348.

It is the province of the law-making power of the state to prescribe rules of evidence to govern the procedure in her own courts. The United States constitution has no application to the

subject. See *Cornwall v. Com.*, 82 Va. 644. *Newton v. Com.*, 82 Va. 647.

In *Crews v. Farmers' Bank*, 31 Gratt. 348, *Hale v. Wilkinson*, 21 Gratt. 75, was cited to support the proposition that congress has no power to declare by law what shall or shall not be evidence in a state court.

State Coupon Bonds.—Section 10, art. 1, U. S. constitution, does not apply to rules of evidence and procedure in state courts; and act of January 21, 1886, providing that on trial of an issue as to the validity of coupons alleged to have been cut from state bonds, expert testimony shall be inadmissible, is not repugnant to said section. And so likewise of act of January 26, 1886, requiring the production of the bonds from which the coupons are alleged to have been cut. *Com. v. Weller*, 82 Va. 721, 1 S. E. 102; *McGahey v. Com.*, 85 Va. 519, 8 S. E. 244.

Section 10, art. 1, U. S. constitution, applies not to rules of evidence and procedure in state courts; and act of January 26, 1886, requiring production of the bonds at certain trials, is constitutional and valid. *McGahey v. Com.*, 85 Va. 519, 8 S. E. 244. *Bryan v. Com.*, 85 Va. 526, 8 S. E. 246, followed in *Cooper v. Com.*, 85 Va. 528, 8 S. E. 247; *Laube v. Com.*, 85 Va. 530, 8 S. E. 246.

"Tenth section, article one, of the United States constitution, provides that no state shall pass any law impairing the obligation of contracts. This rule of evidence is in accordance with the common-law principle of evidence in force in this state, which is in force and applicable to all the citizens of this state alike, and in no way whatever affects the obligation of any contract, proved or unproved, real or imaginary. The cited clause of the United States constitution has no application whatever to rules of evidence prescribed by the law-making power of this state, to govern proceedings in her own courts. The said provision of the United States consti-

tution has no application to this case." *Cornwall v. Com.*, 82 Va. 644, 646; *Com. v. Weller*, 82 Va. 721, 1 S. E. 102; *Com. v. Booker*, 82 Va. 964, 7 S. E. 381.

Stamp Acts.—See generally, the title **REVENUE LAWS**.

The act of congress, entitled, "An act laying duties upon stamped vellum, parchment and paper," being enacted in pursuance of the constitutional power to levy and collect taxes, duties, imposts and excises, and being therefore constitutional, although changing the rules of evidence in state courts; held, in an action of debt, upon a bond, the bond not being duly stamped, could not go in evidence to the jury. *Woodson v. Randolph*, 1 Va. Cas. 128.

The question in this case was, whether the act of congress was consti-

tutional or not. Some persons had supposed that congress had no power to change the rules of evidence in the state courts; the general courts, however, were of opinion that, as congress had power to lay and collect taxes, duties, imposts and excises, and to make all laws necessary and proper for carrying into execution the specified powers, the aforesaid act was within the limits of their chartered authority. *Woodson v. Randolph*, 1 Va. Cas. 128.

A deed or other writing though not stamped, is admissible in evidence, the act of congress not applying to proceedings in state courts. And it seems it is admissible in evidence in the United States courts, unless the omission to stamp it was with fraudulent intent.

Hale v. Wilkinson, 21 Gratt. 75.

Evidence at Former Trial.

See the title **HEARSAY EVIDENCE**.

Examination.

As to examination of witnesses, see the title **WITNESSES**. As to examination of parties before trial, see the title **DISCOVERY**, vol. 4, p. 677. As to preliminary examination of accused, see the title **COMMITMENTS AND PRELIMINARY EXAMINATION OF ACCUSED**, vol. 3, p. 7. As to physical examination of persons, see the title **INSPECTION AND PHYSICAL EXAMINATION OF ACCUSED**. As to privy examination of married women, see the title **ACKNOWLEDGMENTS**, vol. 1, p. 113. As to examination of jurors on voir dire, see the title **JURY**. As to examination of garnishee, see the title **ATTACHMENT AND GARNISHMENT**, vol. 2, p. 123. As to examination of execution debtor, see the title **DISCOVERY**, vol. 4, p. 681.

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As to competency of title examiner to testify as expert, see the title **EXPERT AND OPINION EVIDENCE**. As to examiner of record, see the titles **RECORDS; REFERENCE**.

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See the title **COMMITMENTS AND PRELIMINARY EXAMINATION OF ACCUSED**, vol. 3, pp. 3, 10.

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See the titles **ABUTTING OWNERS**, vol. 1, p. 70; **ADJOINING LAND-OWNERS**, vol. 1, p. 175; **STREETS AND HIGHWAYS**.

Exceptions and Objections in Practice.

See generally, the titles APPEAL AND ERROR, vol. 1, p. 547; EXCEPTIONS, BILL OF. See also, the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2; ACCOUNTS AND ACCOUNTING, vol. 1, p. 99; AFFIDAVITS, vol. 1, p. 234; ALTERATION OF INSTRUMENTS, vol. 1, p. 315; ANSWERS, vol. 1, p. 401; ARGUMENTS OF COUNSEL, vol. 1, p. 718; ASSAULT AND BATTERY, vol. 1, p. 730; BEST AND SECONDARY EVIDENCE, vol. 2, p. 369; BILL OF PARTICULARS, vol. 2, p. 382; BONDS, vol. 2, p. 567; CARRIERS, vol. 2, p. 716; CHAMBERS AND VACATION, vol. 2, p. 771; CONSOLIDATION OF ACTIONS, vol. 3, p. 125; CONTEMPT, vol. 3, p. 268; CONTINUANCES, vol. 3, p. 306; CRIMINAL LAW, vol. 4, p. 47; DEMURRER TO THE EVIDENCE, vol. 5, p. 546; DEPOSITIONS, vol. 4, p. 578; DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 4, p. 721; DOCUMENTARY EVIDENCE, vol. 4, p. 773; EMINENT DOMAIN, vol. 5, p. 108; EVIDENCE, vol. 5, p. 349.

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CROSS REFERENCES.

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I. Definition, Origin and Office.

A. DEFINITION.

"A bill of exceptions is nothing more than a clear and explicit statement, attested by the signature of the judge, of the action of the court, and of the circumstances which attended it, which is ordered to be made part of the record." *Minor's Inst.*, vol. 4, pt. 1, p. 897.

"A bill of exceptions is a mode of placing the law of the case on the record, which is to be brought before the court by a writ of error." *Ex parte Crane*, 5 Pet. 190, quoted in *Taliaferro v. Franklin*, 1 Gratt. 332.

B. ORIGIN.

"At common law no writ of error lay for an error in law not appearing upon the face of the record, and therefore, where a party alleged anything *ore tenus*, which was overruled by the judge, this could not be assigned for error, and so the party was without remedy. The law was amended in this respect by the statute of West. 2, 13 Ed. 1, ch. 31, which provides that 'when one impleaded before any of the justices, alleges an exception, praying they will allow it, and if they will not, and he that alleges the exception, writes the same, and requires the justices will put to their seals, the justices shall so do; and if one will not another shall; and if upon complaint made of the justices, the king caused the record to come before him, and the exception be not found in the roll, and the plaintiff show the written exception, with the seal of the justices thereto put, the justice shall be commanded to appear at a certain day, either to confess or deny his seal; and if he can not deny his seal, they shall proceed to judgment according to the exception, as it ought to be allowed or disallowed.' 1 *Bac. Ab. Bill of Excepts.*; 2 *Inst.* 426." *Taliaferro v. Franklin*, 1 Gratt. 332. See also, *Roanoke, etc., Co. v. Karn*, 80 Va. 589, 592; *Dryden v. Swinburne*, 20 W. Va. 89, 108.

"In Virginia, this statute of West. 2

has been adopted in terms into our Code, with some alterations that have a bearing upon the subject of jurisdiction. The English statute begins, 'When one impleaded before any of the justices:' ours, 'When one impleaded in any court in any cause where appeal, writ of error or supersedeas lies to a higher court.' The English statute directs that, 'upon complaint made of the justices, if the king cause the record to be brought before him' etc.: ours, that, 'if such higher court, upon complaint made of the said justices,' etc. It is clear from our statute, by its express provision, that the writ of which it speaks, is to issue from that appellate court which would have immediate jurisdiction, by appeal, writ of error or supersedeas, if the question of law to be reviewed, had appeared, according to the course of the common law, upon the face of the record." *Taliaferro v. Franklin*, 1 Gratt. 332.

The purposes of this statute were (1) To make it the duty of the justices to seal the exceptions, if truly stated. (2) To provide for the verification of the seals of the justices and so make the exception a part of the record. (3) To require the appellate court to act upon the question and reverse or affirm the judgment. *Taliaferro v. Franklin*, 1 Gratt. 332, 333.

C. OFFICE.

The whole object of a bill of exceptions is to exhibit upon the record the supposed mistakes of the court which tries the cause, with a view to have them corrected in an appellate court. *Minor's Inst.*, vol. 4, pt. 1, p. 897.

The legal and proper office of a bill of exceptions is to obtain relief by an appeal to a higher judicial tribunal of the state. *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76.

The object of the institution of bills of exception was to enable the party to spread upon the record matters that occurred at trial, the improper evi-

dence introduced, the instructions asked, the opinions given and other matters of which the party could not otherwise avail himself in an appellate court. *Roanoke etc., Co. v. Karn*, 80 Va. 589, 592.

The object of a bill of exceptions is to put upon the record all the facts touching the decision of the court respecting questions of law which do not appear upon the record and which arise in the course of the trial, so that when the case is removed to an appellate court by writ of error the bill of exceptions may be taken into consideration, and there finally decided, by which the decision below will be affirmed or reversed. *Brown v. Hall*, 85 Va. 146, 151, 7 S. E. 182.

In the case of *Holleran v. Meisel*, 91 Va. 143, 21 S. E. 658, Judge Riely, in delivering the opinion of the court, says: "It is the office of a bill of exceptions to set forth a specific and definite allegation of error, and so much of the evidence as is necessary to a clear apprehension of the propriety or impropriety of the ruling made by the court, and if it fails to do this the exception will prove unavailing." Quoted in *Norfolk, etc., R. Co. v. Shott*, 92 Va. 34, 22 S. E. 811.

"The office of a bill of exceptions is to call the attention of the court to some specific matter as to which error is claimed. 11 Cyc. 714, 3 Enc. Pl. & Pr. 409. 'The duty rests upon the appellant or party claiming to have been prejudiced to prove the alleged error; he must, when he relies upon the bill of exceptions, show by means of it the error complained of clearly and affirmatively; and he must further show in order to have relief, that such error was prejudicial.'" *State v. Tucker*, 52 W. Va. 420, 44 S. E. 427. See also, *Hughes v. Trum*, 41 W. Va. 445, 23 S. E. 604.

"A bill of exceptions ought to be upon some point of law, either in admitting or denying evidence, or a challenge, or some matter of law arising

upon a fact not denied, in which either party is overruled by the court. It is not to draw the whole matter into examination again; but is only for a single point." 1 Bac. Abr. Bill of Exceptions, quoted in *Taliaferro v. Franklin*, 1 Gratt. 332.

II. When Proper.

In General.—In Virginia the statute taken substantially from 13 Edw. I, ch. 31, provides that "In the trial of a case at law, in which an appeal, writ of error, or supersedeas lies to a higher court, a party may except to any opinion of the court, and tender a bill of exceptions, which (if the truth of the case be fairly stated therein), the judge shall sign, and it shall be a part of the record of the case. Any bill of exceptions may be tendered to the judge, and signed by him, either during the term at which the opinion of the court is announced, to which exception is taken, or in vacation, within thirty days after end of such term, or at such other time as the parties, by consent entered of record, may agree upon, and any bill of exceptions so tendered, and signed by the judge as aforesaid, either in term time or vacation, shall be a part of the record of the case. This act shall apply to criminal as well as civil cases." Va. Code, 1904, ch. 166, § 3385.

By the West Virginia Code, 1899, ch. 131, § 9, it is provided that: "In the trial of a case at law in which a writ of error or supersedeas lies to the court of appeals, a party may except to any action or opinion of the court and tender a bill of exceptions; and if the action or opinion of the court be upon any question involving the evidence or any part thereof, either upon a motion for a new trial or otherwise, the court shall certify all the evidence touching such question, and the judge shall sign any such bill of exceptions (if the truth of the case be fairly stated therein), and it shall be made a part of the record in the case, and the whole

of the evidence so certified shall be considered by the court of appeals, both upon the application for and hearing of the writ of error or supersedeas."

In Criminal Cases.—By the Virginia Code, 1904, ch. 198, § 4050, "A party in a criminal case, or proceeding for contempt, for whom a writ of error lies to the supreme court of appeals, may except to an opinion of the court and tender a bill of exceptions, which (if the truth of the case be fairly stated therein), the judge shall sign; and it shall be a part of the record of the case."

A bill of exceptions is a proceeding technically appropriated to a court of law and is seldom used in a suit in equity. Its use is anomalous in a court of equity. *Evans v. Bradshaw*, 10 Gratt. 207; *Pairo v. Bethell*, 75 Va. 825.

It has been held, however, that under certain circumstances there is no objection to the use of a bill of exceptions, for the purpose of putting evidence upon the record, even though the action in which the evidence is offered is a suit in equity. *Evans v. Bradshaw*, 10 Gratt. 207; *Pairo v. Bethell*, 75 Va. 825.

If the case is one not capable of being reviewed in an appellate court, a bill of exceptions is, of course, superfluous and out of place. *Minor's Inst.*, vol. 4, pt. 1, p. 897.

It is obvious that there can be no occasion for a bill of exceptions in cases where there can be no process of appeal to a higher court. *Minor's Inst.*, vol. 4, pt. 1, p. 897, 915. *Com. v. Heckerson*, 2 Va. Cas. 60; *Souther v. Com.*, 7 Gratt. 673; *Case v. Com.*, 1 Va. Cas. 264.

The statute relating to bills of exceptions confines the cases in which they are to be signed cases in which an appeal, writ of error or supersedeas lies and a court is not therefore required to sign a bill of exception in

cases in which no appeal, writ of error or supersedeas but only a writ of certiorari lies. *Dryden v. Swinburne*, 20 W. Va. 89.

An examining court has no right to sign a bill of exceptions to any opinion or act of the court as no appeal could be taken therefrom, and if they do, it is no part of the record of the trial. *Souther v. Com.*, 7 Gratt. 673.

Originally a county court was not obliged to sign a bill of exceptions in a criminal case, and if the court did sign such bill it did not thereby become a part of the record of the case. *Case v. Com.*, 1 Va. Cas. 264; *Com. v. Heckerson*, 2 Va. Cas. 60; *Souther v. Com.*, 7 Gratt. 673.

By the act of 1814 it was directed that in the prosecution of any person for a crime or misdemeanor, in any superior court of law, it should be the duty of the judge to sign and seal a bill of exceptions tendered to him during the progress thereof, by the person prosecuted, or his counsel. *Com. v. Heckerson*, 2 Va. Cas. 60.

This act, however, confined the duty in terms to the superior courts and did not apply to county courts. *Com. v. Heckerson*, 2 Va. Cas. 60.

III. Necessity.

A. IN GENERAL.

As a general rule if errors, or supposed errors of any sort are committed by a court in its rulings during the trial of a case by a jury, the appellate court can not review these rulings of the court unless such rulings were objected to when made and a bill of exceptions taken or the point then saved and a bill of exceptions taken during the term. *Danks v. Rodeheaver*, 26 W. Va. 274, 299; *Congrove v. Burdett*, 28 W. Va. 220; *Spence v. Robinson*, 35 W. Va. 313, 13 S. E. 1004; *Newberry v. Williams*, 89 Va. 298, 15 S. E. 861; *Central Land Co. v. Obenchain*, 92 Va. 130, 22 S. E. 876; *Norfolk, etc., R. Co. v. Shott*, 92 Va. 34, 23 S. E. 811.

It may be stated as a general rule that a bill of exceptions is necessary whenever it is desired to put upon the record matters of exception which are not per se a part of the record. *Spence v. Robinson*, 35 W. Va. 313, 13 S. E. 1004.

In *Johnson v. Norton, etc., Co.*, 90 Va. 267, 269, 18 S. E. 36, it is said, that "Unless (a bill of exceptions is taken) the court sees nothing but the process, the pleadings, the verdict and the judgment or the judgment when the jury is waived by the parties." See also, *Bowyer v. Chesnut*, 4 Leigh 1; *Roanoke, etc., Co. v. Karn*, 80 Va. 591; *Magarity v. Shipman*, 82 Va. 806, 7 S. E. 381.

Nothing that transpired during the trial in the court below will be considered a part of the record on appeal, unless made so by a bill of exceptions or order of the court; and the mere statement on the record that certain pleas were rejected and that parties excepted to various rulings of the court, is not sufficient. *Lawrence v. Com.*, 86 Va. 573, 10 S. E. 840.

Certificate of Clerk or Entry on Order Book Insufficient.—A paper or deposition, which is not a part of the record can not be made so by the certificate of the clerk. *Cunningham v. Mitchell*, 4 Rand. 189; *Bowyer v. Chesnut*, 4 Leigh 1; *White v. Toncray*, 9 Leigh 352; *Roanoke, etc., Co. v. Karn*, 80 Va. 589; *Magarity v. Shipman*, 82 Va. 806, 7 S. E. 381; *Offtendinger v. Ford*, 86 Va. 917, 12 S. E. 1; *Johnson v. Norton, etc., Co.*, 90 Va. 267, 269, 18 S. E. 36; *West v. Richmond R., etc., Co.*, 102 Va. 339, 341, 46 S. E. 330; *Sweeney v. Baker*, 13 W. Va. 158, 202; *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485.

The unauthorized entry by the clerk on the minutes or order book that the person excepted, although the orders were signed, can not supply the place of a bill of exceptions. *Clark v. Com.*, 90 Va. 360, 18 S. E. 440, citing *Roanoke, etc., Co. v. Karn*, 80 Va. 589; *Fry v.*

Leslie, 87 Va. 269, 12 S. E. 671; *Trumbo v. Street Car Co.*, 89 Va. 780, 17 S. E. 124.

Agreement of Counsel Insufficient.—A stipulation entered into between counsel for the commonwealth and the accused by virtue of which objections noted during the course of the trial might be taken advantage of in the appellate court as though presented in formal bills of exceptions is of no avail. The appellate court will not consent that the labor and responsibility shall be imposed upon them of searching through the record to discover the objection made in the trial court. *Kibler v. Com.*, 94 Va. 804, 26 S. E. 858; *Marion Machine Works v. Craig*, 18 W. Va. 559.

Counsel can not by agreement present issues in the appellate court which were not tried in the lower court. The appellate court must review the case and affirm or refuse it, as appears by the record to be right. *Marion Machine Works v. Craig*, 18 W. Va. 559, 567.

The certificate of counsel affords no evidence of opinions expressed or evidence given at the trial. *Magarity v. Shipman*, 82 Va. 806, 7 S. E. 381; *Bowyer v. Cincinnati*, 4 Leigh 1; *Roanoke, etc., Co. v. Hickson*, 80 Va. 589, 593; *Johnson v. Norton, etc., Co.*, 90 Va. 267, 269, 18 S. E. 36.

For the general rule as to objections not raised below, illustrations thereof and exceptions to such rule, see the title APPEAL AND ERROR, vol. 1, p. 547.

B. ILLUSTRATIONS.

Depositions.—As to the necessity of objecting below to depositions, and for a bill of exceptions making the same a part of the record, see the title DEPOSITIONS, vol. 4, p. 549.

Dismissal of Appeal by County Court.—Where a judgment of the county court dismissing an appeal is superseded by the circuit court, which dismissed the supersedeas as improv-

idently awarded, and in the record of the county court no bill of exceptions was taken to show, that said court improperly dismissed the appeal, and nothing appears in the record to show, that the judgment of the county court was wrong, and it is not clear from the record, that this court has jurisdiction, a supersedeas to said judgment of the circuit court by the appellate court will be dismissed as being improvidently awarded. *Baltimore, etc., R. Co. v. Annon*, 18 W. Va. 393.

Evidence.—It is a rule of law generally enforced by the appellate court, that where an objection is made to the introduction of evidence and overruled by the court, and no exception is taken, such failure to except shall be held to be a waiver of the objection. *Stanbury v. Stanbury*, 20 W. Va. 23.

An objection to a ruling excluding evidence on the ground that the offer came too late can not be considered, in the absence of a bill of exceptions. *Metropolitan Life Ins. Co. v. Rutherford*, 2 Va. Dec. 707.

For a full treatment of the necessity of objecting below to the admission or exclusion of evidence, and the necessity for a bill of exceptions, see the title **APPEAL AND ERROR**, vol. 1, pp. 508, 511, 560.

As to certification of evidence, see post, "Certification of Facts or Evidence," VI, B.

Instructions.—As to the necessity of objecting below to the granting or refusing instructions and of a bill of exceptions to make the same part of the record, see the title **APPEAL AND ERROR**, vol. 1, pp. 509, 511, 563.

Irregularities in Summoning or Convening Grand Jury.—Where the record shows that on a certain day "V., gentleman, foreman, this day appointed by the court as such" (and fifteen others, naming them) "were empaneled and sworn a grand jury of inquest, in and for the body of the county of W., and having been charged were sent to their

room to consider of the business before them" and no irregularity in summoning or convening the grand jury is pointed out in a bill of exceptions, it will be presumed that no such irregularity existed. *State v. Tucker*, 52 W. Va. 420, 44 S. E. 427.

Issue Out of Chancery.—If the court, before which an issue out of chancery is tried, is dissatisfied with the verdict, this dissatisfaction must be certified on the record by the court; or if refused, it should be put on the record by a bill of exceptions; such bill is not to be supplied by affidavit, especially of counsel in the cause. *Stannard v. Graves*, 2 Call 310.

Where an issue is directed in a chancery cause and a verdict found to which no exceptions taken, and a decree is rendered thereon, the facts found in the verdict must be regarded in the appellate court as the established facts in the case. *Lee v. Boak*, 11 Gratt. 182; *Fitzhugh v. Fitzhugh*, 11 Gratt. 300; *Nease v. Capehart*, 15 W. Va. 299.

In *Watkins v. Carlton*, 10 Leigh 560, however, it was held, that where upon a trial at law of issues out of chancery, exceptions are filed to opinions of the court, and made part of the record; the court of law certifies the verdict, but it does not expressly certify, nor is it asked to certify, the exceptions; all the proceedings upon the trial of the issues, spread upon the record thereof, constitute part of the certificate of the verdict, and with it become part of the chancery record.

Private Statutes.—The court does not take judicial notice of private acts of the legislature (and hence a bill of exceptions is necessary to make such act part of the record). *Legrand v. Hampden-Sidney College*, 5 Munf. 324; *Mayor v. Chapman*, 4 Hen. & M. 270; *Hairston v. Cole*, 1 Rand. 461; Va. Code 1887, § 3328. See the title **JUDICIAL NOTICE**.

A plea stricken out or rejected is no

part of the record unless made so by a bill of exceptions. *White v. Toncray*, 9 Leigh 347, 5 Gratt. 180; *Herrington v. Harkins*, 1 Rob. 591; *Bowyer v. Hewitt*, 2 Gratt. 193; *Morrissett v. Com.*, 6 Gratt. 673; *Colley v. Shepard*, 31 Gratt. 312; *Lawrence v. Com.*, 86 Va. 573, 10 S. E. 840; *Fry v. Leslie*, 87 Va. 269, 12 S. E. 671; *Trumbo v. Street Car Co.*, 89 Va. 780, 17 S. E. 124; *Perry v. Horn*, 22 W. Va. 381; *Shank v. Ravenswood*, 43 W. Va. 242, 27 S. E. 223; *Quesenberry v. People's Bldg., etc., Ass'n*, 44 W. Va. 512, 30 S. E. 73.

Where a plea has been rejected, the appellate court will take it to have been rightly done unless defendant has excepted. *White v. Toncray*, 9 Leigh 347; *Herrington v. Harkins*, 1 Rob. 591; *Bowyer v. Hewitt*, 2 Gratt. 193; *Morrissett v. Com.*, 6 Gratt. 673; *Fry v. Leslie*, 87 Va. 267, 274, 12 S. E. 671; *King v. Burdett*, 12 W. Va. 688; *Snodgrass v. Copenhagen*, 34 W. Va. 171, 12 S. E. 695. See also, *Williams v. Knights*, 7 W. Va. 335.

A mere memorandum at the end of the record stating that when the pleas were filed the court declared that the matter thereof might be given in evidence without the pleas being filed, and that this was done at the trial, does not make the rejected pleas a part of the record. *White v. Toncray*, 9 Leigh 347.

The provision of the West Virginia Code of 1899, ch. 125, § 56, allowing the plaintiff to avail himself of the error committed in allowing a plea to be filed without excepting to the decision of the court thereon, does not apply when the plea is rejected. *Hart v. Baltimore, etc., R. Co.*, 6 W. Va. 336; *King v. Burdett*, 12 W. Va. 688, 694; *First Nat. Bank v. Kimberlands*, 16 W. Va. 555; *Perry v. Horn*, 22 W. Va. 381; *Quaker City Nat. Bank v. Showacre*, 26 W. Va. 48.

Setting Aside Order of Reference.—If, after great delay in executing an

order of reference made *pendente lite*, the court set it aside on motion of one of the parties, without previous notice or rule to show cause; but it does not appear, by a bill of exceptions, or otherwise, that any step had been taken to carry such order of reference into effect; after which, a fair trial is had, and judgment entered accordingly; such judgment ought to be affirmed. *Arnold v. Jackson*, 6 Munf. 106.

Order Setting Aside Office Judgment.—When, on motion of the defendants, the judgment entered at rules in the clerk's office, is set aside, and leave given the defendants to file a special plea in thirty days, an appellate court will presume, where no bill of exceptions has been filed, that such order was made by the consent or acquiescence of the plaintiffs. *Williams v. Knights*, 7 W. Va. 335.

Warrants of commitment are no part of the record of an examining court but may be made a part of the record by a bill of exceptions, and if a person excepts to an opinion of the examining court and in his bill of exceptions sets forth the warrant of commitment, he thereby makes the warrant a part of the record of the examining court. *Com. v. Murray*, 2 Va. Cas. 504. See also, *Com. v. McCaul*, 1 Va. Cas. 271.

For further illustrations of what constitutes a part of the record and what must be made so by a bill of exceptions, see the title APPEAL AND ERROR, vol. 1, p. 505, et seq.

IV. When Unnecessary.

A. GENERAL RULE.

Error apparent on the face of the record will be noticed in the appellate court though no bill of exceptions has been taken. *Murdock v. Herndon*, 4 Hen. & M. 200; *Strange v. Strange*, 76 Va. 240; *Nutt v. Summers*, 78 Va. 164; *Cralle v. Cralle*, 84 Va. 198; 6 S. E. 12; *Shrewsbury v. Miller*, 10 W. Va. 115;

Quaker City Nat. Bank v. Showace, 26 W. Va. 48; *Spence v. Robinson*, 35 W. Va. 313, 13 S. E. 1004; *Hughes v. Frum*, 41 W. Va. 445, 23 S. E. 604.

Statutory Provision Stated and Construed.—It is provided by statute in West Virginia that "any party may avail himself of any error appearing on the record by which he is prejudiced without excepting thereto." W. Va. Code, ch. 131, § 9. *Danks v. Rodeheaver*, 26 W. Va. 224, 274; *Perry v. Horn*, 22 W. Va. 381; *Spence v. Robinson*, 35 W. Va. 313, 13 S. E. 1004.

The language used in the West Virginia Code and in the acts of 1872-3, p. 595, that "A party may avail himself of any error appearing upon the record, by which he is prejudiced without excepting thereto" has been held, in a number of cases, to mean, "without filing a bill of exceptions." It never was intended to mean that a suitor could waive nothing by his silence. If this were so, one suitor might gain a great advantage over another. *Perry v. Horn*, 22 W. Va. 381; *Sweeney v. Baker*, 13 W. Va. 158; *Danks v. Rodeheaver*, 26 W. Va. 274; *Gilmer v. Sydenstricker*, 42 W. Va. 52, 24 S. E. 566; *Quesenberry v. People's Bldg. Ass'n*, 44 W. Va. 512, 30 S. E. 73.

"That clause merely meant to say that it was not necessary to save every error by exception; that, if it was not waived, if the error appeared on the record and was to his prejudice, and the fact affirmatively appeared by the record, that he could avail himself of it in the appellate court." *Shrewsbury v. Miller*, 10 W. Va. 115.

In *Shanks v. Ravenswood*, 43 W. Va. 242, 27 S. E. 223, a plea was tendered to the writ of mandamus nisi, setting up in bar of it, as *res adjudicata*, a judgment quashing a former mandamus nisi between the parties, but the court held, that "we can not consider this plea, or the matter it sets up as *res judicata*, because it is not made part of the record by bill of exception

or order of the court, nor is there any exception to the court's action on it. *Hughes v. Frum*, 41 W. Va. 445, 452, 23 S. E. 604; *Perry v. Horn*, 22 W. Va. 381. I think that, if one except on the record to the rejection of a plea, that will make it a part of the record, without order or bill of exception, as § 9, ch. 131, Code, says he may have the benefit of any error appearing on the record without excepting; that is, without the formal bill once required. *Danks v. Rodeheaver*, 26 W. Va. 274, 287. But there must be an exception noted, else the rejection of the plea will be waived. If the complaint is that a plea was improperly allowed, the record must show that it was objected to; and that is sufficient without formal bill, under *Perry v. Horn*, *supra*, and *Bank v. Kimberlands*, 16 W. Va. 555; *Gilmer v. Sydenstricker*, 42 W. Va. 52, 24 S. E. 566."

B. ILLUSTRATIONS.

Where the absence of a necessary party appears by the record, the objection therefor may be made for the first time in the appellate court. *Armentrout v. Gibbons*, 25 Gratt. 371; *Clayton v. Henley*, 32 Gratt. 65; *Iron Co. v. Tayloe*, 79 Va. 671; *Hinton v. Bland*, 81 Va. 588, 593; *Burlew v. Quarrier*, 16 W. Va. 108.

As to raising objection as to parties for the first time on appeal, see the title APPEAL AND ERROR, vol. 1, p. 549.

Want of Jurisdiction.—See the titles APPEAL AND ERROR, vol. 1, p. 549; JURISDICTION.

Error in Pleadings or Judgment Committed Over Objection.—It is firmly established in West Virginia that where there is error in the declaration, pleadings, or judgment, committed against the protest, or over the demurrer or other objection, of a party, the same may be reviewed and corrected in the appellate court, although no motion has been made for a new trial in the court be-

low, and no exception was reserved by bills of exceptions or otherwise. *Spence v. Robinson*, 35 W. Va. 313, 13 S. E. 1004.

Allowance of Plea Over Objection.—

A party may take advantage in the appellate court of an error committed by the trial court in permitting a plea to be filed where the record shows that such party objected to the filing of such plea in the trial court, and that he need not in such case take a bill of exceptions or except to the action of the court overruling his objection. *W. Va. Code*, 1899, ch. 125, § 56. *Bank v. Kimberlands*, 16 W. Va. 555, 557; *Perry v. Horn*, 22 W. Va. 381; *Quaker City Nat. Bank v. Showacre*, 26 W. Va. 48, 50; *Spence v. Robinson*, 35 W. Va. 313, 13 S. E. 1004.

This rule is equally applicable to the filing of a replication. *Quaker City Nat. Bank v. Showacre*, 26 W. Va. 48, 50; *Spence v. Robinson*, 35 W. Va. 313, 13 S. E. 1004.

Rejected Plea Made Part of the Record by Court's Order.—The court held, in *Sweeney v. Baker*, 13 W. Va. 158, that if a rejected plea is by order of the court made a part of the record, and the order shows that its rejection was excepted to, the appellate court will review the action of the court in rejecting such plea, though no formal bill of exceptions was taken to the action of the court in rejecting the plea. Judge Green, in delivering the opinion of the court, at page 215, said: "When the order book shows that a plea was offered and rejected, and that the defendant excepted or objected to the action of the court in rejecting the plea, such entry is equivalent to an order of the court making the rejected plea a part of the record, and the appellate court can look at it and consider the propriety of the order rejecting it." Quoted in *Perry v. Horn*, 22 W. Va. 381. See also, *Quesenberry v. People's Bld'g Ass'n*, 44 W. Va. 512, 30 S. E. 73; *Shanks v. Ravenswood*, 43 W. Va. 242, 27 S. E. 223.

Case Presented on Record of Same Pleadings as Below.—Where a case is presented in the appellate court on a record of the same pleadings and exhibits as were presented in the court below, the appellate court can adjudge the case on its merits though no exceptions were taken to the action of the court below. *Board of Supervisors v. Catletts*, 86 Va. 158, 9 S. E. 999, citing *Wright v. Smith*, 81 Va. 777.

Overruling Demurrer.—A bill of exceptions taken to the action of the lower court in overruling a demurrer to the plaintiff's declaration, is unnecessary, as the judgment upon the demurrer is sufficient to bring this ruling under review by the appellate court upon a writ of error. *Russell Creek Coal Co. v. Wells*, 96 Va. 420, 31 S. E. 614.

If a demurrer to the declaration has been improperly overruled, the appellate court will reverse though no bill of exceptions was taken, and although there was no motion for a new trial. *Brown v. Brown*, 29 W. Va. 777, 2 S. E. 808; *Spence v. Robinson*, 35 W. Va. 313, 13 S. E. 1004.

Where there is a demurrer to the evidence, the evidence given in the cause on both sides is stated in the demurrer, and not set forth in a bill of exceptions. *Berkeley v. Chesapeake*, etc., R. Co., 43 W. Va. 11, 26 S. E. 349; *Chesapeake*, etc., Co. v. *Sparrow*, 98 Va. 630, 37 S. E. 302. See the titles *APPEAL AND ERROR*, vol. 1, p. 509; *DEMURRER TO EVIDENCE*, vol. 4, p. 514.

Where the case is taken from the county court to the circuit court on a writ of error, a bill of exceptions to judgment of the circuit court is unnecessary. The circuit court, in such case, can only look at the record of the county court, and if it errs in its judgment, the error appears by the record without a bill of exceptions. *Morris v. Deane*, 94 Va. 572, 27 S. E. 432.

In a case of caveat all the facts agreed by the parties, or found by the

jury, or if a jury is dispensed with, ascertained by the court, necessarily become and should be made a part of the record of the cause. *Hamilton v. McNeil*, 13 Gratt. 389.

Writ and Inquisition.—Where a motion to quash a writ and inquisition founded on a judgment at large is sustained, the writ and inquisition are a part of the record though not incorporated into a bill of exceptions, and they will be so treated on appeal. The reason that a bill of exception is unnecessary is that the writ and inquisition must of necessity have entered into the consideration of the court below and furnished the basis for its judgment, which, without reference thereto, would be wholly inoperative and consequently a mere nullity. *Wallop v. Scarburg*, 5 Gratt. 1.

V. Foundation for Bill.

A. OBJECTIONS AND EXCEPTIONS BELOW.

1. Necessity.

In order that errors in the rulings of a court during the trial of a case by jury may be reviewed by the appellate court two conditions must concur: First, such rulings must have been objected to when made, and the point saved, if the bill of exceptions is not then taken but is desired to be taken during the term. *Danks v. Rodeheaver*, 20 W. Va. 299.

When the bill of exceptions does not show that objection was made in the lower court the question can not be raised in the appellate court. *Law v. Law*, 2 Gratt. 366; *Roanoke, etc., Co. v. Karn*, 80 Va. 589.

To obtain the benefit of an objection in the appellate court, a formal exception is necessary. And this is true though the bill of exceptions recites that the plaintiff objected to the ruling in question. *Robertson v. Com.*, 1 Va. Dec. 839, 840; *Roanoke, etc., Co. v. Karn*, 80 Va. 589; *Magarity v. Shipman*, 82 Va. 806, 7 S. E. 381; *Fry v. Leslie*, 87 Va. 269, 274, 12 S. E. 671;

Ferguson v. Wills, 88 Va. 136, 13 S. E. 392; *Trumbo v. Street Car Co.*, 89 Va. 780, 17 S. E. 124; *Clark v. Com.*, 90 Va. 360, 18 S. E. 440; *Whalen v. Com.*, 90 Va. 544, 549, 19 S. E. 182; *State v. Harr*, 38 W. Va. 58, 17 S. E. 794; *Halstead v. Horton*, 38 W. Va. 727, 18 S. E. 953.

The refusal of the judge to sign bill of exceptions, whose record does not show that the losing party excepted at the trial to the ruling of the court, can not be maintained as error. *Bransford v. Karn*, 87 Va. 242, 12 S. E. 404, citing *Page v. Clopton*, 30 Gratt. 415, 4 Min. Insts. 745.

Where exceptions are taken to specific points, the appellate court will examine no points but such as were presented to and decided by the court below, though from the matters stated in the bill of exceptions, there be apparently other points that might have been made. *Newsom v. Newsom*, 1 Leigh 86.

On a bill of exceptions to the opinion of the court below refusing to grant a continuance, the appellate court ought not to reverse the judgment, for a ground of continuance not stated in such exceptions. *Ross v. Norvell*, 3 Munf. 170.

Record Need Not Show Exception to Judgment Where Trial by Court.

While it is the usual practice in cases, where a jury is waived and the case submitted to the court in lieu of a jury, if the party, against whom the judgment is rendered, is dissatisfied therewith, to except to the judgment and have the court certify the facts proved, yet it is not necessary for the record to show that the judgment was excepted to. It is sufficient, if the facts appear upon the record by certificate of the court or otherwise. In such case the appellate court will inspect the record and either affirm or reverse the judgment, as the law requires. It seems to be a useless formality to except to the judgment of a court in such

a case. *State v. Miller*, 26 W. Va. 106, 109; *Board v. Parsons*, 24 W. Va. 551.

Generally, as to the necessity for raising objections in the court below, as essential to the consideration of questions on appeal, see the title APPEAL AND ERROR, vol. 1, p. 547.

The exceptions taken during the course of the trial are conditional. The exceptor will take advantage of them, provided he is not satisfied with the verdict. If dissatisfied, he will move to set it aside; and if his motion is overruled, he will except; but if satisfied, he makes no such motion, acquiesces in the verdict, and waives his exception. *State v. Phares*, 24 W. Va. 657.

2. Time of Raising and Saving.

a. General Rule.

It must appear from the record that a point decided by the court has been saved before the jury retires. If this appear from the whole record it is sufficient, though it is not expressly stated in the bill of exceptions; but if it does not so appear from the record the appellate court can not review the judgment of the court below upon the point. *Jones v. Lucas*, 1 Rand. 268; *Coleman v. Lyne*, 4 Rand. 454; *Dickenson v. Davis*, 2 Leigh 401, 434; *Colgin v. Henley*, 6 Leigh 86; *Miller v. Holcombe*, 9 Gratt. 665; *Taylor v. Smith*, 10 Gratt. 557; *Tarr v. Ravenscroft*, 12 Gratt. 642, 651; *Bull v. Com.*, 14 Gratt. 613, 630; *Washington, etc., Tel. Co. v. Hobson*, 15 Gratt. 122; *Hill v. Bowyer*, 18 Gratt. 364, 380; *Thornton v. Com.*, 24 Gratt. 657, 672; *Martz v. Martz*, 25 Gratt. 361; *Peery v. Peery*, 26 Gratt. 320; *Vaiden v. Stubblefield*, 28 Gratt. 153; *Lambert v. Cooper*, 29 Gratt. 61; *Page v. Clopton*, 30 Gratt. 415; *Danville Bank v. Waddill*, 31 Gratt. 469; *Simmons v. Simmons*, 33 Gratt. 451; *Mitchell v. Com.*, 75 Va. 856, 865; *Liberty Savings Bank v. Campbell*, 75 Va. 534; *Strange v. Strange*, 76 Va. 240; *Powell v. Tarry*, 77 Va. 250; *Price v. Com.*, 77 Va. 396; *Nickels v. Kane*, 82

Va. 309; *Shipman v. Fletcher*, 83 Va. 349, 2 S. E. 198; *Cralle v. Cralle*, 84 Va. 198, 6 S. E. 12; *Lawrence v. Com.*, 86 Va. 573, 10 S. E. 840; *Bransford v. Karn*, 87 Va. 242, 12 S. E. 404; *Whalen v. Com.*, 90 Va. 544, 19 S. E. 182; *Williams v. Com.*, 93 Va. 769, 773, 25 S. E. 659; *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226; *Shacklett v. Roller*, 97 Va. 639, 34 S. E. 492; *Todd v. Sykes*, 97 Va. 143, 194, 33 S. E. 517; *Bank v. Preston*, 97 Va. 222, 32 S. E. 546; *Tunis Lumber Co. v. Dennis Lumber Co.*, 97 Va. 682, 34 S. E. 613; *Nadenbousch v. Sharer*, 2 W. Va. 285; *Cunningham v. Porterfield*, 2 W. Va. 447; *Robinson v. Pitzer*, 3 W. Va. 335, 336; *Thompson v. Boggs*, 8 W. Va. 63; *Wustland v. Potterfield*, 9 W. Va. 438; *Hill v. Proctor*, 10 W. Va. 59; *Reinhard v. Baker*, 13 W. Va. 805; *Wickes v. Baltimore, etc., R. Co.*, 14 W. Va. 157, 165; *State v. Seabright*, 15 W. Va. 590; *Perry v. Horn*, 22 W. Va. 381; *Core v. Marple*, 24 W. Va. 354, 355; *Fawcett v. Railway Co.*, 24 W. Va. 755; *Sammons v. Hawvers*, 25 W. Va. 678; *Danks v. Rodeheaver*, 26 W. Va. 274; *Dimmey v. Railroad Co.*, 27 W. Va. 32, 51; *Gilmer v. Sydenstricker*, 42 W. Va. 52, 24 S. E. 566; *Greenbrier, etc., v. Ocheltree*, 44 W. Va. 626, 30 S. E. 78.

"The general rule seems to be that, if intended to be relied on, exceptions should be taken and notice thereof given at the time the decision to which they apply is made, and in jury trials they should be taken at least before verdict." *Page v. Clopton*, 30 Gratt. 415.

Exceptions to the rulings of the circuit court occurring during the trial, ought to be taken before the jury retires. And though it is not necessary to stop the progress of the trial to prepare the bills, yet, at least, the counsel in every instance should state to the court his intention to except, and save the point. *Nadenbousch v. Sharer*, 2 W. Va. 285; *Suffolk v. Parker*, 79 Va. 660.

If there is no exception nor bill of

exceptions at the time of a ruling, nor during the term, a motion for a bill of exceptions at a subsequent term comes too late. *Robertson v. Com.*, 1 Va. Dec. 839.

Reason for Rule.—To entitle a party relying on a bill of exceptions to claim any benefit from such bill, "it is incumbent on him to show that he saved the point or took the exception either at the time when the opinion of which he complains was given, or at least before the verdict of the jury was rendered. In the absence of such showing, justice to his adversary would require that he should be held to have yielded to such opinion. It is not just or reasonable that he should be allowed to take his chance before the jury, and in the event of defeat, then to deprive his successful opponent of the benefits of the verdict by an exception, which, if insisted on during the trial, might have been met and counteracted by the latter." *Washington, etc., Co. v. Hobson*, 15 Gratt. 122.

"In *Danville Bank v. Waddill*, 31 Gratt. 469, it is held, that, 'If an instruction is given to the jury without objection at the time, and no exception, or notice of exception, is taken or given before the verdict is rendered, the giving of the instruction can not be a ground for setting aside the verdict and granting a new trial of the cause.' The principal reason for this rule seems to be that an objection made or exception taken after the verdict has been rendered might affect very injuriously the rights of the opposing party; for, if notice had been promptly given of the exception he might have had it in his power at the time or during the trial to obviate or counteract it, and it would, therefore, be unjust to permit his adversary to insist on the exception and have the benefit of it after he has made it impossible to meet or obviate it by his own negligence or it may be by his contrivance." *Core v. Marple*, 24 W. Va. 354.

"Another reason for the rule is, that

the judge may note the matter of the exception while it is fresh in his mind, and thus be enabled the better to settle the bill when it is presented for his signature." Page *v. Clopton*, 30 Gratt. 415.

When Inapplicable.—But the rule as to notice of intention to take an exception, or of taking it at the time of the ruling, does not apply to a case of judgment for a fine imposed for alleged contempt, when the exceptant and the judge are the only parties concerned. The decision seems to be based on the fact that very little time had elapsed and the facts were still fresh in the mind of the judge. Page *v. Clopton*, 30 Gratt. 415.

b. Applications of Rule.

When counsel makes improper remarks the exceptions thereto should be taken before the verdict is rendered. *Price v. Com.*, 77 Va. 393; *Norfolk, etc., R. Co. v. Shott*, 92 Va. 34, 48, 22 S. E. 811.

Incompetent Juror.—If a prisoner does not know and could not by due diligence have known that one of the jury was a member of the grand jury, he may make that objection before any evidence is introduced, and probably at any time before verdict. *Dilworth v. Com.*, 12 Gratt. 689; *Simmons v. McConnell*, 86 Va. 494, 500, 10 S. E. 838.

An objection that the defendant in ejectment was required to state the particulars of his defense can not be made for the first time after verdict by motion in arrest of judgment. It should have been done by a bill of exceptions, or objection made when the court passed on the motion for the bill of particulars. *Virginia, etc., Coal Co. v. Fields*, 94 Va. 102, 26 S. E. 426.

Instructions.—In *Bull v. Com.*, 14 Gratt. 613, it was held, that if a party be dissatisfied with an instruction, he ought to state his objection at the time. If no objection be made to an instruction at the time it is given, and no exception taken, or the point saved;

but objection be made for the first time, after verdict, and in the form of a motion to set it aside, the court will consider whether, under all the circumstances, the party has been prejudiced by the instruction; and if of opinion that a just verdict has been rendered, according to the law and the evidence, will not set it aside on account of that objection. This case was followed in *Stevenson v. Wallace*, 27 Gratt. 77.

In *Newberry v. Williams*, 89 Va. 298, 15 S. E. 865, however, it was held that "the rule is well established in this state, as declared by Judge Burks in *Danville Bank v. Waddill*, 31 Gratt. 469, notwithstanding what was said in *Bull's Case*, 14 Gratt. 613, that if a party objects to a ruling of the court during the trial either in * * * giving or refusing instructions or otherwise, and intends to except to such ruling, he must make known such intention at the time of the ruling, or at least before verdict * * * and if he neglect to prefer exceptions until after verdict, he will not then be permitted to do so."

In *Danks v. Rodeheaver*, 26 W. Va. 274, the court, after laying down the unusual rule as time of excepting, said: "Whether this general rule which seems to be established by the decisions referred to is to be regarded as modified by the cases of *Bull v. Commonwealth*, 14 Gratt. 613, and *Stevenson v. Wallace*, 27 Gratt. 77, in its application to instructions, to which objection is made for the first time by way of motion to set aside the verdict of the jury, it is not necessary to determine in the present case."

"It seems that as to instructions the exception may be made even after the jury retire if before verdict." *Gilmer v. Sydenstricker*, 42 W. Va. 52, 24 S. E. 566, citing *Nadenbousch v. Sharer*, 2 W. Va. 285; *Core v. Marple*, 24 W. Va. 354.

When on a trial in the lower court verdict is for the plaintiff and defend-

ant moves for and obtains a new trial, neither can in the appellate court call in question instructions given at the first trial: the plaintiff in error, because he secured a verdict; the defendant in error, because he did not object or except to the instructions. *Marshall v. Valley R. Co.*, 97 Va. 653, 655, 34 S. E. 455.

Commissioner's Report.—There is no rule of law or practice which would forbid or prevent a court, so long as it retained a cause under its consideration, from receiving and entertaining an exception to a commissioner's report, even after the same had been confirmed, if it should be clearly shown that the report, if carried out, would be productive of injustice and wrong. *Wooding v. Bradley*, 76 Va. 614, 616; *Foster v. Sutton*, 4 Hen. & M. 401; *Arnold v. Slaughter*, 36 W. Va. 589, 15 S. E. 250.

3. Form and Requisites.

Exceptions must always point specifically to the grounds of objection so as to put the opposing party upon notice of the real ground of objection. *Baldwin v. Baldwin*, 76 Va. 345.

"In all cases 'I take it' where exceptions are necessary at all, they should specify with reasonable certainty the particular ground of objection, so as to enable the opposing party to see clearly what he has to meet, and the court what it has to decide." *Crockett v. Sexton*, 29 Gratt. 46, 55.

As to form and requisites of exceptions to depositions, see the title DEPOSITIONS, vol. 4, p. 549.

Effect of General Instead of Specific Objections.—Where a paper is offered in evidence to the jury, and a general objection is made to its being read, and the objection is overruled, the appellate court will not hold such ruling to be error, if such paper could be properly read as evidence for any purpose. *Stansbury v. Stansbury*, 20 W. Va. 23.

A general objection to evidence will

not be considered on appeal if the evidence is admissible for any purpose. If a party desires to have the evidence limited to a particular purpose he should ask the court to so instruct the jury, and, if the request be refused, except to the refusal. *Meyers v. Falk*, 99 Va. 385, 38 S. E. 178.

It is the duty of a party objecting to evidence to specify and point out such portions as he deems objectionable, and, in the absence of any such specifications on his part, the court will overrule the motion, if any of the evidence thus objected to en masse should be legitimate and proper. 1 *Thomp. Trials*, § 696; *Barker v. Barker*, 2 *Gratt.* 344; *Tompkins v. Wiley*, 6 *Rand.* 242; *Brown v. Point Pleasant*, 36 *W. Va.* 290, 15 *S. E.* 209; *Holly River Coal Co. v. Howell*, 36 *W. Va.* 489, 15 *S. E.* 214; *Bowman v. Dewing*, 37 *W. Va.* 117, 16 *S. E.* 440.

An objection to the introduction of evidence should point out specifically the objectionable part. If part of the evidence objected to is proper and another part not, a general objection to all, not specifying the objectionable part should be overruled. *Sulphur Mines Co. v. Thompson*, 93 *Va.* 293, 25 *S. E.* 232. *Kincheloe v. Tracewells*, 11 *Gratt.* 587, 600,* 601; *Washington Southern R. Co. v. Lacey*, 94 *Va.* 460, 26 *S. E.* 834.

And so of two or more ordinances, one of which is objectionable. The objection must point out specifically the objectionable features. *Washington Southern R. Co. v. Lacey*, 94 *Va.* 460, 26 *S. E.* 834.

It is the duty of a party, as a rule, when he objects to evidence, to state the grounds of his objection, so that the trial judge may understand the precise question or questions he is called upon to decide. The judge is not required to search for objections which counsel have not discovered, or which they are not willing to disclose. It is also due to the party whose evidence is objected to, that the grounds of ob-

jection should be specified, so that he may have an opportunity to remedy the defect pointed out, if possible, and have the case tried upon its merits. *Warren v. Warren*, 93 *Va.* 73, 74, 24 *S. E.* 913.

An objection to a question on the ground that the evidence sought to be elicited is incompetent is properly overruled where the evidence is competent, though the question is leading. The objection should have been to the form of the question so as to apprise opposing counsel of the necessity of asking a proper question. *Washington, etc., Electric R. Co. v. Quayle*, 95 *Va.* 741, 30 *S. E.* 391.

4. Waiver.

Acts Operating as Waiver.—A defendant, who, after the plaintiff has given in his evidence in chief, and rested his case, then moves the court to instruct the jury to render a verdict for defendant, but, the motion being overruled, goes on with his case, will be held to have waived his exception taken to such ruling of the court. *Poling v. Ohio River R. Co.*, 38 *W. Va.* 645, 18 *S. E.* 782.

When the court rules that certain evidence is illegal and promises to hear a motion later to exclude it, if no exception is taken and no further attention called to the matter, the objection must be deemed waived. *Norfolk, etc., R. Co. v. Anderson*, 90 *Va.* 1, 17 *S. E.* 757.

One defendant, F, files an exception to the commissioner's report which is relied on by R, another defendant; but at the hearing in the court below, this exception is waived. The exception having been waived, R can not rely upon it in the appellate court. *Robertson v. Trigg*, 32 *Gratt.* 76.

An exception assigning as a reason therefor a claim under part of act of assembly must be considered as waiving any claim under the other part of said act, such other part not being mentioned in the bill. *Garnett v. Sam*, 5 *Munf.* 542.

A party will not be allowed to specify one or more grounds of objection to evidence offered in the trial court, and rely upon other grounds in the appellate court. He is regarded as having waived all other objections to the evidence except those which he pointed out specifically. *Warren v. Warren*, 93 Va. 73, 24 S. E. 913, citing *Wynn v. Harman*, 5 Gratt. 157.

Where specific objections to the reception of evidence are properly overruled, it can not be thereafter assigned as error that the evidence was objectionable for other reasons. *Richmond Ice Co. v. Crystal Ice Co.*, 103 Va. 465, 49 S. E. 650.

Acts Held Not to Constitute Waiver.—Where the plaintiff objects to the reception of a plea and excepts, the exception is not waived by his subsequently taking issue in fact on the plea. *Campbell v. Montgomery*, 1 Rob. 392; *W. Va. Code 1899*, ch. 125, § 56.

When exception is taken to the admission of evidence, it is not waived by a subsequent demurrer to all the evidence. *Dishazer v. Maitland*, 12 Leigh 524.

An objection to the competency of a party as a witness is written at the commencement of the deposition; the objection is not waived by cross-examination. *Neilson v. Bowman*, 29 Gratt. 732.

A failure to except to the competency of a witness until four questions have been propounded to him on his examination in chief is no waiver of the right to make such exception. *Hord v. Colbert*, 28 Gratt. 49; *Warwick v. Warwick*, 31 Gratt. 70, 77.

B. MOTION FOR NEW TRIAL.

1. General Rule.

The second condition essential to a review of the rulings of the court below by the appellate court is that a new trial must also have been asked and overruled, and objected to, and this noted on the record. *Danks v. Rodeheaver*, 26 W. Va. 274, 299.

Where exceptions are taken to rulings of the court in the progress of a trial before a jury, such exceptions are not available in the appellate court, though made part of the record by bill of exceptions or otherwise unless the record shows that a motion for a new trial was made in the court below and the action of the court in refusing a new trial was excepted to. In the absence of such motion the error will be considered to have been waived. *Guerant v. Tinder*, *Gilmer*, 36, 41; *Austin v. Jones*, *Gilmer*, 341; *Humphrey v. West*, 3 Rand. 516; *Magarity v. Shipman*, 82 Va. 806, 7 S. E. 381; *Newberry v. Williams*, 89 Va. 298, 15 S. E. 865; *Central Land Co. v. Obenchain*, 92 Va. 130, 22 S. E. 876; *Norfolk, etc., R. Co. v. Dunnaway*, 93 Va. 29, 24 S. E. 698; *Bridgewater v. Allemong*, 93 Va. 542, 25 S. E. 595; *Citizens Nat. Bank v. Walton*, 96 Va. 435, 31 S. E. 890; *Shrewsbury v. Miller*, 10 W. Va. 115; *Riddle v. Core*, 21 W. Va. 530; *State v. Phares*, 24 W. Va. 657; *Core v. Marple*, 24 W. Va. 354; *Sammons v. Hawvers*, 25 W. Va. 678; *Danks v. Rodeheaver*, 26 W. Va. 274; *State v. Thompson*, 26 W. Va. 149; *Fisher v. Camp*, 26 W. Va. 576; *Congrove v. Burdett*, 28 W. Va. 220; *Kemble v. Herndon*, 28 W. Va. 524; *Brown v. Brown*, 29 W. Va. 777, 2 S. E. 808; *State v. Rollins*, 31 W. Va. 363, 6 S. E. 923; *Arthur v. Ingels*, 34 W. Va. 639, 12 S. E. 872; *Spence v. Robinson*, 35 W. Va. 313, 13 S. E. 1004; *Bias v. Chesapeake, etc., R. Co.*, 46 W. Va. 349, 33 S. E. 240.

In a case tried by a jury, no matter how many exceptions are taken to rulings of the court made during the trial, unless a motion is made before the trial court to set aside the verdict, and that motion is overruled, all such errors saved will by the appellate court be deemed to have been waived. *State v. Phares*, 24 W. Va. 657.

The reason for the rule requiring a motion for a new trial to be made be-

fore the trial court is thus stated by Judge Roane in *Guerrant v. Tinder*, Gilmer 36: "The same judge may, upon a deliberate motion for a new trial, supported by argument and authority, retract a hasty opinion expressed by him in the progress of the trial." Quoted in *Citizens' Nat. Bank v. Walton*, 96 Va. 435, 31 S. E. 890. See also, *Newberry v. Williams*, 89 Va. 298, 15 S. E. 865; *Bridgewater v. Allemong*, 93 Va. 542, 25 S. E. 595.

When Rule Inapplicable.—It is unnecessary to make a motion for a new trial in trial court in order to have errors reviewed in the appellate court where the whole matter of law and fact is submitted to and determined by the trial court without the intervention of a jury. *Citizens' Nat. Bank v. Walton*, 96 Va. 435, 31 S. E. 890.

The rule is held not to apply where there is an error in the pleadings as in such case there is a mistrial. *State v. Phares*, 24 W. Va. 657; *Danks v. Rodeheaver*, 26 W. Va. 274; *Spence v. Robinson*, 35 W. Va. 313, 13 S. E. 1004.

"There are cases in which, for an error appearing in the record, although no motion was made for a new trial in the court below, the appellate court will reverse the judgment of the inferior court, and remand the cause for a new trial as where the record shows there was no issue taken on a material plea, or if there was no plea at all filed, and the jury were sworn to try the 'issue' as if there was a plea, or where the damages assessed by the jury exceed the amount claimed in the writ or declaration, unless the plaintiff will release the excess." *Shrewsbury v. Miller*, 10 W. Va. 115.

2. Rule Construed and Applied.

Objection to Ruling Unnecessary.—The courts in construing and applying the rule just laid down, have held that where a party moves for a new trial in a court below, and upon the overruling of such motion excepts to such ruling, it is not necessary that he must also

object to the action of the court overruling his motion before he can have the ruling reviewed in the appellate court. If the record shows that the motion was made, overruled and excepted to, this is sufficient, and all that the rule declared by the appellate court in any of its decisions requires. *Congrove v. Burdett*, 28 W. Va. 220, 226.

Time of Excepting.—Exceptions for refusal to set aside the verdict and grant a new trial may be made not later than the close of the term. *Gilmer v. Sydenstricker*, 42 W. Va. 52, 24 S. E. 566.

"It would seem from *Perry v. Horn*, 22 W. Va. 381, that an exception for refusal to set aside a judgment may be made during the term. What reason is there in refusing a party privilege to except during the term? Why require it at the instant of the ruling? In this case, on the day after the ruling, the defendants asked time to file a bill of exceptions. They likely excepted before, as the leave to file a bill imports or implies that, but suppose that the first time of exception. It was not too late." *Gilmer v. Sydenstricker*, 42 W. Va. 52, 24 S. E. 566.

Formal Bill of Exceptions to Action of Court Unnecessary.—Under the rule requiring a motion for a new trial below, it has been held, that it is not even required that there shall be a bill of exceptions to the action of the court overruling the motion for the new trial. *Congrove v. Burdett*, 28 W. Va. 220, 226; *Norfolk v. Pollard*, 94 Va. 279, 26 S. E. 832.

If the fact that the motion for a new trial was made, overruled and excepted to appears in the orders or judgment of the court, or in any other proper manner by record, the appellate court will review any rulings of the inferior court made during the trial, which are properly saved and presented by the record. *Congrove v. Burdett*, 28 W. Va. 220, 226.

"This court, in the case of *Newberry*

v. Williams, 89 Va. 298, 15 S. E. 865, held, that unless the record showed that a motion was made for a new trial in the court below, and was overruled, and that such action was excepted to, this court could not review the judgment; but it did not, as the defendants in error insist, hold that a formal bill of exceptions should be taken to the action of the court in overruling the motion for a new trial. All that the rule requires is that the record shall show that such a motion was made and overruled, and that this action of the court was excepted to. In this case the judgment complained of shows that such motions were made, overruled, and excepted to. This was sufficient." *Central Land Co. v. Obenchain*, 92 Va. 130, 22 S. E. 876.

It is sufficient if the record shows that a motion for a new trial was made and overruled; that the defendant excepted to "sundry rulings and opinions of the court given on said trial and to the judgment entered therein," and that there were but three rulings given on the trial—the refusal to grant one instruction, the granting of another, and the overruling of the motion for a new trial. The motion for a new trial is the only one of the three which would have intercepted judgment after verdict. *Norfolk v. Pollard*, 94 Va. 279, 26 S. E. 832.

VI. Form and Contents of Bill.

A. GENERAL RULES.

1. Insertion of Matter Making Error Complained of Apparent.

a. Rule Stated.

When exception is taken to the admission or exclusion of evidence, or the granting or refusing of instructions, or indeed any other ruling of the court at the trial, the bill should be so framed by the insertion of proper matter as to make the error, if any, complained of apparent, otherwise the exception will generally be unavailing. *Minor's Inst.*, vol. 4, pt. 1, p. 917. *Harman v. Lynchburg*, 33 Gratt. 37; *Cole-*

man v. Com., 84 Va. 7, 3 S. E. 878; *Valley, Mut., etc., Ass'n v. Teewalt*, 79 Va. 421.

The bill should specifically and definitely set forth the allegation of error and so much of the evidence as is necessary to render clear the rulings of the court which were excepted to. *Cluverius v. Com.*, 81 Va. 787; *Holleran v. Meisel*, 91 Va. 143, 21 S. E. 658; *Norfolk, etc. R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226; *Kimball v. Carter*, 95 Va. 77, 27 S. E. 823; *Kay v. Glade, etc., R. Co.*, 47 W. Va. 467, 35 S. E. 974.

The court of appeals will not consider bills of exception which do not point out specifically the objectionable rulings of the trial court. *Kimball v. Fink*, 95 Va. 77, 27 S. E. 823.

All presumptions are in favor of the correctness of the judgment of the court below and against the exceptor, and unless a proper bill of exception is taken, setting forth specifically and definitely the allegation of error relied on and so much of the evidence as is necessary to enable the appellate court to pass intelligently upon the question raised, the judgment of the trial court must be sustained. If the plaintiff in error has failed to observe that requirement by having the evidence at the trial incorporated in the record, the appellate court has nothing before it upon which to base an opinion with respect to the ruling of the court in the particular complained of. *West v. Richmond, etc., R. Co.*, 102 Va. 339, 341, 342, 46 S. E. 330.

A bill of exceptions taken to the refusal of the court to set aside the verdict and award a new trial which sets forth all the evidence given upon the trial together with the objections to the evidence and the rulings of the court as they were noted, during the progress of the trial and much other matter which is simply a stenographic report of all that transpired; signed by the judge, is not sufficient. *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226.

Rule Can Not Be Abrogated by Stipulation.—A rule requiring a bill of exceptions to distinctly point out the error complained of is one necessary for the proper discharge of the court's duties, and can not be abrogated by stipulation. *Hughes v. Kelly*, 2 Va. Dec. 588.

b. Applications of Rule.

(1) Allowance or Exclusion of Pleas.

Allowance of Pleas.—If the filing of a special plea is objected to on the ground that there has been an unreasonable delay in pleading it, the bill of exceptions should show what the ground of exception was or the objection will not be considered on appeal. *Dickinson v. Dickinson*, 25 Gratt. 321.

The cause is continued generally at the March and July terms, 1871, and at the August term defendants, under the leave reversed at the November term, 1870, tendered the plea of nil debit and two special pleas. The first was received without objection, the other two were objected to by the plaintiff but admitted by the court. If it was too late then to plead, and this was the objection to the special pleas, the bill of exceptions should show it, or it will not be considered in the appellate court. *Dickinson v. Dickinson*, 25 Gratt. 321.

Where Pleas Excluded.—Where the ground of complaint is that pleas have been improperly excluded, the bill of exceptions must show affirmatively the propriety of the pleas. *Minor's Inst.*, vol. 4, pt. 4, p. 917. *Lawrence v. Com.*, 86 Va. 573, 10 S. E. 840.

A bill of exceptions taken to the action of the court in rejecting pleas of set-off offered at a term of court subsequent to that at which an issue was made up must state not only the fact of rejection but show the reason for not entering them sooner. *White v. Toncray*, 9 Leigh 347.

On rejection of a plea it is not necessary to set out the whole plea offered in the bill of exceptions provided the

nature of the plea sufficiently appear. *Baltimore, etc., R. Co. v. Bitner*, 15 W. Va. 455.

(3) Where Rulings on Evidence Complained of.

(a) In General

A general bill of exceptions, certifying all the evidence in a cause, and noting, at intervals, that objection was made to questions propounded, and the objection overruled by the court and exceptions taken, is not a sufficient exception to the ruling of the court on such exception. In order to have the benefit of an exception to the ruling of the trial court, on a motion to reject or admit evidence, there must be a bill of exception, signed by the judge, clearly and distinctly pointing out such erroneous ruling complained of; otherwise the objection will be regarded as abandoned. *Norfolk, etc., R. Co. v. Shott*, 92 Va. 34, 22 S. E. 811; *Richmond Passenger, etc., Co. v. Robinson*, 100 Va. 397, 41 S. E. 719; *Kay v. Glade, etc., R. Co.*, 47 W. Va. 467, 35 S. E. 974.

In determining questions of admissibility of evidence, the appellate court can not look outside of the bills of exception taken to its exclusion. *Lake v. Tyree*, 90 Va. 719, 19 S. E. 787.

(b) Admission of Improper Evidence.

In General.—A party complaining of the admission of improper evidence must state the facts in his bill of exceptions from which it will appear affirmatively to the appellate court that the evidence was improper. *Johnson v. Jennings*, 10 Gratt. 1; *Beirne v. Rosser*, 26 Gratt. 537; *Harman v. Lynchburg*, 33 Gratt. 37; *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226; *Carlton v. Mays*, 8 W. Va. 245, 246.

If a party is not satisfied with the rulings of the court in admitting evidence, and wishes to have them reviewed by an appellate court, the bills of exceptions ought to show the specific grounds of objection pointed out and relied on so that the appellate court

will have the same questions presented to it for its determination as were presented to and passed upon by the trial court. *Warren v. Warren*, 93 Va. 73, 74, 24 S. E. 913.

Where a bill of exceptions states, after having set out the evidence of the plaintiffs, that "the defendant, by its attorney, excepted and objected to each and every part of the foregoing evidence going to the jury, and to every item thereof, but the court overruled said objection and exception, and allowed all of said evidence to go to the jury," it was not error in the court to refuse to grant the motion of the defendant, if any of the plaintiffs' evidence was proper to be introduced. It is the duty of a party objecting to evidence to specify and point out such portions as he deems objectionable, and, in the absence of any such specifications, the court will overrule the motion, if any of the evidence thus objected to en masse should be legitimate and proper. *Brown v. Point Pleasant*, 36 W. Va. 290, 15 S. E. 209.

Where the introduction of certain statements as evidence is objected to, the bill of exceptions should state what the statements were; otherwise, the appellate court can not determine whether or not the objecting party was injured thereby and can not therefore consider the objection. *Steptoe v. Pollard*, 30 Gratt. 689.

The exceptions of the defendant to the admission of parol proof of the contents of his letter, not stating what was so proved, the appellate court can not know whether or not the appellant was injured by the evidence, and therefore can not reverse the judgment even if the admission of the evidence was improper. *Beirne v. Rosser*, 26 Gratt. 537.

A bill of exceptions reserved to the denial of a motion to strike out testimony is insufficient, where it does not distinctly set out the testimony. *Hughes v. Kelly*, 2 Va. Dec. 588.

Necessity for Statement of Answer.

—If an objection to a question asked and to the witness' answering it is overruled and an exception taken, the bill of exceptions must state the answer of the witness or the objection will not be considered on appeal. *Stoneman v. Com.*, 25 Gratt. 887.

The appellate court will not consider objections to questions propounded to a witness which he is allowed to answer, unless the answers are given. The court can not determine the relevancy or value of the evidence in the absence of such answers. *Kimball v. Carter*, 95 Va. 77, 27 S. E. 823, citing *Gray's Case*, 92 Va. 772, 22 S. E. 858; *Union Central L. Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421; *Chil dress v. Chesapeake, etc., R. Co.*, 94 Va. 106, 26 S. E. 424; *Kay v. Glade, etc., R. Co.*, 47 W. Va. 467, 35 S. E. 974.

In *Johnson v. Jennings*, 10 Gratt. 1, decided by the appellate court in 1833, a question was propounded to a witness, which was objected to; but the objection was overruled, and an exception was taken. The exception did not state the answer of the witness, nor that he answered the question. The answer might have been of no importance, or of no injury to the exceptant. This court would not reverse the judgment on that alleged ground of error. *Beirne v. Rosser*, 26 Gratt. 537, 547.

Rule Where Relevancy of Evidence Obvious without Inspection of Matter Omitted.—In an action by an executor upon a refunding bond, he offers in evidence the record of the cause in which the decree was rendered against him, on account of which his action is brought; and he then offers in evidence the execution which had issued on the decree, and the return thereon; which were objected to by the defendant, but were admitted by the court. To the admission of the evidence the defendant excepted, but the exception

did not contain the execution. Held, that the relevancy of the evidence being obvious without an inspection of the execution, it was not essential that it should be contained in the bill of exceptions. *Archer v. Archer*, 8 Gratt. 539.

(c) Where Evidence Excluded or Rejected.

General Rule as to Showing Relevancy and Materiality.—Where the ground of complaint is that evidence has been improperly excluded or rejected, the bill must show affirmatively the relevancy of such evidence. *Minor's Inst.*, vol. 4, pt. 1, p. 917. *Rowt v. Kile*, 1 Leigh 216; *Langhorne v. Com.*, 76 Va. 1012; *Triplett v. Goff*, 83 Va. 784, 3 S. E. 525; *Lawrence v. Com.*, 86 Va. 573, 10 S. E. 840; *Carlton v. Mays*, 8 W. Va. 245; *Nease v. Capehart*, 15 W. Va. 299, 308; *Todd v. Gates*, 20 W. Va. 464, 471.

In order to show that the trial court erred in rejecting an offer of evidence, or in excluding evidence, the bill of exceptions must show the materiality of the evidence tendered. A judgment will not be reversed because evidence has been excluded or rejected by the trial court unless its materiality be made to appear. *Crawford v. Jarrett*, 2 Leigh 630; *Continental Ins. Co. v. Kasey*, 25 Gratt. 368, 276; *Stoneman's Case*, 25 Gratt. 887; *Carpenter v. Utz*, 4 Gratt. 270, 272; *Johnson v. Jennings*, 10 Gratt. 1, 17; *McDowell v. Crawford*, 11 Gratt. 377; *Martz v. Martz*, 25 Gratt. 361, 367; *Beirne v. Rosser*, 26 Gratt. 537; *Harman v. Lynchburg*, 33 Gratt. 37; *Langhorne v. Com.*, 76 Va. 1012; *Valley Mut. Life Ass'n v. Teewalt*, 79 Va. 421; *Taylor v. Com.*, 90 Va. 110, 17 S. E. 812; *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 109, 25 S. E. 226; *Union Central Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421; *Atlantic, etc., R. Co. v. Reiger*, 95 Va. 418, 28 S. E. 590; *Jackson's Case*, 98 Va. 845, 36 S. E. 487; *Clark v. Sleet*, 99 Va. 381, 38 S. E. 183; *Richmond, etc., R. Co. v. Rubin*, 102 Va. 809, 810, 47 S. E. 834.

A bill of exception to the action of the court in excluding evidence offered is not available as ground of error, unless it shows that the evidence was, or would have become relevant, material and important. *Snooks v. Wingfield*, 52 W. Va. 441, 44 S. E. 277; *Maxwell v. Kent*, 49 W. Va. 542, 39 S. E. 174.

It is always requisite that where parties complain of the exclusion of proper testimony, the bill of exceptions must state so much of the evidence as tends to show the pertinency and relevancy of that which is excluded. *DeJarnette v. Com.*, 75 Va. 867.

Upon an appeal for error in excluding testimony, it is incumbent on the party seeking to reverse the judgment, to show that error has been committed; and this must appear from a statement of the evidence offered and excluded; or if its relevancy depends upon other facts in the cause, the party alleging the error, should present such a case on the record as shows the relevancy of the evidence rejected. *Carpenter v. Utz*, 4 Gratt. 270.

The party complaining in the appellate court of the rejection of evidence by the court below must state the facts or evidence in his bill of exceptions, from which it must appear affirmatively to the appellate court, that he was prejudiced by the rejection of the evidence. *Taylor v. Boughner*, 16 W. Va. 327.

A bill of exceptions, stating, the plaintiff offered to prove that the contract under seal, on which the defendant relied, appearing absolute on its face, was in fact conditional, and that the court would not permit the plaintiff to offer parol evidence to show it conditional, is too vague and uncertain for the appellate court to give an opinion upon it. *Fowler v. Lee*, 4 Munf. 373.

A bill of exceptions, stating, the plaintiff offered to prove that a deed from a third person to the defendant was obtained by fraud, to defeat the rights of creditors and purchasers, and

that the court rejected such evidence (without stating that the plaintiff was a creditor or purchaser, whose rights were affected by the deed), is also too vague and uncertain. *Fowler v. Lee*, 4 Munf. 373.

Where a question is asked and a witness is not permitted to answer it, in order to have the court's action reviewed by an appellate court, the record must show what the party expected or proposed to prove by the witness. *Valley Mut. Life Ass'n v. Teewalt*, 79 Va. 421; *Union Central Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421; *Childress v. Chesapeake, etc., F. Co.*, 94 Va. 186, 26 S. E. 424; *Mutual Life Ins. Co. v. Oliver*, 95 Va. 451, 28 S. E. 594; *Driver v. Hartman*, 96 Va. 518, 31 S. E. 899; *Jackson v. Com.*, 98 Va. 845, 36 S. E. 487; *Greever v. Bank*, 99 Va. 547, 39 S. E. 159; *Longley v. Com.*, 99 Va. 807, 37 S. E. 339; *Brock v. Bear*, 100 Va. 562, 42 S. E. 307; *Consumers Ice Co. v. Jennings*, 100 Va. 719, 42 S. E. 879; *American Bonding Co. v. Milstead*, 102 Va. 683, 691, 47 S. E. 858; *Richmond, etc., Co. v. Rubin*, 102 Va. 809, 810, 47 S. E. 834; *Kay v. Glade, etc., R. Co.*, 47 W. Va. 467, 35 S. E. 973.

Although counsel may explain the object of a question so far as to show its materiality, the ruling of the trial court refusing to permit the witness to answer will not be considered, unless the bill of exception to the ruling of the court shows what was expected to be proved by the witness. The same rule applies to questions on cross examination as to questions in chief. *American Bonding Co. v. Milstead*, 102 Va. 683, 684, 47 S. E. 853.

Where a question is not allowed to be answered by a witness, and it does not itself import that its answer will prove a fact material, and it does not otherwise so appear, the refusal to allow it to be answered will not be ground of reversal. *Jackson v. Hough*, 28 W. Va. 236, 18 S. E. 575; *Kay v.*

Glade, etc., R. Co., 47 W. Va. 467, 35 S. E. 974, 977.

If the question alone shows that its answer must be material, and it is refused, it is different. If an answer is stricken out, it must appear, or else it will not be considered. *Kay v. Glade, etc., R. Co.*, 47 W. Va. 467, 35 S. E. 974.

Although a bill of exception does not disclose what the answers of witnesses who were excluded would have been, it is sufficient where the bill shows that the character of such answers was disclosed in the argument on the admissibility of their evidence. *Clark v. Sleet*, 99 Va. 381, 38 S. E. 183.

If the witness is permitted to answer, and the answer is excluded, the bill of exceptions should show what the answer was. *Union Central Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421; *Jackson's Case*, 98 Va. 845, 36 S. E. 487.

Reason for Rule.—This is necessary because it may be that the witness had no knowledge upon the subject, or what he knew was irrelevant or immaterial. *Union Central Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421; *Brock v. Bear*, 100 Va. 562, 42 S. E. 307.

This rule applies in the examination of a juror on his voir dire, and where a question is asked a juror on such examination which he is not permitted to answer, the action of the trial court will not be reviewed in the appellate court unless the bill of exceptions shows what answer is expected or what the party proposed to prove by the juror. *Atlantic, etc., R. Co. v. Reiger*, 95 Va. 418, 28 S. E. 590; *Longley v. Com.*, 99 Va. 807, 37 S. E. 339.

Where the objection is to the competency of the witness, and the objection is sustained, the exception need not show what the party expects to prove by the rejected witness. *Metz v. Snodgrass*, 9 W. Va. 190; *Martz v. Martz*, 25 Gratt. 361; *Fant v. Miller*, 17 Gratt. 187, 228; *Statham v. Ferguson*, 25 Gratt. 28, 38.

Where it is not a question of the relevancy or materiality of the testimony, but a question of the competency of the witness, and whether he shall be permitted to testify, at all, though his testimony be ever so relevant and material, it was held, in *Martz v. Martz*, 25 Gratt. 361, 367, that it is not necessary to state in the bill of exception what the testimony of the witness would be in order to have the action of the court in excluding him reviewed by the appellate tribunal. The fact that he was excluded by the court, upon an objection being made to his testimony by the adverse party, implied that it would be unfavorable to such party. *Mutual Life Ins. Co. v. Oliver*, 95 Va. 451, 28 S. E. 594.

Where parol evidence is excluded, which might be proper when connected with a record, the bill of exceptions should state that the record was offered. Otherwise, the rejection will be presumed proper. *McDowell v. Burwell*, 4 Rand. 317; *Courtney v. Com.*, 5 Rand. 666.

An exception because the trial court refused to permit counsel to read authorities to the jury, including decisions of the supreme court of appeals of Virginia, will be overruled where the exception fails to show clearly and specifically what cases and what extracts from text books were offered, so that this court may see what, if any, prejudice resulted therefrom. *Blankenship v. Chesapeake, etc., R. Co.*, 94 Va. 450, 27 S. E. 20.

(3) Granting or Refusing of Instructions.

In General.—When exception is taken to the granting or refusing of instructions, the bill of exceptions must contain such matter as to make the error complained of apparent or the exception will be unavailing. *Harman v. Lynchburg*, 33 Gratt. 37; *Fitzhugh v. Fitzhugh*, 11 Gratt. 300, 301; *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226.

To avail himself of the benefit of an instruction, the exceptor must see to it, that enough of the evidence is incorporated into his bill of exceptions, to show the pertinence or impertinence of the instructions given or refused, to the issue to be tried. *Fitzhugh v. Fitzhugh*, 11 Gratt. 300; *Washington, etc., Tel. Co. v. Hobson*, 15 Gratt. 122, 134; *Harman v. Lynchburg*, 33 Gratt. 37; *Powell v. Tarry*, 77 Va. 260; *Womack v. Tankersley*, 78 Va. 242, 243; *Valley Mut. Life Ass'n v. Teewalt*, 79 Va. 421; *Wright v. Smith*, 81 Va. 777; *Cluverius v. Com.*, 81 Va. 787; *Roanoke Nat. Bank v. Hambrick*, 82 Va. 135; *Curtis v. Com.*, 87 Va. 589, 13 S. E. 73; *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226; *Lively v. Ballard*, 2 W. Va. 496; *Shepherd v. McQuilkin*, 2 W. Va. 90; *Wise v. Postlewait*, 3 W. Va. 452; *Hooff v. Rollins*, 5 W. Va. 540; *Strader v. Goff*, 6 W. Va. 261; *Sherwsbury v. Miller*, 10 W. Va. 115; *Hall v. Hall*, 12 W. Va. 1, 21; *Campbell v. Hughes*, 12 W. Va. 183; *Patton v. Elk River, etc., Co.*, 13 W. Va. 259, 273; *Ball v. Cox*, 29 W. Va. 1407, 1 S. E. 675; *Kinsley v. Monongalia County*, 31 W. Va. 464, 7 S. E. 445; *Hughes v. Frum*, 41 W. Va. 445, 23 S. E. 604.

Unless the record sets out sufficient matter to show whether or not instructions asked for are relevant to the evidence, the appellate court will not consider the question of the propriety or impropriety of trial courts giving, or refusing to give, said instructions. *Valley Mut. Life Ass'n v. Teewalt*, 79 Va. 421; *Powell v. Tarry*, 77 Va. 250, 260.

If, on refusal to give an instruction, the bill of exceptions does not show there was evidence to support such instruction the case will be presumed hypothetical and the action of the lower court sustained; but if another instruction is given in lieu of the one offered, the appellate court will examine both the instruction given and the one refused. *Chapman v. Wilson*, 1 Rob. 267, 269.

When several instructions are asked and refused, and a general exception is taken to the refusal, if all the instructions are proper and should have been given, the exception is sufficient. *Ocheltree v. McClung*, 7 W. Va. 232, 257.

2. Effect of Uncertainty.

It was formerly held, that where the bill of exceptions was uncertain, so that the true state of the case and question in the court below could not be gathered from it, the judgment would be reversed and the cause remanded for a new trial. *Barrett v. Tazewell*, 1 Call [215] 187; *Beattie v. Tabb*, 2 Munf. 254; *Fowler v. Lee*, 4 Munf. 373; *Hairston v. Cole*, 1 Rand. 461; *Brooke v. Young*, 3 Rand. 106; *Raines v. Phillips*, 1 Leigh, 483; *Thompson v. Cumming*, 2 Leigh 321; *Lynch v. Thomas*, 3 Leigh 682, 689; *Bowyer v. Chesnut*, 4 Leigh 1; *McDowell v. Crawford*, 11 Gratt. 397, 398; *McVeigh v. Allen*, 29 Gratt. 588.

"It is the settled rule of this court, that where the facts stated in the bill of exceptions is so imperfectly stated that the court can not discover how the case ought to be decided, the judgment should be reversed." *Lynch v. Thomas*, 3 Leigh 682, 689.

According to numerous other decisions, and especially the later ones, it is held, that in such case the action of the lower court must be presumed to have been right and the verdict must be affirmed. *McDowell v. Crawford*, 11 Gratt. 397; *Board of Supervisors v. Dunn*, 27 Gratt. 608; *Harman v. Lynchburg*, 33 Gratt. 37, 43; *Womack v. Tankersley*, 78 Va. 242; *Roanoke, etc., Co. v. Karn*, 80 Va. 589, 592; *Wright v. Smith*, 81 Va. 777; *Moses v. Old Dominion, etc., Co.*, 82 Va. 19; *Joslyn v. State Bank*, 86 Va. 287, 289, 10 S. E. 166; *Dawson v. Pritchard*, 5 W. Va. 18; *Patton v. Elk River, etc., Co.*, 13 W. Va. 259, 261; *Marion Machine Works v. Craig*, 18 W. Va. 559.

3. Inclusion of Several Exceptions in One Bill.

It has been held, that it is not per-

missible for three separate and distinct rulings to be objected to in one bill but that each ruling must be the subject of a separate bill. Each objection must stand upon its own merits. *Cluverius v. Com.*, 81 Va. 787, 788.

It may be stated, however, as the general rule, that whether one exception, or more than one, is certified in one and the same "bill" is not material, if each, where there is more than one, is therein distinctly set forth and not confused with others therein contained. *Brown v. Hall*, 85 Va. 146, 7 S. E. 182; *Norfolk, etc., R. Co. v. Shott*, 92 Va. 34, 22 S. E. 811; *Snyder v. Pittsburg, etc., R. Co.*, 11 W. Va. 14; *Richmond, etc., Co. v. Robinson*, 100 Va. 394, 41 S. E. 719.

There may be more than one exception embraced in one bill but each exception should set forth clearly and distinctly the ground of objection relied on, so that there will be no confusion. *Brown v. Hall*, 85 Va. 146, 7 S. E. 182; *Holleran v. Meisel*, 91 Va. 143, 21 S. E. 658; *Norfolk, etc., R. Co. v. Shott*, 92 Va. 34, 37, 22 S. E. 811; *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226; *Kay v. Glade, etc., R. Co.*, 47 W. Va. 467, 35 S. E. 974.

The better and usual practice, and that least likely to lead to confusion and uncertainty, is to take separate bills of exception to each ruling or opinion of the court objected to. In such case each bill is properly designated "a bill of exception" and not a bill of exceptions. *Brown v. Hall*, 85 Va. 146, 151, 7 S. E. 182; *Holleran v. Meisel*, 91 Va. 143, 145, 21 S. E. 658.

The term "bill of exceptions," however, is plural and strictly speaking means *ex vi termini* that more than one objection to the rulings of the trial court is embodied in and certified thereby. *Brown v. Hall*, 85 Va. 146, 151, 7 S. E. 182.

One bill of exceptions, duly taken, is sufficient to bring up for review, in the appellate court, all of the instructions given or refused over objections

thereto, though the exceptant may, in the appellate court, abandon his objection to any one or more of the rulings excepted to. *Richmond, etc., Co. v. Robinson*, 100 Va. 394, 41 S. E. 719.

4. Reference from One Bill to Another or to Other Documents.

General Rule.—One bill of exceptions can not be referred to in order to supply an omission in another, unless such reference be made in one of the bills, and that notwithstanding the bills are all parts of the record in the same case. *Minor's Inst.*, vol. 4, pt. 1, p. 916. *Brooks v. Young*, 3 Rand. 106; *Crawford v. Jarrett*, 2 Leigh 630; *Spencer v. Pilcher*, 8 Leigh 566; *Dis-hazer v. Maitland*, 12 Leigh 524; *Craig v. Sebrell*, 9 Gratt. 131; *Perkins v. Hawkins*, 9 Gratt. 649; *Olinger v. Shepherd*, 12 Gratt. 462, 475; *Mathews v. Traders Bank*, 2 Va. Dec. 539, 541; *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 242, 37 S. E. 851; *Hall v. Hall*, 12 W. Va. 1, 21; *Corder v. Talbott*, 14 W. Va. 277, 286; *Richardson v. Donehoo*, 16 W. Va. 685, 687; *Gunn v. Ohio River R. Co.*, 37 W. Va. 421, 16 S. E. 628; *Zumbro v. Stump*, 38 W. Va. 325, 18 S. E. 447; *Klinkler v. Wheeling, etc., Co.*, 43 W. Va. 219, 27 S. E. 237, 238.

A written lease which is the basis of the suit, and which is copied into one bill of exceptions, may be looked to in connection with another bill of exception which fully identifies it, where it is manifest that no injustice can be done the parties. *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 37 S. E. 851.

The reasons for this rule are said to be that "although the evidence stated in the first bill might be all when it is sealed, there might be other important facts brought forward afterwards and because, by thus supplying the defects of one exception from another, we may shut out evidence material for the other party not noticed in either bill." *Brooks v. Young*, 3 Rand. 106, quoted

in *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 242, 37 S. E. 851.

Exception to Rule.—Although it is generally true that the evidence set out in one bill of exceptions, taken in the progress of a trial, can not be looked to in considering another, yet where a bill of exception is taken after all the evidence has been submitted to the jury, and the bill of exception purports to set out all the evidence, it seems that evidence set out in this bill of exception may be looked to in considering the question raised in another bill taken in the progress of the trial. And this, though the evidence had not been introduced when the first bill of exception was taken. *Perkins v. Hawkins*, 9 Gratt. 649, 650; *Olinger v. Shepherd*, 12 Gratt. 462, 475; *Mathews v. Traders Bank*, 2 Va. Dec. 539, 541; *Moore v. Richmond*, 85 Va. 538, 8 S. E. 387; *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 242, 37 S. E. 851; *Hall v. Hall*, 12 W. Va. 1, 21; *Corder v. Talbott*, 14 W. Va. 277, 286; *Klinkler v. Wheeling, etc., Co.*, 43 W. Va. 219, 27 S. E. 237.

It is now provided by statute in Virginia, that "any evidence in the record may be considered by the appellate courts if certified in any bill of exceptions, as though certified in each. *Pol. Va. Code*, § 3484a.

In bills of exceptions where papers and documents are referred to and made part, they should be either copied into it or referred to therein in such manner as to leave no doubt about their identification. *Leigh v. Ripple*, 27 W. Va. 211, 215.

When a paper which is to constitute a part of a bill of exceptions is not incorporated into the body of the bill, it must be annexed to it, or so marked by letter, number or other means of identification mentioned in the bill, as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions, otherwise it will be disregarded. *McKendree v. Shelton*, 51 W. Va. 516, 41 S. E. 909.

That a copy of a paper is attached to a pleading in the case which purports to be the same as the paper mentioned in the bill of exceptions, does not make it a part of that bill, nor can the appellate court presume that it is the same paper read in evidence and excepted to. *McKendree v. Shelton*, 51 W. Va. 516, 41 S. E. 909.

When a bill of exceptions makes such reference to a paper as will enable it to be safely copied into the record, and acted on as the true paper, said reference makes said paper a part of the record. *Gunn v. Ohio River R. Co.*, 37 W. Va. 421, 16 S. E. 628; *McKendree v. Shelton*, 51 W. Va. 516, 41 S. E. 909.

"Very considerable skill and accuracy are required in the preparation of bills of exceptions, so as to bring into the record as parts of its documents not intrinsically part of the record. The usual mode is to incorporate them in their very words, but it is not the universal mode. We must not be so technical here as to defeat justice. If such reference to the paper is made in the bill of exceptions as will enable it to be safely copied into the record, and acted on as the true paper, it is sufficient, under the rule that where one paper refers to another the latter is to be deemed a part of it. The United States supreme court recognizes this in *Leftwich v. Lecanu*, 4 Wall. 187, in the syllabus, that, 'when a paper which is to constitute a part of a bill of exceptions is not incorporated into the body of the bill, it must be annexed to it, or so marked by letter, number, or other means of identification mentioned in the bill as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions; otherwise, it will be disregarded.' See *Richardson v. Donehoo*, 16 W. Va. 687, syllabus, pt. 18; *Craig v. Sebrell*, 9 Gratt. 131." *Gunn v. Ohio River R. Co.*, 37 W. Va. 421, 16 S. E. 628. See the title EXHIBITS.

B. CERTIFICATION OF FACTS OR EVIDENCE.

1. Certification of Facts.

General Rules as to Necessity.—

Generally, as to the duty of the court to sign the bill of exceptions where the same fully states the facts, or to settle and correct the bill, see post, "Preparation, Settlement and Signature of Bill," VII.

Section 9, ch. 131, W. Va. Code, 1891, does not prohibit the supreme court of appeals from considering a case where the facts proven on the trial, and not the evidence, are certified. *King v. Jordan*, 46 W. Va. 106, 32 S. E. 1022.

As to the contents of the bill where the object of the exception is to have the appellate court pass upon the ruling of the court in admitting or rejecting evidence, admitting or rejecting pleas, or in granting or refusing instructions, see ante, "Form and Contents of Bill," VI.

As to the rules of decision where the evidence and not the facts is stated, see post, "Where Evidence and Not Facts Certified," IX, B.

It may be stated as a general rule that bills of exceptions to the judgment of the trial court granting or refusing a new trial, on the ground that the verdict was or was not warranted by the evidence should certify the facts proved on the trial and not the evidence. *Bennett v. Hardaway*, 6 Munf. 125; *Keys v. M'Fatridge*, 6 Munf. 18; *Deems v. Quarrier*, 3 Rand. 475; *Vaughan v. Green*, 1 Leigh 287, 295; *Carrington v. Bennett*, 1 Leigh 340; *Ewing v. Ewing*, 2 Leigh, 337; *Jackson v. Henderson*, 3 Leigh 197; *Green v. Ashby*, 6 Leigh 135; *Mays v. Callison*, 6 Leigh 231; *Rohr v. Davis*, 9 Leigh, 30; *Brooks v. Calloway*, 12 Leigh 466, 480; *Harnsbarger v. Kinney*, 6 Gratt. 287; *Forkner v. Stuart*, 6 Gratt. 197; *Willard v. Overseers*, 9 Gratt. 139; *Farish v. Reigle*, 11 Gratt. 697, 706; *Pryor v. Kuhn*, 12 Gratt. 615; *Gimmi v. Cullen*, 20 Gratt. 439; *McClung v. Ervin*, 22 Gratt. 519; *Seibright v. State*,

2 W. Va. 591; *Dusenberry v. Alford*, 5 W. Va. 115; *Wustland v. Potterfield*, 9 W. Va. 438; *Morgan v. Fleming*, 24 W. Va. 186; *Fawcett v. Railway Co.*, 24 W. Va. 755; *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622, 668.

Rule Inapplicable Where No Conflicting Evidence.—The principle which requires that, on motion for new trial because of a verdict against the weight of the evidence, the facts and not the evidence, should be certified, is that a party shall not be permitted to so frame a bill of exception as to refer the credit of the witnesses to the appellate court. Hence the rule would not apply when the evidence shows that there was no conflicting evidence and that excluding all the evidence against the verdict and admitting the truth of all evidence adduced in its support, the verdict still appears to be contrary to the evidence. In such case the court would not decide on the credit of the witnesses; it would proceed on the admission of their credit. *Ewing v. Ewing*, 2 Leigh 337; *Green v. Ashby*, 6 Leigh 135; *Goodman v. Richmond*, etc., R. Co., 81 Va. 582; *McClung v. Ervin*, 22 Gratt. 519; *Slaughter v. Tutt*, 12 Leigh 147; *Pasley v. English*, 5 Gratt. 141, 148; *Muse v. Stern*, 82 Va. 37; *Patteson v. Ford*, 2 Gratt. 18, 27; *Bell v. Snyder*, 10 Gratt. 350, 353; *Wickham v. Lewis*, 13 Gratt. 427, 431; *Pryor v. Kuhn*, 12 Gratt. 615, 618.

Language Not Decisive as to Nature of Certificate.—Words used in the bill will not be held decisive of the character of the certificate, if it appear from the use of other words, or from the general scope of the certificate, that the object of the court was to certify the facts and not the evidence merely. *Gimmi v. Cullen*, 20 Gratt. 439; *Jackson v. Henderson*, 3 Leigh 197, 212.

Though the bill of exceptions purports to certify the facts, if the facts are contradictory it will be evident that such bill really certifies the evidence and the court must proceed accord-

ingly. *Pruner v. Com.*, 82 Va. 115; *Read v. Com.*, 22 Gratt. 924; *Scott's Case*, 77 Va. 344; *Carrington v. Bennett*, 1 Leigh 340; *Ewing v. Ewing*, 2 Leigh 337; *McClung v. Ervin*, 22 Gratt. 519.

If the bill of exceptions purports to certify the evidence but it appears that the court meant to certify the whole as facts proved, the bill of exceptions is well taken. *Mays v. Callison*, 6 Leigh 230; *Ewing v. Ewing*, 2 Leigh 337; *Rohr v. Davis*, 9 Leigh 30; *McClung v. Ervin*, 22 Gratt. 519.

2. Certification of Evidence.

a. Duty of Court to Certify.

(1) In Virginia.

Former Rule in Case of Verdict and Denial of New Trial.—It was formerly held, in Virginia, that where the evidence is contradictory the court which tried the case could not be required to state in a bill of exceptions either the evidence or the facts proved by the witnesses respectively. It was enough to state that the evidence was contradictory. *Grayson v. Com.*, 6 Gratt. 712. See also, *Brooks v. Calloway*, 12 Leigh 466; *Taliaferro v. Franklin*, 1 Gratt. 332; *Pasley v. English*, 5 Gratt. 141; *Forkner v. Stuart*, 6 Gratt. 197.

It is now, however, well settled in Virginia, that whenever, after verdict and motion for new trial on the ground that the evidence did not warrant the verdict, the lower court can not or will not certify the facts, it must, upon the application of the party aggrieved, certify the evidence. *Powell v. Tarry*, 77 Va. 250, 260; *Dillard v. McCorkle*, 83 Va. 755, 3 S. E. 383; *Muse v. Stern*, 82 Va. 33, 37; *Western Union Tel. Co. v. Powell*, 94 Va. 268, 27 S. E. 429. See post, "Where Evidence and Not Facts Certified," IX, B.

After verdict and denial of new trial, the trial court must certify the facts or the evidence, if asked so to do. *Dillard v. McCorkle*, 83 Va. 755, 3 S. E. 383.

When the evidence is conflicting, the court may refuse to certify the facts proved. *Powell v. Tarry*, 77 Va. 250, citing *Grayson's Case*, 6 Gratt. 712, 7 Gratt. 613; *Farish v. Reigle*, 11 Gratt. 697, 706; *Vaiden's Case*, 12 Gratt. 717, 727; *Bull's Case*, 14 Gratt. 613; *Caldwell v. Craig*, 21 Gratt. 132, 136; *Blosser v. Harshbarger*, 21 Gratt. 214, 215.

It must, however, certify the evidence on motion of any suitor. *Powell v. Tarry*, 77 Va. 250, holding that the opinion in *Grayson's Case*, 6 Gratt. 712, on the point, was mere obiter dictum and not sound in principle.

Lack of time or lapse of memory is no excuse for a judge's refusal to certify the evidence on the trial of a cause before him, or to perform any other duty imposed on him by law. *Powell v. Tarry*, 77 Va. 250.

The court can not require counsel to agree upon a statement of the evidence as a condition precedent to the certification of the evidence. This would make the right of appeal dependent upon the concurrence of the opposing counsel as to what the evidence was. *Dillard v. Dunlop*, 83 Va. 755, 3 S. E. 383.

Where a jury is waived and the whole matter of law and fact is referred to the decision of the court, if either party desires to appeal from the judgment of the court the usual practice is to present by bill of exceptions a statement of all the evidence before the court below, and the appellate court will consider the bill as a demurrer to the evidence. *Lee v. Boak*, 11 Gratt. 182; *Mitchell v. Baratta*, 17 Gratt. 445; *Clafflin v. Steenbock*, 18 Gratt. 842, 844; *Wright v. Rambo*, 21 Gratt. 158; *Hodge v. First Nat. Bank*, 23 Gratt. 51; *Joslyn v. State Bank*, 26 Va. 287, 10 S. E. 166. See post, "Where Evidence and Not Facts Certified," IX, B.

See, however, *Western Union Tel. Co. v. Powell*, 94 Va. 268, 27 S. E. 429, where it is held, that since the Code of 1887 went into effect, a case at law heard and determined by the court, as

well as a case tried by jury, may be heard in the appellate court either upon a certificate of facts, or of the evidence. In either case the court should certify the facts when it can do so, but, if it be unable or unwilling to certify the facts because evidence is conflicting or complicated, or of doubtful credibility, it should certify the evidence. See also, *Pryor v. Kuhn*, 12 Gratt. 615.

(2) In West Virginia.

Former Rule Where New Trial Asked and Evidence Conflicting.—In West Virginia, at least prior to the acts of 1891, courts still followed the authority of *Grayson's Case*, 6 Gratt. 712, and held, that after verdict and motion for new trial on the ground that the evidence did not warrant the verdict, if the evidence was contradictory the court below was not bound to certify the facts or the evidence further than was sufficient to show the pertinency of an instruction predicated on it. *Renick v. Correll*, 4 W. Va. 627; *Morgan v. Fleming*, 24 W. Va. 186; *Nease v. Capehart*, 15 W. Va. 299.

A bill of exceptions to the judgment of the trial court granting or refusing a new trial, on the ground that the verdict is or is not warranted by the evidence, should properly in every case state the facts proved on the trial and not the evidence. *Morgan v. Fleming*, 24 W. Va. 186.

When a new trial is asked in a common-law suit, and the evidence is so conflicting on material points in the case that the appellate court would not even consider the statement of facts if they were certified, the court is not bound to sign any bill of exceptions setting out such conflicting evidence. *Poteet v. County Commissioners, etc.*, 30 W. Va. 58, 3 S. E. 97; *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76.

By § 9, ch. 131, W. Va. Code, as amended by the acts of 1891, it was, however, provided that "If the action or opinion of the court be upon any question involving the evidence or any

part thereof, either upon a motion for a new trial, or otherwise, the court shall certify all the evidence touching such question." *Poling v. Ohio River R. Co.*, 38 W. Va. 645, 18 S. E. 782; *Johnson v. Burns*, 39 W. Va. 658, 20 S. E. 686; *Yeager v. Bluefield*, 40 W. Va. 484, 21 S. E. 752; *Mapel v. John*, 42 W. Va. 30, 24 S. E. 608; *Laidley v. Kanawha County Court*, 44 W. Va. 566, 30 S. E. 109; *Deering v. Coberly*, 44 W. Va. 606, 29 S. E. 512; *Teel v. Ohio River R. Co.*, 49 W. Va. 85, 38 S. E. 518; *Buck v. Newberry*, 55 W. Va. 681, 47 S. E. 889. See post, "When Evidence and Not Facts Certified," IX, B.

"Under § 9, ch. 131, all the evidence, and not the facts is certified." *Poling v. Ohio River R. Co.*, 38 W. Va. 645, 18 S. E. 782.

In *Buck v. Newberry*, 55 W. Va. 681, 47 S. E. 889, it was held, that the Code of 1899, ch. 131, § 9, does not, even if it could do so under the constitution, direct the courts as to what effect they shall give evidence on a motion for a new trial. See generally, the title NEW TRIALS.

By § 3, ch. 110, of the West Virginia Code, 1899, relating to writs of prohibition and certiorari, it is provided that: "In every case, matter or proceeding before a county court, council, justice or inferior tribunal, in which a writ of certiorari would lie according to the provisions of the preceding section, the majority of the commissioners composing a court, or the justice or the officer or officers presiding over such council or other inferior tribunal, shall upon request of either party in a civil case, matter or proceeding, or the defendant in a criminal case, matter or proceeding, certify the evidence if any which may have been heard, and sign bills of exceptions, setting forth any rulings or orders which may not otherwise appear of record. Such certificate of evidence and bills of exceptions shall be part of the record and as such removed and returned to the circuit

court." *Board of Education v. Hopkins*, 19 W. Va. 84; *Alderson v. Commissioners*, 32 W. Va. 454, 9 S. E. 863; *Natural Gas Co. v. Healy*, 33 W. Va. 102, 10 S. E. 56; *Bee v. Seaman*, 36 W. Va. 381, 15 S. E. 173; *Womer v. Ravenswood*, 37 W. Va. 287, 16 S. E. 488; *Arnold v. Lewis County Court*, 38 W. Va. 142, 18 S. E. 476; *Grafton v. Davisson*, 45 W. Va. 12, 29 S. E. 1028.

Where a jury is waived and the whole matter of law and fact is referred to the decision of the court, if either party desires to appeal from the judgment of the court by writ of error or otherwise, the usual practice in West Virginia is to present by bill of exceptions a statement of all the evidence before the court below. *Ramsberg v. Erb*, 16 W. Va. 777, 783; *Wickes v. Baltimore, etc., R. Co.*, 14 W. Va. 157; *Nutter v. Sydenstricker*, 11 W. Va. 535. See post, "Where Evidence and Not Facts Certified," IX, B.

Where the parties by consent waive a jury and submit the whole matter of law and fact to the court, if either party be dissatisfied with the decision he must generally have the whole evidence certified and made a part of the record, either in a bill of exception or in some other manner recognized by law. *Ramsburg v. Erb*, 16 W. Va. 777, 783; *Ramsburg v. Erb*, 16 W. Va. 787; *Smith v. Townsend*, 21 W. Va. 486, 493.

b. Mandamus to Compel Certification.

Mandamus will lie to compel the court to certify the evidence upon refusal to certify the facts proved, on the ground that the evidence is conflicting. *Dillard v. Dunlop*, 83 Va. 755, 3 S. E. 383; *Powell v. Tarry*, 77 Va. 250.

c. Refusal as Error.

Where, after service of mandamus upon the trial judge to certify the facts or the evidence, and his refusal to do so, the record of the case is presented in the petition of the losing party to the appellate court, it will reverse the

judgment complained of and remand the case for new trial. *Dillard v. Dunlop*, 83 Va. 755, 3 S. E. 383.

"While mandamus will lie to compel the judge to certify the evidence when he shall so refuse, it is also error to so refuse, of which any party injured may complain to this court, and for which this court will reverse the judgment of the court below. It is the right of a suitor to have the evidence certified to this court in a case where the judge refuses to certify the facts proved, on the ground that the evidence is conflicting. To refuse to do so, is to deny to the suitor his right of appeal." *Dillard v. Dunlop*, 83 Va. 755, 3 S. E. 383, quoting *Powell v. Tarry*, 77 Va. 250.

3. Effect of Failure to Certify Either Facts or Evidence.

On an exception to an opinion of the court overruling a motion for a new trial on the ground that the verdict is contrary to the evidence, if the exception states neither the facts proved nor the evidence introduced on the trial, nor refers to another bill of exceptions in which all the facts or evidence given on the trial is shown to be stated, the appellate court can not review the judgment of the court below. *Washington, etc., Tel. Co. v. Hobson*, 15 Gratt. 122; *Ayres v. Rolins*, 30 Gratt. 165; *Valley Mut. Life Ass'n v. Teewalt*, 79 Va. 421; *Wright v. Smith*, 81 Va. 777; *Com. v. Brown*, 90 Va. 671, 19 S. E. 447; *Wustland v. Potterfield*, 9 W. Va. 438; *Todd v. Gates*, 20 W. Va. 464.

On refusal of new trial the motion for which was on the ground of new evidence discovered since the verdict, a bill of exceptions which does not state the facts proved or the evidence at the trial below, is not well taken. *Callaghan v. Kippers*, 7 Leigh 608.

Where there is a motion to set aside a verdict and grant a new trial on the ground of after-discovered evidence, and there is in the record no certificate of the evidence or facts proven, the

bill of exceptions raising such exception will not be considered by the appellate court, it being impossible to ascertain whether the after-discovered testimony is merely cumulative or is of such a character as ought to produce a different result on a new trial. *Rutter v. Sullivan*, 25 W. Va. 427.

4. Necessity for Showing That All Facts or All Evidence Certified.

On refusal to set aside the verdict as contrary to the evidence, if the facts are certified the bill of exceptions should show that they are all the facts; if the evidence is certified it should appear that all the evidence is certified. Otherwise the action of the lower court must be presumed to be right. *Smith v. Walker*, 1 Call. 24 [28]; *Willard v. Overseers*, 9 Gratt. 139; *Massie v. Com.*, 30 Gratt. 841; *McArter v. Grigsby*, 84 Va. 159, 4 S. E. 369; *Adams v. Hays*, 86 Va. 153, 9 S. E. 1019; *Shewsbury v. Miller*, 10 W. Va. 115, 116; *Hunter v. Stewart*, 23 W. Va. 549; *Edgell v. Conway*, 24 W. Va. 747; *State v. Ice*, 34 W. Va. 244, 12 S. E. 695; *Williamson v. Hays*, 35 W. Va. 52, 12 S. E. 1092.

Where a bill of exceptions certifies the evidence given and not the facts proved, and where it does not appear that the evidence certified was all the evidence before the jury on which they found their verdict, it does not affirmatively appear that the verdict is contrary to evidence nor that the court below committed any error in refusing to grant a new trial, on the ground that the verdict was against evidence. *Bank v. Berkeley*, 3 W. Va. 386.

Where the concluding statement in a bill of exception is that "the foregoing was all the evidence material in the cause," it is not subject to objection as being too vague and uncertain on the ground that the opinion of the court below ought not to determine what is material and what is not. This is substantially like certifying the facts proved instead of the evidence and no material fact can be supposed to have

been omitted from a bill so certified by the court with the presence and aid of the counsel of both sides. *Bloss v. Plymale*, 3 W. Va. 397.

VII. Preparation, Settlement and Signature of Bill.

A. TIME OF PREPARATION.

1. General Rule.

Although the point should be saved during the trial, yet the bill of exceptions may be drawn up and presented for settlement and signature either during the trial, or after the trial is ended and during the term. *Jones v. Lucas*, 1 Rand. 268; *Coleman v. Lyne*, 4 Rand. 454; *Dickenson v. Davis*, 2 Leigh 401, 434; *Colgin v. Henley*, 6 Leigh 86; *Miller v. Holcomb*, 9 Gratt. 665; *Taylor v. Smith*, 10 Gratt. 557; *Tarr v. Ravenscroft*, 12 Gratt. 642, 651; *Bull v. Com.*, 14 Gratt. 613, 630; *Washington, etc., Tel. Co. v. Hobson*, 15 Gratt. 122; *Hill v. Bowyer*, 18 Gratt. 364, 380; *Thornton v. Com.*, 24 Gratt. 657, 672; *Martz v. Martz*, 25 Gratt. 361; *Peery v. Peery*, 26 Gratt. 320; *Vaiden v. Stubblefield*, 28 Gratt. 153; *Lambert v. Cooper*, 29 Gratt. 61; *Page v. Clifton*, 30 Gratt. 415; *Danville Bank v. Waddill*, 31 Gratt. 469; *Simmons v. Simmons*, 33 Gratt. 451; *Mitchell v. Com.*, 75 Va. 856, 865; *Liberty Savings Bank v. Campbell*, 75 Va. 534; *Strange v. Strange*, 76 Va. 240; *Powell v. Tarry*, 77 Va. 250; *Price v. Com.*, 77 Va. 396; *Nickels v. Kane*, 82 Va. 309; *Shipman v. Fletcher*, 83 Va. 349, 2 S. E. 198; *Cralle v. Cralle*, 84 Va. 198, 6 S. E. 12; *Lawrence v. Com.*, 86 Va. 573, 10 S. E. 840; *Bransford v. Karn*, 87 Va. 242, 12 S. E. 404; *Whalen v. Com.*, 90 Va. 544, 19 S. E. 182; *Williams v. Com.*, 93 Va. 769, 773, 25 S. E. 659; *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226; *Shacklett v. Roller*, 97 Va. 639, 34 S. E. 492; *Todd v. Sykes*, 97 Va. 143, 194, 33 S. E. 517; *Bank v. Preston*, 97 Va. 222, 33 S. E. 546; *Tunis Lumber Co. v. Dennis Lumber Co.*, 97 Va. 682, 34 S. E. 613; *Nadenbousch v. Sharer*, 2 W. Va. 285; *Cunningham v. Porter-*

field, 2 W. Va. 447; *Robinson v. Pitzer*, 3 W. Va. 335, 336; *Thompson v. Boggs*, 8 W. Va. 63; *Wustland v. Potterfield*, 9 W. Va. 439; *Hill v. Proctor*, 10 W. Va. 59; *Reinhard v. Baker*, 13 W. Va. 805; *Wickes v. Baltimore, etc., R. Co.*, 14 W. Va. 157, 165; *State v. Seabright*, 15 W. Va. 590; *Perry v. Horn*, 22 W. Va. 381; *Core v. Marple*, 24 W. Va. 354, 355; *Fawcett v. Railway Co.*, 24 W. Va. 755; *Sammons v. Hawvers*, 25 W. Va. 678; *Danks v. Rodeheaver*, 26 W. Va. 274; *Dimmey v. Railroad Co.*, 27 W. Va. 32, 51; *Gilmer v. Sydens-tricker*, 42 W. Va. 52, 24 S. E. 566; *Greenbrier v. Ocheltree*, 44 W. Va. 626, 30 S. E. 78.

If the bill of exceptions can not be drawn at once, liberty should be reserved to do so during the term. *Danville Bank v. Waddill*, 31 Gratt. 469; *Danks v. Rodeheaver*, 26 W. Va. 274.

If an exception to the ruling of the court excluding a witness, is taken at the time, the bill of exceptions may be prepared, and signed and sealed after the verdict and judgment. And if the counsel of the parties do not agree as to the fact whether the exception was taken at the time, the court, not remembering, may certify the facts; and the entry of the clerk in the memorandum stating that the exception was taken on the trial, the court was right in certifying the facts, and the appellate court may consider the question raised by the bill of exceptions. *Martz v. Martz*, 25 Gratt. 361.

Delaying Trial for Preparation of Bill.—Whether the court shall allow the trial to be stopped to enable counsel to prepare a bill of exceptions, is a matter within its discretion. *Jones v. Com.*, 87 Va. 63, 69, 12 S. E. 226; *Nadenbousch v. Sharer*, 2 W. Va. 285.

It is not error for the court to refuse to stop the trial to enable the counsel for prisoner to prepare a bill of exceptions as the same might be prepared after verdict. *Jones v. Com.*, 87 Va. 63, 12 S. E. 226.

In a prosecution for a felony, where the trial has been protracted, and much evidence introduced, and it will consume much time in preparing a bill of exceptions, the court may properly refuse to delay the trial to permit the counsel to prepare the bill of exceptions, and postpone its preparation until the case is submitted to the jury. *Coleman v. Com.*, 25 Gratt. 865, 863.

"According to our practice, it is not necessary that a bill of exceptions should be tendered immediately on the transpiring or happening of the action of the court to which a party excepts. It is true, that when the character of the exceptions is such that little delay is occasioned by the preparation of the bill of exceptions, it is sometimes immediately prepared and disposed of; and in such case, a memorandum of the transactions is usually made in the minutes of the proceedings of the day.

"But as in a great number, perhaps a majority of cases, serious delay and inconvenience would result from stopping the progress of the trial to prepare bills of exceptions to the rulings of the court, a practice sanctioned by long usage, has prevailed, for the counsel desiring to except to any opinion of the court given against them on the trial, simply to state to the court that they intend to save the point, and ask the court to note the exception, and afterwards during the term to prepare the bill of exceptions, and tender it to the court for its signature. Such was the practice which prevailed under our law of 1819, which follows substantially the provisions of the statute of Westm. 2, 13 Edw. 1, ch. 31. I do not think that any such change in the law has been introduced by the 8th section of chapter 177 of the present Code, as requires us to declare that such a practice is no longer to be allowed." *Washington, etc., Tel. Co. v. Hobson*, 15 Gratt. 122.

Effect of Stopping Trial for Preparation and Signature.—Though it is not

necessary to stop the progress of a trial to prepare a bill of exceptions, yet at least the point should be saved before the jury retires, and the bill may be then prepared and signed afterwards; but when exception is taken and the progress of the trial stopped for the purpose, and the bill is then prepared and signed, the parties may well rely on the case thus made by the record and shape their course accordingly. In such case it would not be error in the court after the verdict had been rendered, to refuse to amend the bill of exceptions, notwithstanding in general where the exception has been taken before the jury retired but the bill not drawn up and signed till after the verdict, the court may correct the bill to conform to the truth. *Robinson v. Pitzer*, 3 W. Va. 335.

2. After Term at Which Final Judgment Rendered.

In Absence of Statute.—In the absence of statute a court has no authority to sign bills of exceptions in a cause after the end of the term at which final judgment is rendered. *Winston v. Giles*, 27 Gratt. 530; *Virginia, etc., Co. v. Rich Patch Iron Co.*, 98 Va. 700, 37 S. E. 280.

If an exception to the ruling of the court excluding a witness, is taken at the time, the bill of exceptions may be prepared, signed and settled after verdict and judgment; but this must be done before the end of the term at which final judgment is rendered. *Martz v. Martz*, 25 Gratt. 361; *Alderson v. Cunningham*, 33 W. Va. 607, 11 S. E. 76.

A bill of exceptions can not be properly or regularly added to the record of a case after that case has been ended by a final judgment rendered therein. *Winston v. Giles*, 27 Gratt. 530, 534; *Moses v. Cromwell*, 78 Va. 673; *Suffolk v. Parker*, 79 Va. 660; *Danville Bank v. Waddill*, 31 Gratt. 469, 477; *Jones v. Com.*, 87 Va. 63, 12 S. E. 226; *Wickes v. Baltimore, etc., R. Co.*, 14 W. Va. 157, 166.

In an action at law, which is submitted to the judgment of the court without a jury, the court renders a judgment, to which one party excepts, and it being near the end of the term, the court gives the counsel time, until the first day of the next term, to prepare the bill of exceptions; but judgment is entered. The court can not give such leave, and the bill of exceptions can not be made a part of the record. *Winston v. Giles*, 27 Gratt. 530.

Even if the court had authority to give the time until a day certain in the next term to prepare the bill of exception, if the bill of exception is not tendered to the court on that day, it can not afterwards be received. *Winston v. Giles*, 27 Gratt. 530.

"The usual practice is to give notice of the exception at the time the decision is made, and reserve liberty, with the permission of the judge, to draw up and present the bill for settlement and signature either during the trial or after trial and during the term, as may be allowed or directed by the judge. The bill should be presented and signed at least during the term at which final judgment is entered in the suit or other proceeding in which the exception is taken, and it will be disregarded in the appellate court if signed after the end of such term, although signed pursuant to a previous order allowing it, unless perhaps such order be made by consent of parties entered of record. *Winston v. Giles*, 27 Gratt. 530, 535." Page *v. Clopton*, 30 Gratt. 415.

In cases where it may be important to give time until the next term to prepare the bill of exceptions, the case should be kept open, and the judgment should not be entered until the next term. *Winston v. Giles*, 27 Gratt. 530; *Welty v. Campbell*, 37 W. Va. 797, 17 S. E. 312; *Virginia, etc., Co. v. Rich Patch Iron Co.*, 98 Va. 700, 37 S. E. 280; *Hudgins v. Simon*, 94 Va. 659, 27 S. E. 606.

In West Virginia previous to the act of March 12, 1891, which took effect at the expiration of ninety days from its passage, the rule of practice was that bills of exception might be signed by the judge presiding at the trial before the close of the term at which final judgment was rendered, but not afterwards. *Welty v. Campbell*, 37 W. Va. 797, 17 S. E. 312; *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76; *State v. McGlumphy*, 37 W. Va. 805, 17 S. E. 312; *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. 656.

"If the judge of the court adjourns his court to a future day, according to and by authority of the said 6th section of chapter 15 of the acts of the legislature of 1872-3, the term of said court, quoad a judgment rendered by such court in a cause before or during the day on which such adjournment becomes final, is ended. And it is not competent ordinarily for such court, or the judge thereof, thereafter at the adjourned term, or any other term, to receive a bill of exceptions and sign it and make it a part of the record in the cause, in which judgment was so rendered." *Wickes v. Baltimore, etc., R. Co.*, 14 W. Va. 157.

Under Statute.—The Virginia acts of 1901, p. 186, amending § 3385 of the Code, (Va. Code, 1904, § 3385), provide that "Any bill of exceptions may be tendered the judge and signed by him, either during the term at which the opinion of the court is announced, to which exception is taken, or in vacation, within thirty days after the end of such term, or at such other time as the parties, by consent entered of record, may agree upon." *Lynchburg, etc., Mills v. Stanley*, 102 Va. 592, 46 S. E. 908.

The act of February 15, 1901, was intended to extend the time within which bills of exception could be tendered and signed. Until final judgment is rendered the case is open for the purpose of perfecting exceptions taken to rulings during the trial. The act

extends the time in which they may be perfected for thirty days beyond final judgment, or 'until such time as the parties shall agree of record to extend it. *Lynchburg, etc., Mills v. Stanley*, 102 Va. 592, 46 S. E. 908.

Where an action is argued and submitted at one term of a court and decided at a later term, the parties have thirty days after the final judgment within which to perfect exceptions duly taken during the trial of the cause at the prior term. The bills do not have to be signed within thirty days from the adjournment of the term of the court at which the decisions were rendered. If such a construction of the statute were to prevail, the result would be that the act which was plainly intended to enlarge the time, would be converted into a means of curtailing, by giving litigants less time in which to perfect their bills of exceptions than they had before the act was passed. *Lynchburg, etc., Mills v. Stanley*, 102 Va. 592, 46 S. E. 908.

In **West Virginia** under ch. 131, § 9, of the Code of 1899, the bill may be made up either before the close of the term at which final judgment is rendered or within thirty days after the close. *State v. McGlumphy*, 37 W. Va. 805, 17 S. E. 315; *Griffith v. Corrothers*, 42 W. Va. 59, 24 S. E. 569.

Under this act a bill of exceptions may be signed within thirty days after the close of the term. *State v. McGlumphy*, 37 W. Va. 805, 17 S. E. 312, 315; *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. 656; *Jordan v. Jordan*, 48 W. Va. 600, 37 S. E. 556.

The provision of § 9, ch. 131, W. Va. Code, 1891, allowing a bill of exceptions to be made within thirty days after the term, is applicable to criminal as well as civil cases. *State v. McGlumphy*, 37 W. Va. 805, 17 S. E. 312, 315.

The statute allowing a circuit judge to sign a bill of exceptions within thirty days after the close of the term,

does not apply to justices. *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. 656.

A justice's court has no term. When a case is ended by final judgment the functions of the justice are obviously at an end, and the justice can thereafter do nothing to change the record of that trial, or make a part of that record what was not such before. If he can sign and date the certificate of facts the next day, he can do it the next week, and thus violate the statute which requires judgment to be entered upon a verdict within twenty-four hours of the verdict. *Bee v. Seaman*, 36 W. Va. 381, 15 S. E. 173; *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. 656.

Even under the act of 1891, a court has no power to grant more than thirty days' time after a term at which final judgment is rendered for signing a bill of exceptions, and bills signed after thirty days from the close of such term are signed without jurisdiction, and are no part of the record. *Jordan v. Jordan*, 48 W. Va. 600, 37 S. E. 556.

Where a cause has been tried, resulting in a verdict for the defendant, and a motion to set aside the verdict has prevailed, a new trial has been awarded, and the record shows that the defendant excepted, and at a subsequent term of the court a new trial has taken place before another judge, resulting in a verdict for the plaintiff, and the defendant moves to set aside the verdict, and, his motion being unsuccessful, he excepts, and counsel agree that two bills of exception may be signed within ninety days, setting out the facts on both trials, and the court enters an order showing that said bills were signed, the judge who presided at the first trial can not be compelled, within ninety days, or at any other time, by mandamus, to sign the bill of exceptions which pertains to said first trial. *Welty v. Campbell*, 37 W. Va. 797, 17 S. E. 312.

B. PRESENTATION TO JUDGE.

The exceptions having been noted at the time the decision is given, and the bill having been made out, such bill is to be handed to the judge at some time during the term, for any corrections or amendments which he may be able to suggest. *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76.

"The bill is 'handed to' the judge, or, as Judge Green expresses it [in *Poteet v. County Commissioners*, etc., 30 W. Va. 58, 3 S. E. 97], 'the judge takes the bill as presented.'" *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76.

C. SETTLEMENT.**1. Definition and Nature of Proceeding.**

By settling a bill of exceptions, when presented by counsel, is meant that the court below shall take the bill as presented, striking from it no facts or statements however impertinent or immaterial the court may consider them, if such statements or facts are correctly stated; and, if any facts or statements are incorrectly stated, they must be altered by the court only by changing the bill of exceptions so far as to make the statements or facts correct, taking care to strike out of the bill no part or any statements or any facts further than is necessary to make it correspond accurately with the truth. *Poteet v. County Commissioners*, etc., 30 W. Va. 58, 3 S. E. 97; *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76.

If there be any statement in the bill, or any facts stated which are without any basis of truth, then, and then only, can they be properly stricken out entirely, and the court will, if necessary, modify such bill by adding to it any statement or fact which it regards as material, which has been omitted in such bill of exceptions. *Poteet v. County Commissioners*, etc., 30 W. Va. 58, 3 S. E. 97; *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76.

Examination of Bill at Chambers.—

There is no rule of practice which prohibits the court or the judge from taking exceptions, instructions, and other pleadings to his office or library for the purpose of examining them, consulting authority, and passing upon them. Before doing so, it is proper to hear counsel upon them. *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76.

"I can not find it anywhere insisted that the bill must only be examined or considered in banc, and that it can not be carried into the chamber or library by the judge." *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76.

2. Duty of Court to Settle.

Originally it was supposed that the judge was only bound to sign the bill when a true one was presented to him, and, when there was any objection to it, that he was not to aid in its correction, and might therefore refuse to sign it. The practice, however, for a long time has been otherwise. Page *v. Clopton*, 30 Gratt. 415, 427; *Poteet v. County Commissioners*, etc., 30 W. Va. 58, 3 S. E. 97.

The duty of the judge is not ended and fully discharged when he merely refuses to sign a particular bill tendered, on the ground that the truth of the case is not fairly stated therein. He should go further. He should proceed, with the aid of counsel, to settle the bill, and, when settled to sign it. *Poteet v. County Commissioners*, etc., 30 W. Va. 58, 3 S. E. 97; Page *v. Clopton*, 30 Gratt. 415, 427; *Collins v. Christian*, 92 Va. 731, 24 S. E. 472; *Douglas v. Loomis*, 5 W. Va. 542.

"If the bill presented is not truthful and fair, the judge should alter it, making it such, or suggest what alterations should be made, where such alteration can be made in the draft; or, when necessary, he may require it to be redrafted in accordance with such suggestions; for he is not bound to sign a bill that is not true." Page *v. Clopton*, 30 Gratt. 415, 427.

Duty of Court to Certify Evidence.
—See ante, "Certification of Evidence," VI, B, 2.

3. Time of Settlement.

Bills of exceptions may be settled at any time during the term. *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76.

D. SIGNATURE.

1. Necessity.

A bill of exceptions without the signature of the judge is fatally defective; for without his signature it does not become a part of the record. *Com v. Hall*, 8 W. Va. 259; *Henry v. Davis*, 13 W. Va. 230; *Shanks v. Fenwick*, 2 Munf. 478; *Adkins v. Globe Fire Ins. Co.*, 45 W. Va. 384, 32 S. E. 194; *Clark v. Com.*, 90 Va. 360, 18 S. E. 440.

Exceptions to be of any avail, must not only be drawn up so as to distinctly present the ruling objected to, but must be signed by the judge. *Roanoke, etc., Co. v. Karn*, 80 Va. 589; *Fry v. Leslie*, 87 Va. 269, 12 S. E. 671; *Trumbo v. Street Car Co.*, 89 Va. 780, 17 S. E. 124; *Clark v. Com.*, 90 Va. 360, 18 S. E. 440; *Whalen v. Com.*, 90 Va. 544, 19 S. E. 182.

Signature by All Judges Present.—

A bill of exceptions to the opinion of the court (two judges being present) is not sufficient unless signed by both judges. *Gordon v. Browne*, 3 Hen. & M. 219.

2. Duty of Court to Sign.

General Rule.—If a bill of exceptions be tendered as to the ruling of the court at the trial, and if it fully state the facts (if the truth of the case be fairly stated therein), the judge must sign it, and it must be made a part of the record of the case. Va. Code, 1904, §§ 3385, 4050; W. Va. Code, 1899, ch. 131, § 9. *Robertson v. Com.*, 1 Va. Dec. 839, 840.

"In either of the cases in which bills of exceptions are allowed, that is, in the trial of the case at law, or in a criminal case or proceeding for contempt in which a writ of error lies to

a higher court, if the party excepts, as he may, to an opinion or judgment of the court in due time, and tenders in due time his bill of exceptions, the judge is required to sign the bill, 'if the truth of the case be fairly stated therein.' If the conditions of the statute are satisfied, the right of the party is clear and the duty of the judge equally clear, and it is imperative. He has no discretion in the matter. The language of the law is, he 'shall sign.'" *Page v. Clopton*, 30 Gratt. 415.

When the court has settled the bill of exceptions, it is its duty to sign such bill of exceptions, and make it a part of the record, whereon the case, matter, or proceeding can be reviewed. *Poteet v. County Commissioners, etc.* 30 W. Va. 58, 3 S. E. 97; *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76.

When Signature Properly Refused.

—"It is not the duty of the judge who presides at the trial, to sign a bill of exceptions not confined to the legal effect of the evidence, and which, therefore, will not be considered by the appellate court. On the contrary, it is his duty to refuse to sign it." *Taliaferro v. Franklin*, 1 Gratt. 332. See post, "Mandamus to Compel Performance of Duty by Judge," VII, E.

3. Time of Signature.

See ante, "Time of Preparation," VII, A.

E. MANDAMUS TO COMPEL PERFORMANCE OF DUTY BY JUDGE.

In General.—A writ of mandamus will lie to compel the judge to sign bills of exception in a case, if "the truth of the case be fairly stated therein." *Shanks v. Fenwick*, 2 Munf. 478; *Vaughan v. Doe*, 1 Leigh 287; *Jackson v. Henderson*, 3 Leigh 197; *Taliaferro v. Franklin*, 1 Gratt. 332; *Page v. Clopton*, 30 Gratt. 415; *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883.

In *Taliaferro v. Franklin*, 1 Gratt. 332, the court was of the opinion that

the proper remedy to compel a judge to sign a bill of exceptions when tendered was by special writ grounded on the statute, and that the appellate court might frame the writ under power conferred by the Code.

If a judge refuses to proceed to settle the matter of the bill objected to, he may be compelled by mandamus to act, just as in the case of refusal to sign a proper bill. *Page v. Clopton*, 30 Gratt. 415, 427; *Poteet v. County Commissioners, etc.*, 30 W. Va. 58, 3 S. E. 97; *Collins v. Christian*, 92 Va. 731, 24 S. E. 472; *Douglass v. Loomis*, 5 W. Va. 542.

By the West Virginia Code, 1899, ch. 131, § 9, "if any judge refuse to sign such bill of exceptions, he may be compelled to do so, by the court of appeals by mandamus; in which case the bill of exceptions shall be a part of the record, to the same extent as if it had been signed by the judge at the proper time."

Section 48, ch. 39, of the West Virginia Code, 1899, specially provides that, if a commissioner of a county court refuses to sign a bill of exceptions which states the truth of the case, he may be compelled to do so by the circuit court of the county by mandamus. *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76.

Conclusiveness of Return That Bill Does Not Truly State Facts.—A judge will not be compelled by mandamus to sign a bill of exceptions, when he alleges in his return to the conditional writ, that the bill does not truly state the facts. *Douglass v. Loomis*, 5 W. Va. 542; *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76; *Cummings v. Armstrong*, 34 W. Va. 1, 11 S. E. 742.

The judges have sole power of determining whether the bill is true or not; their return to the writ being conclusive of the case, and not liable to be passed upon by a jury. *Douglass v. Loomis*, 5 W. Va. 542; *State v. Cunningham*, 33 W. Va. 607, 11 S. E.

76; *Poteet v. County Commissioners, etc.*, 30 W. Va. 58, 3 S. E. 97; *Morgan v. Fleming*, 24 W. Va. 186, 187.

The rule is equally applicable to courts of inferior jurisdiction. *Poteet v. County Commissioners, etc.*, 30 W. Va. 58, 3 S. E. 97; *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76.

Where the respondent, a county commissioner in reply to the rule to show cause why he should not be fined for contempt because of his refusal to sign a bill of exception in the proper case, replies that he did not sign the bill as presented, because it did not truly state the facts; nor did he sign the bill which the other commissioners settled and signed as the act of the board, for a similar reason; but that he did settle and sign the bill which accompanies his answer, and which he says does truly state the facts as they were proved or occurred; held, this return is conclusive, and can not be traversed by the state or the relator in this proceeding. *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76.

See, however, *Collins v. Christian*, 93 Va. 1, 24 S. E. 472, in which it was held, that if, on application for a mandamus to compel a judge to sign a bill of exceptions, he answers that he refused to sign the bill because it did not state the truth of the case, and the relator traverse this answer, an issue of fact is presented, to be determined upon the evidence, whether the bill did correctly set forth the truth of the case.

VIII. Recordation.

A. NECESSITY.

In General.—When alleged bills of exception are not properly certified and made part of the record, the appellate court will not consider the grounds of error thereby presented. *Phelps v. Smith*, 16 W. Va. 522; *Griffith v. Corrothers*, 42 W. Va. 59, 24 S. E. 569; *Furbie v. Shay*, 46 W. Va. 736, 34 S. E. 746; *Craft v. Mann*, 46 W. Va. 478,

33 S. E. 260, 269; *Koontz v. Koontz*, 47 W. Va. 31, 34 S. E. 752; *Ketterman v. Dry Fork R. Co.*, 48 W. Va. 606, 37 S. E. 683.

Merely Copying into Record Insufficient.—A paper purporting to be a bill of exceptions and copied into the record as such will not be regarded or treated by the appellate court as a part of the record unless the record shows that it was, in the manner prescribed by law, made a part of the record. *Roanoke, etc., Co. v. Karn*, 80 Va. 589; *Phelps v. Smith*, 16 W. Va. 522; *Bank v. Showacre*, 26 W. Va. 48; *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485; *Winters v. Null*, 31 W. Va. 450, 7 S. E. 443; *Koontz v. Koontz*, 47 W. Va. 31, 34 S. E. 752; *Wells v. Smith*, 49 W. Va. 78, 38 S. E. 547.

"The mere fact that a bill of exceptions appears to have been signed by the judge and is found among the papers of the cause, does not make it a part of the record of the cause. To make such bill of exceptions a part of the record so that the appellate court may consider it, the record of the proceedings of the court required to be kept by the 4th section of chapter 9 of the acts of 1872-3 must show substantially, that the bill of exceptions was tendered, received and signed, and directed to be made a part of the record, and should also show, it was received and signed in the trial of the cause either before or during the term at which the judgment was rendered." *Wickes v. Baltimore, etc., R. Co.*, 14 W. Va. 157.

That Bill Is Not Properly Part of Record May Be Shown on Appeal.—If a record of a circuit court has been altered, it can be restored to its original state only in that court, and not by the supreme court on writ of error or appeal; though, when so restored in the circuit court, and certified to the supreme court, it will be there treated as in its true and restored state. But where a bill of exceptions

or memorandum of such bill, or any document, is inserted in a transcript of the record, which is no part of that record, that fact may be shown in the supreme court, and it will be treated as no part of the record. *Wells v. Smith*, 49 W. Va. 78, 38 W. Va. 547.

B. MANNER AND TIME.

Entry of Order Certifying Bill.—The order of the judge certifying the bills of exceptions must be recorded to make the bill a part of the record. *Phelps v. Smith*, 16 W. Va. 522; *Griffith v. Corrothers*, 42 W. Va. 59, 24 S. E. 569; *Craft v. Mann*, 46 W. Va. 478, 33 S. E. 269; *Koontz v. Koontz*, 47 W. Va. 31, 34 S. E. 752; *Ketterman v. Dry Fork R. Co.*, 48 W. Va. 606, 37 S. E. 683.

In Virginia and in West Virginia, under statute, the judge below, when he seals the bill of exceptions, directs it to be made a part of the record, and it is copied with the balance of the record, when the case is taken to an appellate court. *Dryden v. Swinburne*, 20 W. Va. 89.

"Unless that which purports to be a bill of exceptions and copied into the record as such, is by some order or memorandum of the trial court entered on the order book, made a part of the record, this court can not regard it or treat it as a part of the record in the case, but will wholly disregard it." *Bank v. Showacre*, 26 W. Va. 48.

Where a judgment is rendered in a case, and the court allows twenty days, under the statute, to make up and obtain from the judge in vacation bills of exception, such bills of exception, when signed by the judge, must be certified to the clerk of the court, who must enter them upon the order book of such court before they become a part of the record of the case. *Griffith v. Corrothers*, 42 W. Va. 59, 24 S. E. 569; *Craft v. Mann*, 46 W. Va. 478, 33 S. E. 260.

Entry of Order Certifying Sufficient.—In *Bodkin v. Arnold*, 48 W. Va. 108,

35 S. E. 980, the plaintiff objected that the bills of exception were not spread on the order book. It was held, however, that under § 9, ch. 131, of the West Virginia Code of 1899, the entry of the order certifying the bills of exceptions was a sufficient spreading on the record, and all the law required.

Time as Dependent on When Bill Executed and Certified.—A bill of exceptions executed in the term must be noted in the record not later than the term of judgment. If in vacation, it must be executed and certified as executed, and ordered to be made a part of the record by the judge within 30 days after the end of the term of final judgment, and the certificate must be recorded in the law order book. *W. Va. Code, 1899, ch. 131, § 9. Wells v. Smith, 49 W. Va. 78, 38 S. E. 547.*

"There is no order of the judge in vacation certifying the bills. This is absolutely essential. His certificate in vacation takes the place of a record entry in term, and it has been always held, that such record entry in term is indispensable. The certificate and order of the judge must be made and recorded. *Craft v. Mann, 46 W. Va. 478, 33 S. E. 260; Ketterman v. Dry Fork R. Co. (decided Dec., 1900) 48 W. Va. 606, 37 S. E. 683.* If the bill is executed in term, the law order book must show the execution of the bill, else it is no part of the record. *Koontz v. Koontz, 47 W. Va. 31, 34 S. E. 752; Furbee v. Shay, 46 W. Va. 736, 34 S. E. 746; Bank v. Showacre, 26 W. Va. 48; Wickes v. Baltimore, etc., R. Co., 14 W. Va. 157.*" *Wells v. Smith, 49 W. Va. 78, 38 S. E. 547.*

Transmission and Recordation in Thirty Days Not Necessary.—If a bill of exceptions be both signed and certified by the judge within thirty days from the close of the term of court, as it must be, the fact that the certificate of the judge does not reach the clerk, or is not recorded by him, within thirty days, will not vitiate the bill. *Ketterman v. Dry Fork R. Co.,*

48 W. Va. 606, 37 S. E. 683; Wells v. Smith, 49 W. Va. 78, 38 S. E. 547.

"So the bill of exceptions is signed within thirty days, it is good, for the transmission of the bill of exceptions and order of the judge are only ministerial acts, as is also the act of the recording the order, and § 9, ch. 131, Code, 1891, does not require such transmission and recordation within any particular time." *Ketterman v. Dry Fork R. Co., 48 W. Va. 606, 37 S. E. 683.*

IX. Rules of Decision as Dependent on Whether Facts or Evidence Certified.

A. WHERE FACTS CERTIFIED.

Where the facts certified to the appellate court present but a naked question of law that court will not be influenced by the opinion of the jury or inferior court as to the law of the case, and will grant a new trial or not according to its own opinion of the law arising from the facts stated. *Fisher v. Vanmeter, 9 Leigh 18; Slaughter v. Tutt, 12 Leigh 147, 151.*

But in many cases the propriety of the verdict may rest on inferences properly drawn by the jury from the facts found arising out of incidents at the trial which may be omitted, or could not easily be committed to the court's certificate. In such cases a new trial should not be granted "unless in a case of plain deviation, and not a doubtful one, merely because the court, if of the jury, would have given a different verdict." Judge Tucker in *Slaughter v. Tutt, 12 Leigh 147, 151.* See, to the same effect, *Carrington v. Bennett, 1 Leigh 340; Hilb v. Peyton, 22 Gratt. 550, 569; Brugh v. Shanks, 5 Leigh 598, 649; Harnsberger v. Kinney, 6 Gratt. 287; Patteson v. Ford, 2 Gratt. 18, 23; Mitchell v. Baratta, 17 Gratt. 445, 452; Steptoe v. Flood, 31 Gratt. 323; Mahon v. Johnston, 7 Leigh 317; Richmond, etc., R. Co. v. Snead, 19 Gratt. 354; Calbreath v. Virginia, etc., Co., 22 Gratt. 697; Collins v. Loff-*

tus, 10 Leigh 5; *Hill v. Com.*, 2 Gratt. 594; *Blair v. Wilson*, 28 Gratt. 165; *Goode v. Love*, 4 Leigh 635; *Caldwell v. Craig*, 21 Gratt. 132, 136; *Blosser v. Harshbarger*, 21 Gratt. 214; *Muse v. Stern*, 82 Va. 33, 39; *Grayson's Case*, 6 Gratt. 712; *Montague v. Allan*, 78 Va. 598. See the title *APPEAL AND ERROR*, vol. 1, p. 621, et seq.

In an action at law, the parties waive a trial by jury, and submit the whole matter of law and fact to the judgment of the court; under the act, Va. Code, ch. 163, § 9, p. 629. An exception taken to the judgment of the court must state the facts proved, not the evidence; and it will be treated as governed by the principles applicable to exceptions taken to the opinion of a court overruling a motion for a new trial, on the ground that the verdict is contrary to the evidence. *Pryor v. Kuhn*, 12 Gratt. 615.

"The judgment of a court of original jurisdiction, in any case is pronounced upon a state of facts ascertained upon the trial of such case. It is the duty of an appellate court, in reviewing the judgment of the inferior court, to regard such judgment in reference to the facts upon which it was founded in the opinion of the inferior court. If, however, the appellate court should be required to engage in a new investigation of the facts, it might arrive at a result different from that of the inferior court; and that a judgment of the inferior court, perfectly correct on the facts as they appeared to that court, might be reversed only because the appellate court found a different state of facts. Thus it would result that the appellate court must finally pass upon questions of fact, and this with means far inferior to those of the court which heard the witnesses, and which had other means of deciding which are denied to the appellate court. The legislature, I conceive, could not have intended to impose upon this court the duty of revising the action of the circuit court in regard to ques-

tions which the circuit court had better means of deciding correctly than those which are allowed to this court." *Pryor v. Kuhn*, 12 Gratt. 615.

B. WHERE EVIDENCE AND NOT FACTS CERTIFIED.

1. Former Rule, Modifications and Exception.

a. Original Rule.

It was originally held, that the appellate court would not examine the evidence, which had been before the court below, on a motion for a new trial, but such facts only as the judge would certify. *Bennett v. Hardaway*, 6 Munf. 125; *Forkner v. Stuart*, 6 Gratt. 197; *Pasley v. English*, 5 Gratt. 141. See also, *Vaughn v. Doe*, 1 Leigh 287, 295; *Carrington v. Bennett*, 1 Leigh 340, 343; *Ewing v. Ewing*, 2 Leigh 337, 340; *Jackson v. Henderson*, 3 Leigh 212, 214.

b. Modification of Rule.

This rule was modified to the extent of holding that the appellate court would consider the case where the evidence instead of the facts was certified, but would not reverse the decision of the lower court unless, on rejecting all the parol evidence of the party excepting, and giving full faith to the evidence of the adverse party, the judgment should still appear to be wrong. *Carrington v. Bennett*, 1 Leigh 340; *Ewing v. Ewing*, 2 Leigh 337; *Rohr v. Davis*, 9 Leigh 30; *Pasley v. English*, 5 Gratt. 141; *Grayson v. Com.*, 6 Gratt. 712; *Moffett v. Bowman*, 6 Gratt. 219; *Farish v. Reigle*, 11 Gratt. 697, 720; *Noyes v. Humphreys*, 11 Gratt. 635, 651; *Read v. Com.*, 22 Gratt. 924; *Vaiden v. Com.*, 12 Gratt. 717; *Carrington v. Goddin*, 13 Gratt. 587; *Bull v. Com.*, 14 Gratt. 613; *Brumbaugh v. Wissler*, 25 Gratt. 463; *Scott v. Shelor*, 28 Gratt. 891, 900; *Lambert v. Cooper*, 29 Gratt. 61; *Richmond, etc., R. Co. v. Morris*, 31 Gratt. 200, 208; *Danville Bank v. Waddill*, 31 Gratt. 469; *Old Dominion Steamship Co. v. Burckhardt*, 31 Gratt. 664; *Dean v.*

Com., 32 Gratt. 912; Daingerfield v. Thompson, 33 Gratt. 136; Wolverton v. Com., 75 Va. 909; Taylor v. Com., 77 Gratt. 692; Scott v. Com., 77 Va. 344; Proctor v. Spratley, 78 Va. 264; Suffolk v. Parker, 79 Va. 660; Norfolk, etc., R. Co. v. Ferguson, 79 Va. 244; Jones v. Rixey, 79 Va. 656; Farley v. Tiller, 81 Va. 275; Payne v. Grant, 81 Va. 164; Cluverius v. Com., 81 Va. 816-863; Lawrence v. Com., 81 Va. 484; Hanriot v. Sherwood, 82 Va. 3; Roanoke Nat. Bk. v. Hambrick, 82 Va. 135; Pruner v. Com., 82 Va. 115, 116; Hartmen v. Strickler, 82 Va. 225; Moses v. Old Dominion, etc., Co., 82 Va. 19, 21; Muse v. Stern, 82 Va. 33; Finchim v. Com., 83 Va. 690, 3 S. E. 343; Southwest Imp. Co. v. Smith, 85 Va. 306, 7 S. E. 365; Tucker v. Sandidge, 85 Va. 546, 8 S. E. 650; Eastern Ice Co. v. King, 86 Va. 97, 9 S. E. 506; Sanaker v. Cushwa, 3 W. Va. 29; Newlin v. Beard, 6 W. Va. 110, 111; Henry v. Davis, 7 W. Va. 715; Chenowith v. Ritchie, 32 W. Va. 628, 9 S. E. 910; Sheff v. Huntington, 16 W. Va. 307; Webb v. Dye, 18 W. Va. 376; Varner v. Core, 20 W. Va. 472; Nicholas v. Kershner, 20 W. Va. 251; Dower v. Church, 21 W. Va. 23, 63; Smith v. Townsend, 21 W. Va. 486; Black v. Thomas, 21 W. Va. 709; State v. Thompson, 21 W. Va. 741; State v. Chambers, 22 W. Va. 779; Morgan v. Fleming, 24 W. Va. 186, 195; State v. Flanagan, 26 W. Va. 116, 119; Travis v. Insurance Co., 28 W. Va. 583, 584; Coffman v. Hedrick, 32 W. Va. 119, 9 S. E. 65, 69; State v. Baker, 33 W. Va. 319, 10 S. E. 639; State v. Zeigler, 40 W. Va. 593, 21 S. E. 763.

In a bill of exceptions to the refusal of the court to grant a new trial, the evidence, and not the facts proved, is stated. If all the evidence was introduced by the exceptor, the appellate court will not review the judgment; but if all the evidence is introduced by the party who recovers the judgment, the appellate court will review the judgment, and, if taking it all as

true, the verdict and judgment is erroneous, will reverse it. *Gimmi v. Cullen*, 20 Gratt. 439; *Morgan v. Fleming*, 24 W. Va. 186. The same reasoning applies here as in the case of *Bennett v. Hardaway*, 6 Munf. 125.

c. Exception Where Trial by Court.

When the whole case was submitted to the court, and the bill of exceptions to the judgment certified the evidence, the rule of decision was said to be as on a demurrer to evidence by the party excepting. *Mitchell v. Baratta*, 17 Gratt. 445; *Clafin v. Steenbock*, 18 Gratt. 842; *Hodge v. First Nat. Bank*, 22 Gratt. 51, 57; *Dobson v. Culpeper*, 23 Gratt. 352; *Backhouse v. Selden*, 29 Gratt. 581; *Old Dominion Steamship Co. v. Burckhardt*, 31 Gratt. 664, 666-67; *Hollingsworth v. Sherman*, 81 Va. 668; *Randolph v. Longdale Iron Co.*, 84 Va. 457, 5 S. E. 30; *Weiss v. Hobbs*, 84 Va. 489, 5 S. E. 367; *State v. Miller*, 26 W. Va. 106, 109. See the title DEMURRER TO THE EVIDENCE, vol. 4, p. 514.

This is now the statutory rule in Virginia. See post, "Modern Rule," IX, B, 2.

In *Old Dominion Steamship Co. v. Burckhardt*, 31 Gratt. 664, the court says: "And first, it is to be premised that the question as to how the appellate court will regard and give effect to a bill of exceptions in which the evidence and not the facts proved are certified, in a case tried by the court without a jury, and where the evidence is conflicting, is a question not definitely settled by the decisions of this court. There is certainly some conflict of authority on this point. Some of the cases hold that the same rule is to be applied to a case where a jury is waived and the case is tried by the court upon the law and facts, as to a case where there is a verdict of a jury; and that in both cases where the evidence (and not facts proved) is certified, and the evidence is conflicting, the bill of exceptions must be taken as a

demurrer to the evidence, and so regarding it, the appellate court will only reverse when it appears that by rejecting all the oral evidence of the plaintiff in error and giving full credit to that of the defendant in error, together with all fair and legal inferences to be deduced from said evidence, the judgment is erroneous. See *Pryor v. Kuhn*, 12 Gratt. 615; *Backhouse v. Selden*, 29 Gratt. 581; *Hodge v. First National Bank of Richmond*, 22 Gratt. 51, 61. In *Mitchell v. Barratta*, 17 Gratt. 445, two judges out of three (the court then composed of three judges) held, that a different rule prevailed where the judgment is by the court upon the law and facts; and it was so held, also, in *Wickham v. Lewis*, 13 Gratt. 427, by two judges out of four. According to these last-mentioned authorities, the rule in such case is different from that which prevails where there is a verdict of a jury; the bill of exceptions is not in such case to be regarded as a demurrer to evidence, but in case of a conflict of evidence in such a case, the preponderance will be given to that side which prevailed in the court below. In the case before us, I do not think it necessary to reconcile these conflicting decisions and to declare which is the true rule settled by the weight of authority."

The plaintiff in error, the exceptor, must be taken to have admitted, as in case of a demurrer to evidence, all that could be reasonably inferred by a jury from the evidence given by the plaintiff below, and to have waived all the evidence on his part which conflicts with it, or which tends to establish a case inconsistent with the case proved by it. *Tutt v. Slaughter*, 5 Gratt. 364; *Backhouse v. Selden*, 29 Gratt. 581.

2. Modern Rule.

a. In Virginia.

Statutory Provision.—"When a case at law, civil or criminal, is tried by a jury and a party excepts to the judg-

ment or action of the court in granting or refusing to grant a new trial on a motion to set aside the verdict of a jury on the ground that it is contrary to the evidence, or when a case at law is decided by a court or judge without the intervention of a jury and a party excepts to the decision on the ground that it is contrary to the evidence, and the evidence (not the facts) is certified, the rule of decision in the appellate court in considering the evidence in the case shall be as on a demurrer to the evidence by the appellant, except that when there have been two trials in the lower court, in which case the rule of decision shall be for the appellate court to look first to the evidence and proceedings on the first trial, and if it discovers that the court erred in setting aside the verdict on that trial it shall set aside and annul all proceedings subsequent to said verdict and enter judgment thereon." Va. Code, 1904, ch. 170, § 3484. *Sutton v. Com.*, 85 Va. 128, 7 S. E. 323; *Southwest Imp. Co. v. Smith*, 85 Va. 306, 7 S. E. 365; *Hollingsworth v. Funkhouser*, 85 Va. 448, 8 S. E. 592; *Tucker v. Sandidge*, 85 Va. 546, 8 S. E. 650; *Williams v. Com.*, 85 Va. 607, 8 S. E. 470; *Eastern Ice Co. v. King*, 86 Va. 97, 9 S. E. 506; *Adams v. Hays*, 86 Va. 153, 9 S. E. 1019; *Joslyn v. State Bank*, 86 Va. 287, 10 S. E. 166; *Mears v. Dexter*, 86 Va. 828, 11 S. E. 538; *Woods v. Com.*, 86 Va. 929, 11 S. E. 798; *Tucker v. Com.*, 88 Va. 20, 13 S. E. 298; *Cunningham v. Com.*, 88 Va. 37, 13 S. E. 309; *Norfolk, etc., R. Co. v. Groseclose*, 88 Va. 267, 13 S. E. 454; *Bell v. Com.*, 88 Va. 365, 13 S. E. 742; *Lyles v. Com.*, 88 Va. 396, 13 S. E. 802; *Virginia Fire, etc., Ins. Co. v. Buck*, 88 Va. 517, 13 S. E. 973; *Richmond, etc., R. Co. v. Burnett*, 88 Va. 538, 14 S. E. 372; *Gaines v. Com.*, 88 Va. 682, 14 S. E. 375; *Stearns v. Richmond*, 88 Va. 992, 14 S. E. 847; *Richmond, etc., R. Co. v. Brown*, 89 Va. 749, 17 S. E. 132; *Whalen v. Com.*, 90 Va. 544, 19 S. E. 182; *Smith v. Com.*,

90 Va. 759, 19 S. E. 843; *National Bank v. Nolting*, 94 Va. 265, 26 S. E. 826; *Western Union Tel. Co. v. Powell*, 94 Va. 268, 27 S. E. 429; *Bristol, etc., R. Co. v. Bullock, etc., Co.*, 101 Va. 652, 44 S. E. 892. See the title *DEMURRERS TO THE EVIDENCE*, vol. 4, p. 514.

Where the evidence (and not the facts) is certified, the accused must be considered here on review of refusal by court below to award a new trial, as admitting the truth of all the commonwealth's evidence and as waiving all his own which conflicts therewith, even where one of the commonwealth's witnesses admitted at the trial she had made different statements. *Lyles v. Com.*, 88 Va. 396, 13 S. E. 802.

Although a writ of error is heard in the appellate court as upon a demurrer to the evidence, yet the court is not obliged to accept as true what, in the nature of things, could not have occurred in the manner and under the circumstances narrated, or what is not susceptible of proof. *Chesapeake, etc., R. Co. v. Anderson*, 93 Va. 650, 25 S. E. 947.

At the trial of an action at law the evidence was conflicting, but the jury found for the plaintiff. Defendant moved for a new trial, but the motion was denied. Held, under rule that a certificate of the evidence shall be considered as a demurrer to the evidence, the judgment complained of should be affirmed. *Boulware v. Jewett*, 87 Va. 253, 12 S. E. 403.

The provision in case of trial by court seems to have always been the rule in Virginia. See ante, "Exception Where Trial by Court," IX, B, 1, c.

Application of Rule Where Two Trials below Prior to Amendment of 1890.—Where, at trial, under Va. Code, 1873, ch. 118, § 32, jury finds against the will, verdict is set aside on motion of plaintiff. At second trial jury finds for the will. Motion for defendants to set aside verdict is overruled, and the defendants having

excepted, and the evidence (not the facts) certified, on appeal; held, under Code, 1887, § 3484, plaintiff in error's exception must, in considering the decision of the court below setting aside the first verdict, be treated as a demurrer to the evidence, and all his oral evidence treated as waived, and all his adversary's evidence and all fair influences therefrom be treated as true, instead of considering the whole evidence at the first trial as under the rule before § 3484 was enacted. *Tucker v. Sandidge*, 85 Va. 546, 8 S. E. 650. See also, *Eastern Ice Co. v. King*, 86 Va. 97, 9 S. E. 506.

Where motion to set aside verdict as contrary to evidence is overruled, the mover excepts and evidence is certified, this court will consider the case as if it was a demurrer to evidence by the exceptor under § 3484, Va. Code, 1887, though lower court rendered its judgment before that Code took effect, because that section took away no vested right, and merely prescribed a rule of practice. *Southwest Imp. Co. v. Smith*, 85 Va. 306, 7 S. E. 365.

By the act of February 7, ch. 1890 (Va. Code, 1904, § 3484), this section was amended by substituting for the words "party excepting" the word "appellant" and providing further that when there have been two trials in the lower court the rule of decision is for the appellate court to look first to the evidence and proceedings of the first trial, and if it discovers that the court erred in setting aside the verdict on that trial, it shall set aside and annul all proceedings subsequent to the said verdict and enter judgment thereon. Va. Code, 1904, § 3484. *Mears v. Dexter*, 86 Va. 828, 11 S. E. 538; *Stearns v. Richmond*, 88 Va. 992, 14 S. E. 847. See cases cited, ante, "Modern Rule," IX, B, 2.

If a motion to set aside a verdict on the ground that it is contrary to the evidence is sustained and a new trial granted, and the ruling of the court in so granting a new trial is ex-

cepted to and all the evidence is certified, the appellate court will, if the verdict appears to have been warranted by the evidence so certified, set aside all proceedings, subsequent to the verdict and enter such judgment as should have been rendered by the circuit court. *Brown v. Rice*, 76 Va. 629.

b. In West Virginia.

Under § 9, ch. 131, W. Va. Code, 1899, when exceptions is taken to the action or opinion of the court upon a question involving evidence upon motion for a new trial or otherwise, all the evidence, whether conflicting or not, must be certified, and the whole of the evidence so certified shall be considered by the court of appeals both upon the application for and hearing of the writ of error or supersedeas. *Laidley v. Kanawha County Court*, 44 W. Va. 566, 30 S. E. 109; *Deering v. Coberly*, 44 W. Va. 606, 29 S. E. 512; *Yeager v. Bluefield*, 40 W. Va. 484, 21 S. E. 752; *State v. Zeigler*, 40 W. Va. 593, 21 S. E. 763; *Johnson v. Burns*,

39 W. Va. 658, 20 S. E. 686; *Poling v. Ohio River R. Co.*, 38 W. Va. 645, 18 S. E. 782.

Where a case is tried by a court in lieu of a jury, the party excepting must be regarded as a demurrant to the evidence, and the judgment of the court below will not be reversed, unless it is plainly erroneous. *Nutter v. Sydenstricker*, 11 W. Va. 535; *Wickes v. Baltimore, etc., R. Co.*, 14 W. Va. 157; *Abrahams v. Swann*, 18 W. Va. 274; *Dower v. Church*, 21 W. Va. 23; *Black v. Thomas*, 21 W. Va. 709; *Smith v. Townsend*, 21 W. Va. 486; *Board v. Parsons*, 24 W. Va. 551; *State v. Miller*, 26 W. Va. 106; *State v. Ripple*, 27 W. Va. 211; *Moundsville v. Velton*, 35 W. Va. 217, 13 S. E. 373; *Wells-Stone Co. v. Truax*, 44 W. Va. 531, 29 S. E. 1006; *Hysell v. Sterling, etc., Mfg. Co.*, 46 W. Va. 158, 33 S. E. 95; *State v. Thacker, etc., Co.*, 49 W. Va. 140, 38 S. E. 539; *Rohrbough v. Express Co.*, 50 W. Va. 148, 40 S. E. 398. See the title DEMURRER TO THE EVIDENCE, vol. 4, p. 514.

Excessive Damages.

See the titles DAMAGES, vol. 4, p. 202; EXEMPLARY DAMAGES; NEW TRIALS.

Excessive Fines.

See the titles CONSTITUTIONAL LAW, vol. 3, p. 199; FINES AND COSTS IN CRIMINAL CASES.

Exchange and Re-Exchange.

As to recovery of damages on protested bills of exchange, see the title BILLS, NOTES AND CHECKS, vol. 2, p. 432.

EXCHANGE OF PROPERTY.

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CROSS REFERENCES.

See the titles DOWER, vol. 4, p. 801; FRAUDS, STATUTE OF; RECORDING ACTS; RESCISSION, CANCELLATION AND REFORMATION; SALES; SPECIFIC PERFORMANCE; VENDOR AND PURCHASER; WARRANTY; WORKING CONTRACTS.

I. Exchange of Interests in Land.

A. TRANSACTION CONSTITUTING AN EXCHANGE.

Mrs. K. owned land in fee, and she and her husband conveyed it to P., taking his bonds payable to K.; and the same day bought the "Cassell place," K. executing his bonds for the price, with P. and A. as sureties, the latter being privy to the fact that the sale and purchase were one transaction. P.'s bonds were assigned to A., who agreed to apply them to the Cassell purchase money, but instead, applied them to a debt due himself from K. The "Cassell place" was sold for the unpaid purchase money. It was held, that the sale of Mrs. K.'s land did not amount to a conversion thereof into personalty, but the sale and purchase was one transaction, as to these parties, and constituted an exchange of lands. *Aston v. Kendrick*, 90 Va. 325, 20 S. E. 827.

B. REQUISITES AND CONSTRUCTION OF CONTRACT.

Contract Must Be in Writing.—A contract for the exchange of lands to be binding must be in writing, such contract being within the statute of frauds. *Vanscoy v. Stinchcomb*, 29 W. Va. 263, 11 S. E. 927.

Omission of Name of Grantee.—Where a deed of exchange of land is made between two or more persons, and the name of the grantee of one

of the parcels of land is omitted, the omission may be supplied and effect given to the deed, if, on inspection of the deed, enough shall appear to show in whom the title to that parcel vested. The deed should be so construed as to give effect to the true intent of the parties, as expressed in the deed, considered in all its parts, and construing the language used according to its common and usual acceptation. *Lagorio v. Dozier*, 91 Va. 492, 22 S. E. 239.

In a deed of exchange of land, husband and wife were described as "parties of the second part." It was declared that they were seized of the land conveyed to the party of the first part; that the parties of the first and second parts being seized of their respective lots desired to exchange them, the one for the other, and the usual covenants of title were inserted. Apt words of conveyance were used and the party of the first part was named as grantee of one parcel of the land, but no grantee was named of the other parcel. It was held, that there was no ambiguity in the deed, and it alone could be looked to, in a court of law, as expressing the intention of the parties, and, looking to the deed alone, the husband and wife should be considered as grantees of the other parcel. *Lagorio v. Dozier*, 91 Va. 492, 22 S. E. 239.

When Contract Presumed to Be for an Exchange in Gross.—When two

owners enter into an agreement to exchange several tracts of land, and nothing is said therein about any money valuation of the lands, either by the acre or otherwise, the contract will be presumed to be for an exchange in gross. *Atkinson v. Beckett*, 34 W. Va. 584, 12 S. E. 717.

C. RIGHTS UNDER EXECUTORY CONTRACT.

Contract with Legal Owner Where Others Are in Adversary Possession.—A plaintiff has no legal or equitable title to a tract of land so as to justify him in selling it, and in enforcing the collection of the purchase money bonds, though he has a contract in writing with one who has a clear legal title to the land, whereby this legal owner of the land has agreed to convey to him this land, upon condition that he, said plaintiff, shall convey to such owner of such land another tract of land, and make him a title thereto free from all incumbrances, if he is unable to make such conveyance, and others are in the adversary possession of the tract of land claimed by the plaintiff, and have been for many years, and the plaintiff never has been in possession of such land. *Vanscop v. Stinchcomb*, 29 W. Va. 263, 11 S. E. 927.

D. EXCHANGE OF LANDS BELONGING TO INFANTS.

Invalid Exchange Not Validated by Act of 1888.—Under a decree in suit by a father in 1884, land of his infant children was exchanged for his own land. The bill was not filed by one authorized to do so, the trustee was not a party, and in other respects also the proceedings were not conformable to Va. Code, 1873, p. 932, even had that statute provided for the exchange of such lands. It was held, that the exchange was not validated by the act of 1888 Sess. Acts 1887-88, p. 504. *Brown v. Putney*, 90 Va. 447, 18 S. E. 883.

E. REMEDIES.

1. Specific Performance of Contract.

A parol contract for the exchange of lands, partly executed by delivery of possession, and acts of ownership over the lands so received into possession, will be specifically enforced in equity. *Parrill v. McKinley*, 9 Gratt. 1. See the titles FRAUDS, STATUTE OF; SPECIFIC PERFORMANCE.

Specific Enforcement with Correction of Mistake Made in Reducing Contract to Writing.—Either party to a written contract for exchange of lands may have the same specifically enforced in a court of equity, with such corrections in it as parol proof may show to be necessary to correct a mistake made in reducing the contract to writing. *Fishack v. Ball*, 34 W. Va. 644, 12 S. E. 856.

But before such correction and enforcement can be made, the proof must be strong, clear, and preponderating, and, in the absence of fraud, must prove that the mistake was mutual. *Fishack v. Ball*, 34 W. Va. 644, 12 S. E. 856. See the title MISTAKE AND ACCIDENT.

Defect in Title Not Sufficient to Prevent Specific Performance.—T. and H. entered into a contract for the exchange of lands. It appeared that H. had been in possession of his land for twelve years, and had paid all the purchase money; but D. from whom he purchased, had died, and he had brought a suit against D.'s widow and heirs to have the title made to T. It was held, that if the land contracted to be exchanged by H. with T. was in fact encumbered by the right, title or estate of dower of the widow of D. and that was the only defect in the title of H. to the land, such defect was not sufficient to prevent the specific execution of the contract; but the same might be executed, with an allowance of compensation for such defect on the terms prescribed in the Va. Code, ch. 106, § 12, p. 855. *Stimson v. Thorn*, 25 Gratt. 278.

G. A. R. executed his bond May 3, 1861, to his brother, E. W. R., for \$1,916.93, in which was incorporated the following: "It is understood, however, that I having sold to the said E. W. R. a tract of land purchased by me of C. A. N. for \$1,500.00 (or thereabouts), and when I procure a good title from said N., and convey the same to E. W. R., the amount is to be deducted from this bond." Upon a bill filed by D., devisee of E. W. R., deceased, and J. G. R., his executor, it appeared, that G. A. R. and said N. had exchanged lands, G. A. R. to have the "brush land," and N. to have three hundred and fifty acres on Meadow river; each was placed in possession; each bound himself to make to the other a good title to the lands respectively; but they never passed deeds. G. A. R. died intestate leaving two infant sons. E. W. R. died the same day testate, leaving D. his devisee. D. after the death of testator took possession of the "brush land," and remained there several years. D. filed her said bill alleging, that N. disclaimed ability to make deed to the "brush land," as the title was in J. M. by conveyance from J. Z. N., in trust for the wife and children of N.; but said D. alleged in her bill that at the time the deed was made to J. M. as trustee, the "brush land" was in fact the property of N., though the legal title was outstanding in J. Z. N., who conveyed to J. M. at the instance of N., to hinder, delay and defraud creditors; and D. prayed the court to decree to her either the land, if bound to take it, or the \$1,500.00, with interest. N., his wife and children answered the bill, tendered a deed for the land signed by all, and acknowledged by all except one, who was an infant, and offered to indemnify against the said infant. N. denied, that the deed to M. as trustee was made for any fraudulent purpose, and alleged, that the land was purchased and paid for by himself, and that J. Z. N., who held

the legal title, conveyed to M. as said trustee, at his own instance, and without the concurrence of N. Said J. Z. N. deposed, that N. owned a mill property, and Lipps owned the "brush tract," the legal title to which was in J. Z. N., that Lipps traded the "brush tract," to N. for said mill property, and that he J. Z. N., at the request of Lipps, conveyed the "brush tract" to M. for benefit of Mrs. N. and her children. It was held that the contract of exchange between N. and G. A. R. and also the contract of May 3, 1861, between G. A. R. and his brother E. W. R. were capable of specific execution. *Rader v. Neal*, 13 W. Va. 373. See the title **VENDOR AND PURCHASER**.

Verbal Agreement by One Not Having Legal Title—Collusive Conveyance to Third Party.—D. made a verbal agreement with E., for an exchange of lands, but afterwards refused to perform the agreement. At the time, D. did not have the legal title. E., brought suit to compel a specific performance of the contract, and by the highest court in the state, it was ascertained and adjudicated, that he was entitled to have the contract performed. F., being fully informed of all these facts, of the existence of the contract, of its binding obligation, and of the pendency of a suit to enforce it, co-operated with D., in obtaining and using a deed conveying the land to himself, and by virtue of said deed, recovered in ejectment against E. It was held, that it was inequitable to allow F. the advantage of a deed obtained under these circumstances, which amounted to bad faith and fraud; that he should be perpetually enjoined from all proceedings under the same, and that D., and F., should be decreed to convey the legal title to E., by sufficient deeds for that purpose. *Parrill v. McKinley*, 6 W. Va. 67.

Specific Performance, without a Reference to a Commissioner of Plaintiff's Title.—Under what circumstances,

in a suit in equity for specific performance of an agreement for an exchange of lands, the court may decree according to the prayer of the bill, without a reference to a commissioner of the plaintiff's title, though objected to by the defendant in his answer, see *Stovall v. London*, 5 Munf. 299.

Necessary Parties to Suit.—The heirs of H. filed a bill to enforce the execution of a contract for the exchange of lands, made between H., in his lifetime, and C. The bill alleged that H. derived title to one-ninth part of one of the tracts so exchanged, from one W. and wife, by deed of conveyance, which was burned up and never admitted to record. It was held, on demurrer that W. and wife were necessary parties, because it was necessary for the purpose of the bill to set up the conveyance from them; that no possession by H., and those claiming under him, could bar a recovery by W. and wife, because they could not dispute the title of their vendors. *Callihan v. Hall*, 4 W. Va. 531.

When Plaintiff May Amend and Ask for Rescission of Contract.—A bill being filed for the specific execution of a contract for the exchange of lands, if it appears in the progress of the cause that the defendant can not comply with his contract, the plaintiff may amend his bill and ask for a rescission of the contract, and for such other relief as under the circumstances he is entitled to. *Parrill v. McKinley*, 9 Gratt. 1. See the title RESCISSION, CANCELLATION AND REFORMATION.

2. Remedy Where There Is a Deficiency in the Exchange.

Upon a bill filed to recover compensation for a deficiency in an exchange of lands, and for general relief, before decreeing compensation in money, the court should ascertain, through one of its commissioners, whether specific performance is practicable or not, and if so, to decree it with compensation

for the use of the land from the time it ought to have been conveyed. If not practicable, a decree should be rendered for the value of the land at the time of the exchange. It is immaterial whether the lands have subsequently appreciated or depreciated. *Meadows v. Bridges*, 95 Va. 184, 27 S. E. 839.

3. Remedy of Party Deceived as to Quantity of Land.

Though the contract for the exchange of lands be for an exchange in gross, yet if one party has been misled and deceived by the other as to the quantity of land he was getting, and thus induced to enter into the exchange, equity will decree him compensation. *Atkinson v. Beckett*, 34 W. Va. 584, 12 S. E. 717.

But where the controversy is narrowed down to a question of fact, and the evidence is conflicting, with no marked preponderance either way, and the lower court has decided against the party claiming compensation, the supreme court will not interfere. *Atkinson v. Beckett*, 34 W. Va. 584, 12 S. E. 717.

4. Recovery of Compensation for an Excess.

Facts Precluding Recovery.—A. and B. made an exchange of lands, whereby A. was to convey to B. 28 acres, and B. was to convey to A. 45 acres. The 28 acres was part of a tract of 76 acres owned jointly by A. and C. Before any conveyance B. purchased C.'s portion of the 76 acres, and then A. and C. united in a deed with general warranty conveying the 76 acres to B. It was subsequently ascertained that the 28 acres was in fact 31 acres, and the 76 acres was but 73 acres. In a suit by A. against B. to recover compensation for the excess of 3 acres in this 28 acre tract, it was held, that even conceding that A. might have been entitled to recover for such excess of 3 acres, if he had conveyed the 28 acres separately, yet, as the record

showed he was *prima facie* liable to B. for the deficiency in the tract of 76 acres, he was not entitled to relief in such suit. *Currey v. Lawler*, 29 W. Va. 111, 11 S. E. 897.

5. Recovery of Money Agreed upon as Difference in Value.

Agreement in Two Parts, One Sealed and the Other Not.—Upon terms not specified in a writing signed and sealed, parties agreed to exchange lands. By a writing signed but not sealed of the same date, and referring to the other, it was agreed that \$500 should be the consideration for the exchange. It was held, that the two writings constituted one agreement, and that covenant would lie to recover the money. *Horner v. Ebersole*, 83 Va. 765, 3 S. E. 131.

6. Remedy of Assignee of Bonds Given for Boot Money.

In 1859, by written contract, H. and B. exchanged lands, B. giving bonds for boot. H. sold his tract to G. and I., taking their bonds. No formal conveyances were made. H. assigned some of the bonds to plaintiff. Then H., G., I., and B.'s widow essayed to annul the exchange, the sale, and the bonds. H. took his former land back, and sold it to L. on condition he would assume payment of B.'s bonds, and the widow took possession of B.'s former land; but no care was taken of the as-

signee's interests. It was held, that the assignee could subject H.'s former land to the lien of B.'s bonds, and B.'s former land to the lien of the bonds of G. and I. *Ginter v. Breeden*, 90 Va. 565, 19 S. E. 656.

II. Exchange of Goods.

A. WHO MAY CONTRACT FOR AN EXCHANGE.

A married woman having personal property, which she is allowed to hold by statute as her separate property, may barter and trade with reference thereto through her husband as her agent. *Miller v. Peck*, 18 W. Va. 75. See the title HUSBAND AND WIFE.

B. WARRANTY.

See the title WARRANTY.

Exchange of Bank Notes.—There is no implied warranty of value in the exchange of genuine bank notes. *Edmonds v. Diggs*, 1 Gratt. 259.

But it seems that upon an exchange of bank notes there is an implied warrant of the genuineness of the notes. *Edmonds v. Diggs*, 1 Gratt. 259.

Exchange of Horses.—A warranty of title is to be implied from the contract, as much in the case of an exchange of horses then in the possession of those making the trade as upon a sale; and this implied warranty is as much a part of the contract as if it had been express. *Byrnside v. Burdett*, 15 W. Va. 702.

Exchanges.

See the titles ASSOCIATIONS, vol. 1, p. 843; CORPORATIONS, vol. 3, p. 510.

Exclamations.

See the titles DECLARATIONS AND ADMISSIONS, vol. 4, p. 325; DYING DECLARATIONS, vol. 4, p. 847; RES GESTÆ.

Exclusive Privileges.

See the title MONOPOLIES.

Excusable Homicide.

See the title HOMICIDE.

EXECUTED.—See **ACKNOWLEDGE**, vol. 1, p. 104. And see the title **CONTRACTS**, vol. 3, p. 387.

In *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. 1084, it is said: "A deed, to be valid, must be signed, sealed, and delivered to pass legal title; but a contract signed and delivered, though not sealed, even by a married woman, is effective as an executory contract, when duly acknowledged. The word **executed** would import all that is necessary to consummate a deed, but it does not in this question necessarily import delivery, for it often is acknowledged before delivery."

A return upon a summons, "**executed in person**," signed by the deputy sheriff with his own name and that of his principal, shows that the summons was actually served on the defendants; and therefore if it is defective the defect can only be taken advantage of by plea in abatement. The court said: "A return of **executed**, made by an officer whose duty it is to **execute** the process, shows that it was served on the defendant according to its mandate, and it will be presumed that the service was in the mode prescribed by law. * * * There is a manifest difference between a return upon a summons and a return upon a notice. A summons is directed to an officer, and contains a mandate to which his return of **executed** is a response that the thing commanded has been done. A notice is not directed to any officer, but to the party on whom it is to be served. It contains no mandate, and therefore a return of **executed**, simply, is no response, but unmeaning." *Barksdale v. Neal*, 16 Gratt. 314, 316, 317. See also, *Bowyer v. Knapp*, 15 W. Va. 291. And see generally, the titles **SERVICE OF PROCESS**; **SUMMONS AND PROCESS**.

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I. Manner of Executing Instruments.

As to the manner of executing instruments, see the titles BILLS, NOTES AND CHECKS, vol. 2, p. 401; BONDS, vol. 2, p. 507; CONTRACTS, vol. 3, p. 307; DEEDS, vol. 4, p. 364; SEALS AND SEALED INSTRUMENTS.

II. Proof of Execution.**A. NECESSITY FOR PROOF.****1. In General.**

As a general rule, in the absence of statute, before a document is admissible in evidence, its execution must be proved. See *Shanks v. Lancaster*, 5 Gratt. 110; *Feamster v. Withrow*, 9 W. Va. 296; *James River, etc., Co. v. Littlejohn*, 18 Gratt. 53; *Caruthers v. Eldridge*, 12 Gratt. 670.

In an action of ejectment the plaintiff, to connect his title with the patent under which he claimed, offered in evidence a deed bearing date January 13th, 1791, from a prior holder, to whom he traced title from the patentee, to a person from whom plaintiff traced title by regular conveyances to himself. This deed was not proved, but the plaintiff introduced parol proof for the purpose of showing possession in conformity with the deed; but the proofs did not show the possession farther back than the date of the deed from this grantee to a purchaser from

him, which was fifteen years after the date of the deed offered in evidence. The tenant also offered evidence to rebut and disprove the parol proof of plaintiff, but the court excluded the evidence of the tenant and admitted the deed. It was held, that the deed was improperly admitted without being proved, there being no sufficient proof of possession in conformity therewith. *Shanks v. Lancaster*, 5 Gratt. 110.

On Plea of Non Est Factum.—The plea of non est factum in an action on a bond always puts in issue the execution and delivery of the bond. *Harris v. Harris*, 23 Gratt. 739. See the titles BONDS, vol. 2, p. 558; PLEADING.

The burden of proof of the formal execution of a deed or bond, when put in issue under the plea of non est factum, rests upon the party claiming under the deed or bond; and that proof must show that the deed or bond was signed, sealed and delivered by the authority of the obligor as his deed. *Newlin v. Beard*, 6 W. Va. 110.

In an action of debt founded on a bond or other deed, the defendant may put in issue the execution of the instrument by pleading non est factum generally and in the common form. But if he wishes to separate the law from the facts, so that the court may pass upon the sufficiency of any special ground why it is not his deed,

then he must allege such facts specially, concluding with an "et sic non est factum," "and so is not his act" (or deed). *American Button-Hole, etc., Co. v. Burlack*, 35 W. Va. 647, 14 S. E. 319.

The plea of nil debet in an action of debt at common law, on a negotiable note, put in issue the execution of the note and all transfers thereof. *Clason v. Parrish*, 93 Va. 24, 24 S. E. 471.

Contract Specifically Enforced by Decree.—Where in an action of ejectment the plaintiff offers in evidence a deed made by a commissioner in pursuance of a decree entered in a suit brought for the specific execution of a written contract for the sale of the land so conveyed, and such portions of the record, as show the authority of the commissioner to make such deed, including the written contract, it is not necessary to prove the execution of the contract by the vendor of the land. The court will presume that the execution of the contract was duly proved in the suit resulting in the decree for specific performance. *Waggoner v. Wolf*, 28 W. Va. 820.

Failure to Object to Admission of Writing without Proof of Execution.—A plaintiff in equity filed with his bill, as the ground of his claim, an order on one of the defendants, which had not been accepted. No proof of the execution of the order was given; but its genuineness was not questioned in the court below, and it was made the basis of a decree in favor of the plaintiff. It was held, that it was too late to make the objection in the appellate court, to the want of proof of the execution of the order. *James River, etc., Co. v. Littlejohn*, 18 Gratt. 53. See also, *Lyle v. Higginbotham*, 10 Leigh 63, 77; *Harnsberger v. Cochran*, 82 Va. 727, 1 S. E. 120.

Harmless Error.—A paper writing, purporting to be a statement of the amount paid by one of the parties to a note, who claims that he was in fact

but a security therein, and a receipt purporting to be signed by the cashier of the bank holding said note, appended to statement, to the party making the payment in full of the debt, which is filed in a chancery cause, as evidence, by one of the plaintiffs therein, and objected to being read as evidence by defendants in the cause, whose interests may be affected thereby, can not be read as evidence in the cause, unless properly proved. But if the paper writing contains material evidence on its face if read, and there is other evidence in the cause, which proved substantially the same as the paper, the hearing of the cause by the court, upon the paper, is not error for which the decree of the court should be reversed. *Feamster v. Withrow*, 9 W. Va. 296.

2. Proof of Authority to Execute.

a. In General.

"As to individuals, if capable of contracting at all, the authority to bind themselves is unquestionable; and therefore when an instrument, purporting to have been made and signed by a person in his individual character, is treated as genuine, no question can arise upon a want of authority." *Shepherd v. Fry*, 3 Gratt. 442, 445.

b. Instruments Executed by Agents.

Where a writing purporting to be signed by an agent, is offered in evidence and objected to, it is error to admit it, until the agency, and the agent's authority to sign it, are proved. *Winkler v. Chesapeake, etc., R. Co.*, 12 W. Va. 699. See the title AGENCY, vol. 1, p. 240.

Presumption of Authority from Use of Corporate Seal.—Where the contract of a corporation purports to be sealed with its corporate seal, and it is proven to be signed by the proper agents of the corporation, the presumption is that the seal was affixed by the proper authority, and such contract will be held valid until the contrary is shown. *Fidelity Ins., etc., Co. v. Shen-*

andoah Val. R. Co., 32 W. Va. 244, 9 S. E. 180; *Ruffner v. Welton Coal, etc., Co.*, 36 W. Va. 244, 15 S. E. 48. See the title CORPORATIONS, vol. 3, p. 528.

Partnership Instruments.—The act of February 5th, 1828 (Sup. Rev. Code 265) dispensing with proof of handwriting in certain cases, applies to instruments signed with the name of a partnership; but the question is still open whether the persons sought to be charged are members of the partnership. *Shepherd v. Fry*, 3 Gratt. 442. See the title PARTNERSHIP.

c. Deeds Executed by Officers or Fiduciaries.

Deeds of Executors and Administrators.—See the title EXECUTORS AND ADMINISTRATORS.

Deeds in Tax Sales.—The clerk of a court in making a deed of land sold as delinquent for taxes exercises a mere naked power, not coupled with an interest, and it is essential that every prerequisite to the exercise of such power, including the fact that he is clerk, be shown, in order to pass title by such deed. The deed itself is not sufficient for that purpose, though it is admissible to show color or claim of title, where title is claimed by adversary possession for the statutory period. *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347. See the title TAXATION.

The commissioner to make sales under the delinquent land laws, has no interest in the subject of sale. He acts like a commissioner to make sales under a decree of the chancery court, and is clothed with a mere naked authority. Having no interest in the land conveyed, the deed of the commissioner can avail nothing where his authority to make it does not appear, unless there has been such a long acquiescence and possession under the deed as to justify a presumption in favor of the deed. *Walton v. Hale*, 9 Gratt. 194.

A decree directing a conveyance of land by the marshal of the court, being a necessary chain of title, is not of itself competent evidence to show the authority of the marshal to convey land embraced in his deed, unless it designates the land directed to be conveyed; but the whole record, or so much of it as will show what land was directed to be conveyed, must be produced with the decree. *Masters v. Varner*, 5 Gratt. 168.

The recitals in the deed of the marshal are no evidence of his authority to convey, against an adverse claimant. *Masters v. Varner*, 5 Gratt. 168.

Deed of Commissioner in Chancery.—Where a deed made under a decree by a commissioner or other authority is offered in evidence as a connecting link in the plaintiff's chain of title to land, it is necessary to introduce with it so much of the record of the suit in which such decree was made as will satisfactorily show that the person having the legal title to land conveyed was a party to the suit, and as will identify the land conveyed with the land decreed. *McDodrill v. Pardee, etc., Co.*, 40 W. Va. 564, 21 S. E. 878; *Waggoner v. Wolf*, 28 W. Va. 820. See the titles JUDICIAL SALES; RECORDS.

As against a party who claims against the deed of a commissioner and is a stranger thereto, the recital of such facts therein, without more, is not evidence thereof, and the deed does not prove the transfer of the title to the land it purports to convey. *McDodrill v. Pardee, etc., Co.*, 40 W. Va. 564, 21 S. E. 878.

A party offering in evidence a deed purporting to be executed by a commissioner under the decree of a court, and conveying land, must offer with it so much of the record of the cause in which the decree was made, as will show the authority of the commissioner to convey the land described in the deed. *Cales v. Miller*, 8 Gratt. 6.

3. Ancient Documents.

A deed of above thirty years' standing requires no further proof of its execution than the bare production, where the possession has gone according to its provisions, and there is no apparent erasure or alteration. *Roberts v. Stanton*, 2 Munf. 128, 129. See the title ANCIENT DOCUMENTS, vol. 1, p. 372.

An ancient deed may be introduced in evidence without proof of its execution; though possession may not have been held for thirty years in accordance therewith, if such account be given of the deed as may be reasonably expected under all the circumstances of the case and will afford the presumption that it is genuine. *Nowlin v. Burwell*, 75 Va. 551; *Caruthers v. Eldridge*, 12 Gratt. 670. But see *Dishazer v. Maitland*, 12 Leigh 524.

"The rule stated applies to deeds, powers of attorney, and to all other ancient writings, with or without attesting witnesses." *Nowlin v. Burwell*, 75 Va. 551.

4. Admission of Execution in Pleadings.

In an action of debt upon a bond, profert of the bond was excused on the ground that it was lost by accident. The defendant pleaded payment, and special pleas in which he averred that the bond was not lost or destroyed by accident, but was destroyed by the obligee in her lifetime, with the intention and for the purpose of releasing the obligor from the payment of the debt, and issues were made up on the pleas. On the trial of the cause the defendant insisted that the plaintiff should first prove to the satisfaction of the court the original existence of the bond and its loss, and it was agreed that all the evidence in the cause should be heard, and that the defendant might move to exclude it; and on his motion all the evidence was excluded. It was held, that every pleading should be taken to confess such traversable matter on the

other side as it did not deny, and that the pleas having confessed the original existence of the bond as described in the declaration and its destruction, there was no necessity for the plaintiff to prove to the satisfaction of the court the original existence and loss of the bond before receiving testimony as to its contents. *Colley v. Sheppard*, 31 Gratt. 312.

"The plea of release or payment, admits the execution of the deed, as set forth in the declaration, and concludes the party from denying, and the jury from finding against the fact." *Colley v. Sheppard*, 31 Gratt. 312.

5. Statutes Dispensing with Proof of Execution.

a. Act Requiring Genuineness of Writings to Be Denied under Oath.

(1) In General.

"Where a bill, declaration, or other pleading alleges that any person made, endorsed, assigned, or accepted any writing, no proof of the fact alleged shall be required, unless an affidavit be filed with the pleading putting it in issue, denying that such endorsement, assignment, acceptance or other writing was made by the person charged therewith, or by any one thereto authorized by him." Va. Code (1904), § 3279. See also, W. Va. Code, Ch. 25, § 40.

The act of February 5th, 1898, (Sup. Rev. Code, p. 265), provided that on all actions thereafter brought on promissory notes, bills of exchange, drafts or other writings, or endorsements, assignments, or acceptances thereof, if the declaration alleged that they were signed by any person, such writing should be evidence and held as genuine without any proof of handwriting, unless an affidavit was filed disputing its genuineness. *Robinson v. Dix*, 18 W. Va. 528; *Phaup v. Stratton*, 9 Gratt. 615; *Archer v. Ward*, 9 Gratt. 622.

The purpose of the statute was not to narrow the defense under the general issue; but, in regard to a particu-

lar matter, to require notice of the defense, and some security against its being vexatious or frivolous. *Shepherd v. Fry*, 3 Gratt. 442.

(3) Instruments to Which Applicable.

Partnership Instruments.—The act of February 5th, 1828, dispensing with proof of handwriting in certain cases, applied to instruments signed with the name of a partnership. *Shepherd v. Fry*, 3 Gratt. 442; *Phaup v. Stratton*, 9 Gratt. 615.

Not Applicable to Writings under Seal.—"The effect of the statute is to dispense with the proof of handwriting in actions on writings not under seal—nothing more. *Phaup v. Stratton*, 9 Gratt. 615, 619." *Clason v. Parrish*, 93 Va. 24, 24 S. E. 471. See also, *Shepherd v. Fry*, 3 Gratt. 442.

Deeds Introduced Collaterally.—In a suit brought upon a deed, the plaintiff is not required to prove it without a plea of non est factum verified by oath; but, when a deed is introduced collaterally as evidence, it must be proved by the party introducing it according to the rules of law; and the other party, without any denial of the deed under oath, may assail it by any evidence which shows or tends to show that it is not his deed. *Harrison v. Middleton*, 11 Gratt. 527.

Transfer of Instrument by Delivery.—The object of the statute (Va. Code, 1887, § 3279) is to dispense with proof of handwriting in certain cases, and it has no application to a transfer of paper by mere delivery. *Clason v. Parrish*, 92 Va. 24, 24 S. E. 471.

Instruments Signed by Defendant.

The act of February 5th 1828 (Sup. Rev. Code, p. 265), dispensing with proof of handwriting in certain cases, only applied where the declaration alleged that the defendant or the person stated to have made the writing, subscribed his name thereto. *Kelley v. Paul*, 3 Gratt. 182; *Shepherd v. Fry*, 3 Gratt. 442; See also, *Phaup v. Stratton*, 9 Gratt. 615; *Archer v. Ward*, 9

Gratt. 622; *Robinson v. Dix*, 18 W. Va. 528.

Where the declaration alleged that the writing sued on was made by the defendant, but did not allege that it was signed by the defendant, the case did not come within the act of 1828, and the signature was required to be proven, although there was no affidavit denying its genuineness. *Kelley v. Paul*, 3 Gratt. 182.

But in the revision of 1850 a much more comprehensive statute was adopted, now West Virginia Code, ch. 125, § 40 (Va. Code, 1904, § 3279), which only requires that the writing shall be alleged to have been "made" by the party. *Robinson v. Dix*, 18 W. Va. 528.

An allegation that plaintiff delivered his receipts to the respondent, is equivalent to alleging that he made such receipts. *Maxwell v. Burbridge*, 44 W. Va. 248, 28 S. E. 702.

Where a bill alleges that the order in controversy was "drawn" by one of the defendants, the act (Va. Code, 1850, ch. 171, § 38) applies, and no proof of the signature is necessary in the absence of an affidavit denying the genuineness of the order. *James River, etc., Co. v. Littlejohn*, 8 Gratt. 53.

Writing Set Up in Chancery Proceedings.—"It might have been regarded as questionable on the language used in the Code, whether the writing had not to be one named in a common-law pleading; but its language, 'other pleading', has been interpreted to include chancery pleadings, as a bill in equity. See *James River, etc., Co. v. Littlejohn*, 18 Gratt. 53. The words 'other pleadings' must obviously be construed to mean a plea in a common-law suit or an answer in chancery. The word plea in the close of the section obviously is used in its comprehensive sense and means any pleading, as a replication in law or in chancery." *Robinson v. Dix*, 18 W. Va. 528.

If a defendant in a chancery suit in

his answer alleges that a third person or the plaintiff wrote a letter touching the matter in controversy, and files with his answer as part thereof what purports to be the original letter, such letter under § 40, ch. 125, of the Code of West Virginia will be regarded by the court as genuine without any proof of the handwriting, unless the fact, that such letter was written by such third person or by the plaintiff, is denied by an affidavit. *Robinson v. Dix*, 18 W. Va. 528.

A defendant in a chancery suit in his answer alleges that the plaintiff's decedent delivered his three receipts to respondent for money paid him on account of the matter in controversy, and filed with his answer, as part thereof, what purports to be the original receipts. Such receipts under § 10, ch. 125, W. Va. Code, will be regarded by the court as genuine, without any proof of the handwriting, unless the fact that such receipts were made by the plaintiff's decedent is denied by affidavit. *Maxwell v. Burbridge*, 44 W. Va. 248, 28 S. E. 702.

Where the answer to a bill for an accounting sets up certain bonds as set-offs against the complainant's demand, and the plaintiff files a general replication, in the absence of statute it devolves on the defendant to prove the execution of the bonds filed with the answer, but the effect of Va. Code, 1873, ch. 167, § 39, is to relieve the defendant from proving the execution of the bonds referred to, unless the replication be accompanied by the affidavit required by the statute. *Simmons v. Simmons*, 33 Gratt. 451.

Writings Other than Those Sued on.—The act of 1828, dispensing with the proof of handwriting in certain cases, applied only to the writing on which the suit was brought, but the present law applies to any writing alleged to have been made, in any pleading. *Robinson v. Dix*, 18 W. Va. 528, 542. See also, *Maxwell v. Burbridge*, 44 W. Va. 248, 28 S. E. 702.

(3) Sufficiency of Affidavit.

In General.—Where a bill in equity charges, among other things, that the bond exhibited with the bill and upon which a recovery is sought, was "executed" by the female defendant *dum sola*, and the respondent, in reference to this allegation, only says "that he knows nothing of the execution of the note," this is not such a denial, though the answer is sworn to, as the statute (Va. Code, 1873, ch. 167, § 3839) requires, in order to put the complainant to proof of the obligor's handwriting. *Coles v. Hurt*, 75 Va. 385.

Answer under Oath Denying Execution of Instrument.—Where bill or other pleading sets up a writing and alleges that it was made and signed by defendants' intestate in his lifetime, and defendant, by his answer under oath, denies the allegation and demands proof; such answer is a substantial compliance with Va. Code, 1873, ch. 167, § 39, and puts the genuineness of the writing in issue with the burden of proof on the allegor. *Harnsberger v. Cochran*, 82 Va. 727, 1 S. E. 120.

Verified Plea to Answer in Chancery Treated as Affidavit.—With the answer of a defendant in chancery, a bond of the plaintiff's decedent was filed. The plaintiff filed no replication but pleaded *non est factum* to the bond filed with the answer. On the evidence being heard, the court below decided that the bond was not the deed of the plaintiff. It was held, that while it was irregular and improper to have allowed a plea to have been filed to the answer, and the proper course was for the plaintiff to have filed a general replication to the answer, accompanied by an affidavit putting in issue the execution of the bond, which would have been sufficient to require the defendant to prove such execution, yet as the plea which was sworn to, can be now treated as an affidavit, as the parties took issue on it, and testimony, and the defendant has not been prejudiced by the irregular proceedings and trial on

said plea as such, the decree will not be reversed for such irregularities, substantial justice having been done between the parties. *Simmons v. Simmons*, 33 Gratt. 451.

(4) Effect of Filing Affidavit.

When the answer of the maker of a negotiable note denies that the payee endorsed the note to complainant, as alleged in the latter's bill, and the denial is supported by affidavit, as required by § 3279 of the Va. Code of 1887, the burden of proof is thrown upon the complainant to show such endorsement, and in default thereof his bill should be dismissed. *Piedmont Bank v. Hatcher*, 94 Va. 229, 26 S. E. 505.

(5) Effect of Failure to File Affidavit.

In General.—Where no affidavit, or an insufficient one, is filed denying the genuineness of a writing, such writing must be taken to be genuine and that it purports to be. *Coles v. Hurt*, 75 Va. 385.

In an action of debt at common law on a negotiable note, the plea of nil debet put in issue the execution of the note and all transfers thereof, but by statute in Virginia (Code, 1887, § 3279) when the execution and endorsement of the note are averred in the declaration, no proof thereof is required unless the plea putting it in issue be supported by affidavit. *Clason v. Parrish*, 93 Va. 24, 24 S. E. 471.

If an answer in chancery avers that an agreement was made by the complainant who is a married woman, a general replication by her, not under oath, will put in issue her capacity to make the agreement, but not the genuineness of her signature. *Stewart v. Conrad*, 100 Va. 128, 40 S. E. 624.

Where in an action against the endorser of a negotiable note, the declaration averred that the endorser endorsed the note by subscribing his name on the back thereof, and the defendant did not file an affidavit with his plea according to the statute (Act,

February 5th, 1828) he was not permitted to question the genuineness of the note, or to show that it was altered after it was endorsed by him. *Archer v. Ward*, 9 Gratt. 622.

Evidence Attacking Genuineness of Instrument Inadmissible.—Where a defendant in chancery in his answer alleges that the plaintiff's decedent delivered his three receipts to respondent for money paid on account of the matter in controversy, and files with his answer as part thereof, what purports to be the original receipts, and the plaintiff files with his replication no affidavit denying the genuineness of the receipts, it is error to admit depositions taken on behalf of the plaintiff, attacking the genuineness of such receipts. *Maxwell v. Burbridge*, 44 W. Va. 248, 28 S. E. 702.

Partnership Instruments.—In an action of debt on a note signed with a partnership name, the declaration charged that the defendants by their partnership name subscribed the note, and there was no affidavit by the defendants, or any of them, putting the execution of the note in issue. It was held, that the defendants were precluded from showing that the partnership had been dissolved before the note was made, and that the person making it had no authority to execute it for the other partners. *Phaup v. Stratton*, 9 Gratt. 615.

But in *Shepherd v. Fry*, 3 Gratt. 442, it is said that while the act of February 5th, 1828, applies to instruments executed in the name of a partnership, the question remains open whether the persons sought to be charged are members of the partnership.

b. Deeds Authenticated for Record.

An original deed duly authenticated for record in the manner prescribed by law at the time of authentication, is admissible as evidence without further proof of its due execution, though it has not been duly recorded. *Hassler v. King*, 9 Gratt. 115.

A deed of emancipation recorded in the wrong court was not so authenticated as to be lawful evidence in a suit for freedom; and such deed ought not to be received as evidence, until proved or acknowledged before the proper court. *Givens v. Manns*, 6 Munf. 191.

Deed Recorded but Improperly Authenticated for Recordation.—A deed not acknowledged or not certified according to law, though actually admitted to record, can not be read in evidence as a recorded deed, but as between the parties it is valid. *Raines v. Walker*, 77 Va. 92.

B. MANNER OF PROVING EXECUTION.

1. Unattested Documents.

By Proof of Handwriting.—When a deed is of recent date and there are no subscribing witnesses, the party who offers it in evidence must prove the handwriting of the maker. *Caruthers v. Eldridge*, 12 Gratt. 670.

In an action on an official bond, if there is no recorded evidence, the execution of it may be established by the testimony of attesting witnesses, or if there be none, by proof of handwriting, or by discovery from the adverse party. *Washington Co. v. Dunn*, 27 Gratt. 609.

As to manner of proving handwriting, see the title HANDWRITING.

The certificate of a notary public, that a release was acknowledged by a party to be his act and deed, ought not to be received in evidence to prove the execution of the release; but the deposition of the notary public, or some equivalent testimony, ought to be produced to the court. *Kidd v. Alexander*, 1 Rand. 456.

Evidence Showing Falsity of Matter Contained in Paper.—In a controversy over the genuineness of a paper, evidence which tends to impeach the truth of the matter contained in the paper is admissible, as such evidence tends to show the nonexecution of the

paper by the party introducing such evidence. "There is no better way to discredit a paper than to show its falsity." *Flowers v. Fletcher*, 40 W. Va. 103, 20 S. E. 870.

Proving Genuineness of Coupons from State Bonds.—See the title MUNICIPAL, STATE AND COUNTY SECURITIES.

2. Attested Documents.

a. By Production of Attesting Witnesses.

(1) General Rule.

The general rule is that if there be a subscribing witness to an instrument, his evidence is the best and must be adduced, if in the power of the party. *Gilliam v. Perkinson*, 4 Rand. 325; *Caruthers v. Eldridge*, 12 Gratt. 670.

A subscribing witness to a written instrument, if he attested it by request, express or implied, of the author of the instrument, which will be presumed to have been the case in the absence of evidence to the contrary, must be produced to testify as to the execution of the instrument by the party who seeks to set it up or show its execution, provided the witness is alive, and in the jurisdiction of the court, and competent to testify. *Step-toe v. Flood*, 31 Gratt. 323, 340.

Witnesses attesting the delivery of a deed, shall not afterwards be admitted to disprove it. *Currie v. Donald*, 2 Wash. 58.

(2) Exceptions to Rule.

Where a subscribing witness is "dead or blind, or insane, or infamous, or interested since the execution of the deed, or beyond the process of the court, or not to be found after diligent inquiry; in all these cases (and others, perhaps, might be stated) the course is to prove the handwriting of the witness." *Gilliam v. Perkinson*, 4 Rand. 325; *Manns v. Givens*, 7 Leigh 703; *Bogle v. Sullivant*, 1 Call 561; *Turner v. Stip*, 1 Wash. 319; *Step-toe v. Flood*, 31 Gratt. 323; *Thompson v.*

Halstead, 44 W. Va. 390, 29 S. E. 991. See post, "Of Attesting Witnesses," II, B, 2, b, (1).

b. By Proof of Handwriting.

(1) Of Attesting Witnesses.

It is a general rule that the evidence of a subscribing witness to an instrument is the best, and must be adduced if it can be had, and if it can not, proof of the handwriting of the subscribing witness will be required. *Gilliam v. Perkinson*, 4 Rand. 325; *Caruthers v. Eldridge*, 12 Gratt. 670; *Manns v. Givens*, 7 Leigh 703.

"While I acknowledge it to be the rule, that proof of the handwriting of the attesting witness is considered better evidence of the execution, than proof of the handwriting of the party executing, I am free to confess, that I think it a rule founded rather in technical strictness, and artificial reasoning, than in sound good sense." *Gilliam v. Perkinson*, 4 Rand. 325, per Carr, J.

When the subscribing witnesses are dead, proof of their handwriting may be introduced to prove the execution of the instrument. *Bogle v. Sullivan*, 1 Call 561; *Thompson v. Halstead*, 44 W. Va. 390, 29 S. E. 991.

If the attesting witness can not be produced or is incompetent to testify, the genuineness of his attestation to the instrument must be proved by evidence that the signature to the attestation is in the handwriting of the subscribing witness. *Steptoe v. Flood*, 31 Gratt. 323, 340.

As to manner of proving handwriting, see the title **HANDWRITING**.

Evidence That Instrument Is Not in Handwriting of Maker, Admissible.—

On the trial of an issue out of chancery the plaintiff in the issue relies upon a receipt to which there is an attesting witness, but both the witness and the principal are dead. The plaintiff having proved the handwriting of the witness, the defendant may introduce the testimony to prove that the name of the principal to the receipt is not in

his handwriting. *Steptoe v. Flood*, 31 Gratt. 323.

(2) Of Maker of Instrument.

Where the attesting witness is dead, the first call is for proof of his handwriting; and wherever that can not be had, the handwriting of the party may be proved. *Gilliam v. Perkinson*, 4 Rand. 325; *Steptoe v. Flood*, 31 Gratt. 323.

"If there be no subscribing witness, or he denies having any knowledge of the execution, or the name of a fictitious person is inserted, or if, after diligent inquiry, nothing can be heard of the witness, so that he can neither be produced, or his handwriting proved, the execution of the instrument may be established by proving the handwriting of the party, or his admission, that he executed it." *Gilliam v. Perkinson*, 4 Rand. 325, 327.

Where the subscribing witness to an instrument is dead, and it is shown to be impracticable to prove his handwriting, evidence of the handwriting of the party himself is admissible. *Raines v. Philips*, 1 Leigh 483.

If the proof, or acknowledgment, of a deed, made by a nonresident, of land lying in Virginia, be not certified according to law, though it should be admitted to record, it can not be read in evidence as a recorded deed. But it will be sufficient at the trial, to prove the execution by one witness, though he be not a subscribing witness, if the subscribing witness be dead, or can not be procured. *Turner v. Stip*, 1 Wash. 319.

Where the subscribing witness merely makes his mark, if he is dead, proof of the handwriting of the party executing the instrument will be proper. *Gilliam v. Perkinson*, 4 Rand. 325.

C. SUFFICIENCY OF EVIDENCE OF EXECUTION.

Sufficiency of Evidence Question for Jury.—Whether the evidence sufficiently establishes the execution of an

instrument is a question for the jury. *Bogle v. Sullivant*, 1 Call 561.

Where, on the trial of an issue out of chancery, the plaintiff relies upon a receipt and there is great conflict of opinion among the witnesses as to the genuineness of the handwriting of the principal to the receipt, the verdict of the jury against its genuineness will not be disturbed by the appellate court. *Steptoe v. Flood*, 31 Gratt. 323.

Proof of Handwriting of Attesting Witness Prima Facie Evidence of Execution.—Where a paper purports to have been signed by a party, with a subscribing witness thereto, and such subscribing witness is dead, proof of the handwriting of the subscribing witness is prima facie evidence of the execution of the paper; but such evidence may be rebutted by the party denying its execution and by outside circumstances. *Thompson v. Halstead*, 44 W. Va. 390, 29 S. E. 991.

On the trial of a plea of non est fac-

tum in an action on a bond, proof of the handwriting of the subscribing witnesses, and that they are dead, will be sufficient to submit the case to the jury. *Bogle v. Sullivant*, 1 Call 561.

The proof of the handwriting of the subscribing witness is "evidence of everything on the face of the instrument. The sealing and delivery will be presumed; and it is laid down in many cases, that it will not be necessary to prove the handwriting of the party to the deed. Other cases, however, have required such proof to connect the party with the instrument." *Gilliam v. Perkinson*, 4 Rand. 325.

Joint and Several Bond—Signature of One Party Only Proved.—On a plea of non est factum, by several defendants, to a joint and several bond, where the signature of one of the defendants is proven, it is proper to permit such proof to go to the jury as against such defendant, but not as to the other. *Kuykendall v. Ruckman*, 2 W. Va. 332.

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See the title EXECUTIONS.

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CROSS REFERENCES.

See the titles APPEAL AND ERROR, vol. 1, p. 418; CONTINUANCES, vol. 3, p. 289; ELEGIT, ante, p. 58; FORTHCOMING AND DELIVERY BONDS; INDEMNITY; JUDGMENTS AND DECREES; SERVICE OF PROCESS; SHERIFFS' SALES; SURETYSHIP; TRUSTS AND TRUSTEES; VENDITIONI EXPOSAS.

As to the necessity of a revival of a judgment by scire facias, where the judgment has been entered after the death of a party, prior to the issuance of an execution, see the title JUDGMENTS AND DECREES. As to execution as part of the record, see the title APPEAL AND ERROR, vol. 1, p. 507. As to variance between execution and the recital thereof in a forthcoming bond, see the title FORTHCOMING AND DELIVERY BONDS. As to restitution of property seized under an execution on an erroneous judgment which is afterwards reversed or corrected, see the title RESTITUTION. As to actions on assignments of executions, see the title ASSIGNMENTS, vol. 1, p. 787. As to appeals from decisions ordering executions to issue, see the title APPEAL AND ERROR, vol. 1, p. 452. As to executions for specific property, see the title POSSESSION, WRIT OF. As to the rights of a sheriff, holding an execution in his hands, upon payment by him of the debt, see the title SUBROGATION.

I. Scope of Title.

This title includes the enforcement of judgments and decrees in civil actions and proceedings generally, by final process against property; the nature of such process; property liable to execution; the issuance, requisites and validity of executions; the levy of executions; the lien of executions; the stay of executions; the quashing of executions; trial of right of property, return of executions, their satisfaction and the distribution of their proceeds, and proceedings in aid of execution.

It excludes executions for specific property; injunctions against executions; sale under executions; executions against the person; executions on forthcoming bonds; revival of judgment as a requisite to issuance of execution; and the duties and liabilities of officers as to the issuance, levy and return of

executions with their right to demand indemnity.

II. Definition and Nature.

Definition.—Bouvier's law dictionary contains the following: "Final execution is one which authorizes the money due on a judgment to be made out of the property of the defendant."

Nature of Execution.—In *Lusk v. Ramsay*, 3 Munf. 417, the court said: "I will remark, in the first place, that an execution is the life of the law; that it is the end, and effect, a fruit of the law; that it differs from an action which only continues until the judgment is rendered; and that, consequently a release of all actions would not release it."

Purpose of Fieri Facias.—The writ of fieri facias is given to the court to enable it to enforce its judgments. With-

out it the court would be powerless to carry into effect its judgment when rendered. *Erb v. Hendricks Co.*, 50 W. Va. 28, 40 S. E. 338.

Scire Facias as Writ of Execution.—As to when a writ of scire facias may be properly called a writ of execution, see the title SCIRE FACIAS.

Execution an Entire Thing.—An execution is an entire thing. *Lusk v. Ramsey*, 3 Munf. 417.

Fieri Facias and Ca. Sa. Distinguished.—In *Evans v. Greenhow*, 15 Gratt. 153, the court in distinguishing between the writs of fieri facias and capias ad satisfaciendum used the following language: "The two remedies differ in many respects. The new remedy is more beneficial to the creditor in some respects and less so in others, than the old. It gives a lien on all the personal estate of the debtor from the time that the writ of fi. fa. is delivered to the officer for execution, subject only to the exceptions enumerated. The lien does not depend upon the levy of the writ, but continues to operate after the return day and until the right of the creditor to levy any execution upon his judgment ceases, or is suspended by a forthcoming bond being given and forfeited, or by a supersedeas or other legal process. Code, p. 717, § 4; *Puryear v. Taylor*, 12 Gratt. 401. On the other hand the ca. sa. was a lien only from the time of its execution, and then only a qualified and conditional lien. It was not a lien at all upon personal estate, until by the act of March 2, 1821, it was declared, that 'every writ of capias ad satisfaciendum shall bind the property of the goods of the party against whom the same is sued forth, from the time that such writ shall be levied.' Sess. Acts, p. 35, ch. 34, § 4. It is at least doubtful whether even that act made it a lien on choses in action. * * * The writ of fi. fa. is generally issued on a judgment, and always, in the absence of special direc-

tion to the clerk to the contrary. It is to this execution, thus almost always issued upon a judgment, that the Code (1849), ch. 188, § 3, has imparted the important additional effect therein mentioned. In giving to the creditor this new and extensive lien, it was eminently proper so to guard it as that it should do no injury to the just rights of others. Accordingly, it was given subject to certain exceptions, which the legislature supposed would have that effect, and which are reasonable, and ought to be fairly construed."

In *Evans v. Greenhow*, 15 Gratt. 153, the court said: "It is true, that the additional effect given by the Code, to the writ of fi. fa. was intended as a substitute for the remedy formerly afforded by the writ of ca. sa. But it was not intended to be coextensive with that remedy in all respects. On this subject the revisors observe, 'we will not undertake to say that the remedies now proposed to be substituted in the place of process to take the body for debt, will in every possible case attain for the creditor everything that he can now attain by means of that process; but we express the opinion, without hesitation, that in cases generally, the rights of creditors will be better protected by the measures proposed than by those for which they are substituted.'"

III. Issuance of Execution.

A. WHENCE AND BY WHOM ISSUED.

At Law.—The power of courts of law to issue executions is conferred by the common law, and also by statutory enactments, in Virginia. *Coleman v. Cocke*, 6 Rand. 618.

In Equity.—See post, "Decrees in Chancery," III, B, 7.

Chancery Courts Bound by Common Law Statute in Issuing.—The court, in *Windrum v. Parker*, 2 Leigh 361, 369, said: "Since all executions, which can be issued upon a judgment at law, have

been allowed by our statute to issue upon decrees in chancery, the courts of chancery are bound, in deciding upon all questions in respect to them, to abide by the common law and statutes respecting executions at law." See also, *Snavely v. Harkrader*, 30 Gratt. 487.

Motion for Order of Court Directing Issuance.—A party may, without any previous notice to the defendant, move the court to direct an execution to be issued, where the clerk refused to issue one. *Com. v. Hewitt*, 2 Hen. & M. 181.

Power of Justice after Certifying Case.—In *Erb v. Hendricks Co.*, 50 W. Va. 28, 40 S. E. 338, the court said: "It is contended by appellee that certifying the judgment by the justice to the clerk does not take from the justice the right to issue execution thereafter on the judgment from his docket. This is a question that seems never to have arisen or been decided in this court and does not properly arise in this case." See generally, the title JUSTICES OF THE PEACE.

B ON WHAT FOUNDED.

1. Valid Judgment or Decree.

As a condition precedent to the issuance of a writ of execution there must be a valid subsisting judgment, or decree, to support it. *Lowther v. Davis*, 33 W. Va. 132, 10 S. E. 20; *Farmer's Bank v. Montgomery*, 11 W. Va. 169; *Blair v. Henderson*, 49 W. Va. 282, 38 S. E. 552; *Maxwell v. Leeson*, 50 W. Va. 361, 40 S. E. 420; *Shackelford v. Apperson*, 6 Gratt. 451.

In *Evans v. Greenhow*, 15 Gratt. 153, it is said: "The writ of *fi. fa.* is generally issued on a judgment, and always, in the absence of special direction to the clerk to the contrary."

It is well settled that no execution can be issued by a justice until there is a judgment rendered upon which an execution can be issued. *Lowther v. Davis*, 33 W. Va. 132, 10 S. E. 20.

Judgment was entered in favor of A against B, upon conviction of B for

larceny, for money mentioned in the indictment. It was held: "That judgment ought not to have been entered in the said case for the money in the indictment mentioned, and therefore execution ought not to issue on the judgment entered therein." *Henley's Case*, 1 Va. Cas. 145.

2. Office Judgment.

An execution may be issued upon an office judgment the same as upon a final judgment, without an order of court, general or special for that purpose. It can be corrected, set aside or reversed, only by proceedings in error in the same or a higher court. *Enders v. Burch*, 15 Gratt. 64, 68. See the title JUDGMENTS AND DECREES.

3. Verdict of Jury.

It is clear that no execution can be issued on the verdict of a jury, and that one so issued is void. *Lowther v. Davis*, 33 W. Va. 132, 10 S. E. 20, 26.

4. Final Judgment.

The common-law rule was that no execution could issue except upon a final judgment. *Baker v. Swineford*, 97 Va. 112, 33 S. E. 542.

Interlocutory Decree.—In *Shackelford v. Apperson*, 6 Gratt. 451, it was held, that, according to statute, the clerk had no authority to issue an execution upon an interlocutory decree, without an order of the court or the judge thereof in vacation.

Though circumstances may exist which will warrant the court, or a judge in vacation, to allow process of execution on an interlocutory decree, these circumstances must be shown, and if not shown, it is improper to allow it. *Shackelford v. Apperson*, 6 Gratt. 451.

Where there was a suit to subject land for the payment of purchase money, a decree was entered against the defendant for a certain sum, and if he should fail to pay such sum within thirty days a commissioner was directed to sell the land upon terms pre-

scribed in the decree; it was held, that the clerk had no authority to issue an execution on such decree without an order of the court or of the judge in vacation. *Shackelford v. Apperson*, 6 Gratt. 451.

5. Justice's Judgment.

On Transcript of Judgment.—Section 118, ch. 50, Code, W. Va. provides that "the person in whose favor a judgment is rendered by a justice, or who is entitled to receive the money due thereon, or any part of it, may file in the clerk's office of the circuit court of the county in which the judgment was rendered, a transcript thereof, certified by the justice who has the lawful custody of the docket in which such judgment is entered; and the said clerk may issue execution thereon in the same manner, and with like effect as if the judgment had been rendered by the circuit court." *Erb v. Hendricks Co.*, 50 W. Va. 28, 40 S. E. 338; *Collins v. Mann*, 15 W. Va. 171, 189; *Lanham v. Lanham*, 30 W. Va. 222, 4 S. E. 273.

Where Transcript Not Filed.—An execution issued by the clerk of the circuit court upon a judgment of a justice, without a transcript of such judgment having been filed in such clerk's office as required by § 118, ch. 50, W. Va. Code, 1899, is void as between the parties. *Steringer v. Mackie* (W. Va.), 49 S. E. 942.

On Abstract of Judgment.—The filing of an abstract of a judgment of a justice in a clerk's office of the county in which the judgment was rendered, confers no authority on the clerk of the circuit court to issue an execution or such judgment. *Steringer v. Mackie* (W. Va.), 49 S. E. 942.

6. Sci. Fa. Where Defendant Makes Default.

If a writ of scire facias is returnable at rules and the defendant makes default, there should be an award of execution. *McVeigh v. Bank*, 76 Va. 267; *Williams v. Crawford*, 7 Gratt. 202.

7. Decrees in Chancery.

In *Shackelford v. Apperson*, 6 Gratt. 451, the court said: "It is only by force of our statute law that process of execution can be sued out upon decrees in chancery. Our act concerning executions, 1 Rev. Code, p. 545, § 55, authorizes such process to be issued by the clerk, on the application of a party who has obtained a final decree for lands, * * * in like manner as upon a final judgment at law." See also, *Windrum v. Parker*, 2 Leigh 361; *Snively v. Harkrader*, 30 Gratt. 487.

By the execution law of 1793, § 53; (§ 55; ch. 134, Rev. Code, Ed. 1819), parties were allowed to sue out common-law executions upon decrees in chancery, which execution the law declared should be executed and returned, and have the same operation and force, to all intents and purposes, as similar process at common law. *Skipwith v. Clinch*, 3 Call 86.

8. Conditional Decree.

Directing Executor to Pay Certain Sums Conditionally.—An execution can not be issued and enforced against an executor where there has been a conditional decree directing the executor to pay certain sums due by his testator, or due from him in his fiduciary capacity, when he shall have collected certain other claims or debts coming to his testator's estate; without further proceedings in the case, and in the court where such decree has been rendered. *Gay v. Skeen*, 37 W. Va. 582, 15 S. E. 64.

On Award of Arbitration.—Where a matter in controversy is referred to arbitrators, the award to be entered as the decree of the court, the award is made of an amount to be paid upon the fulfilment of certain conditions and entered as the decree of the court and the plaintiffs in such controversy come into court four or five years after the decree, asking for an award of execution for the sum decreed thereon conditionally; plaintiffs having had posses-

sion of property referred to in the decree, it was held, that the court should direct an account of the subsequent transactions between the partners; and award execution in favor of the party ascertained by that account to be the creditor of the others. *Davis v. Crews*, 1 Gratt. 407.

Judgment "If Assets."—In *Braxton v. Wood*, 4 Gratt. 25, it was held that no execution can issue upon a judgment "if assets."

C. WHEN ISSUED.

See post, "Stay of Execution," VII.

1. After What Time Execution May Issue.

As Soon as Possible after Adjournment.—It was held, in *Evans v. Greenhow*, 15 Gratt. 153, 159, that it is the duty of the clerk, in all cases, to issue the execution as soon as possible after the adjournment of the court, unless he be instructed to the contrary by the plaintiff or his attorney.

After Ten Days from Date of Judgment or Decree.—Section 3600 of the Va. Code provides that: "Any court, after the fifteenth day of its term, may make a general order allowing executions to issue on judgments and decrees after ten days from their date, although the term at which they are rendered be not ended. For special cause, it may, in any particular case, except the same from such order, or allow an execution thereon at an earlier period." *Baker v. Swineford*, 97 Va. 112, 114, 33 S. E. 542; *Enders v. Burch*, 15 Gratt. 64, 71.

A circuit court after the fifteenth day of the term may make a general order allowing executions to issue on judgments or decrees after ten days from their date, although the term at which they are rendered be not ended. For special cause it may, in any particular case, except the same from such order or allow an execution thereon at an earlier period. W. Va. Code, ch. 131, § 21; Va. Code (1849), ch. 177, § 21; *Enders v. Burch*, 15 Gratt. 64.

2. Before What Time Execution Must Issue.

In Virginia—One Year.—Section 3577 of the Virginia Code provides that: an execution may be issued, on a final decree within one year. *Serles v. Cromer*, 88 Va. 426, 13 S. E. 859; *Hamilton v. McConkey*, 83 Va. 533, 5 S. E. 724.

The fact that an execution was issued irregularly and unlawfully after the expiration of more than a year and a day from the time of the decree, without any previous proceeding by way of scire facias or otherwise to authorize the same, is not such irregularity as would render the execution void, but only voidable. *Beale v. Botetourt*, 11 Gratt. 278; *Spotts v. Com.*, 85 Va. 531, 8 S. E. 375.

In West Virginia—Two Years.—In West Virginia an execution may be issued within two years after the date of the judgment. *Gardner v. Landcraft*, 6 W. Va. 36. See W. Va. Code, ch. 139, § 10.

After Dissolution of an Injunction to a Judgment.—Upon the dissolution of an injunction to a judgment, execution may issue thereon within a year and a day from the dissolution of the injunction without a scire facias, though the injunction was in force for more than ten years. *Hutsonpiller v. Stover*, 12 Gratt. 579.

In *Hutsonpiller v. Stover*, 12 Gratt. 579, the court said: "It is clear, therefore, that where the plaintiff is prevented by injunction from proceeding to execution, he may at any time within the year after its dissolution, sue out execution without scire facias; and this, where the parties remain unchanged, whether the injunction have continued for more or less than ten years from the date of the judgment. A scire facias is no more necessary in the former case than in the latter, the reason for dispensing with it being exactly the same in both. Nor will the statute of limitations forbidding exe-

cution after the expiration of ten years from the date of the judgment apply, because notwithstanding the general terms employed, it must be understood to embrace only the cases in which the party may levy his execution if he will, and not those in which he is positively prohibited by legal process from so doing; and where the injunction continues for more than ten years, the plaintiff is equally restrained from levying his execution during the whole period as during the year after the date."

Where Order of Dissolution Appealed.—If proceedings on a judgment at law be enjoined by a court of chancery, and the injunction be afterwards dissolved, and on appeal the order of dissolution is affirmed in omnibus, an execution may be sued out on the judgment at law, before the decree of affirmation is entered up in the court of chancery. *Epes v. Dudley*, 4 Leigh 145.

After Stay of Execution on Error.—In *Hutsonpiller v. Stover*, 12 Gratt. 579, the court said: "If the defendant bring error and thereby hinder the plaintiff from taking execution within the year, and the plaintiff in error be nonsuited or the judgment affirmed, the defendant in error may proceed to execution after the year without scire facias, because the writ of error is a supersedeas to the judgment, and the plaintiff must acquiesce till he hears the judgment above."

Effect of Stay Law.—In computing the time within which an execution was to be sued out, the time between January 1, 1869, and March 29, 1871, was excluded by express statutory provision. *Fadeley v. Williams*, 96 Va. 397, 31 S. E. 515; *James v. Life*, 92 Va. 702, 24 S. E. 275. See § 3577, Va. Code. *Adams v. Logan*, 27 Gratt. 201; *Shipley v. Pew*, 23 W. Va. 487; *Hamilton v. McConkey*, 83 Va. 533, 5 S. E. 724.

Under the provisions of the act of the 29th of March, 1862, generally known as the "stay law," no writ of

fieri facias could be issued while that act remained in force. *Adams v. Logan*, 27 Gratt. 201.

Where a creditor gave up a substantial part of a debt due before April 21, 1865, in consideration of a new security for a part of it, such new security came within the meaning of the act of March 21, 1866, providing that no execution should issue, except in certain cases, until January 1, 1868, and excepting cases wherein the liability or debt was contracted or incurred after April 2, 1865. *Utterbach v. Rixey*, 18 Gratt. 313.

After Ten Years.—In West Virginia it is provided that no execution shall issue on any judgment after ten years from its date, with certain stated exceptions. See *Bank v. Hays*, 37 W. Va. 475, 16 S. E. 561; *Spang v. Robinson*, 24 W. Va. 327; *Shipley v. Pew*, 23 W. Va. 487; W. Va. Code, ch. 139, § 11.

In West Virginia it is held, that the statute providing that no execution shall issue on any judgment after ten years from its date, applies to judgments rendered prior to the first day of April, 1860, when the Code took effect. *Bank v. Hays*, 37 W. Va. 475, 16 S. E. 561; *Spang v. Robinson*, 24 W. Va. 327.

On Judgment of Justices.—Section 131, ch. 50, W. Va. Code, provides that "executions for the enforcement of the judgment of a justice in a civil action may be issued * * * at any time within three years from the entry of the judgment," etc. *Lowther v. Davis*, 33 W. Va. 132, 10 S. E. 20.

3. Teste.

Where Writ Tested after Plaintiff's Death.—If an execution be tested after the plaintiff's death it is irregular on its face. *May v. State Bank*, 2 Rob. 56.

Where Writ Tested before Party's Death.—If an execution is tested before the party's death it is to be considered as regular, notwithstanding the fact that it is issued afterwards. *May v. State Bank*, 2 Rob. 56.

Conclusiveness as between Parties.—

As between the parties, an execution has relation to its teste. *May v. State Bank*, 2 Rob. 56.

D. IN CONJUNCTION WITH OTHER WRITS.

Distringas and Fi. Fa.—In *Garland v. Bugg*, 5 Munf. 166, it was held, that there could be no difficulty arising from the distringas and fi. fa. being both in operation at the same time, for a party, by suing out a second execution before the property taken on the first should be sold, abandoned the lien given by the first.

Ca. Sa. and Fi. Fa.—In *Garland v. Bugg*, 5 Munf. 166, it was held, that a ca. sa. and fi. fa. might issue together, but both could not be executed; if one should be executed, the court on motion would quash the other.

E. AFTER DEATH OF PARTY IMPRISONED UNDER CA. SA.

At common law where the defendant was taken on a ca. sa., if he died imprisoned the plaintiff might have a fi. fa. against his goods. *Garland v. Bugg*, 5 Munf. 166.

F. IN WHOSE FAVOR ISSUED.

On Assigned Judgment.—The assignee of a judgment, acquires the ancillary right of execution and may, upon sufficient proof of his rights, demand an issuance of the writ. *Wallop v. Scarburgh*, 5 Gratt. 1, 5; *Reinhard v. Baker*, 13 W. Va. 805.

Equitable Rights.—A stranger having acquired an equitable right to the benefit of an execution, or to the property upon which it is levied, will generally have authority to sue out a writ of execution. *Wallop v. Scarburgh*, 5 Gratt. 1; *Reinhard v. Baker*, 13 W. Va. 805.

Claimant Must Show Ownership.—Where a party claims as equitable owner the right to sue out an execution in the name of the plaintiff, such person, claiming the right to control the execution must show himself to be

such equitable owner. *Reinhard v. Baker*, 13 W. Va. 805.

Writs May Issue Severally.—In *Stuart v. Heiskell*, 86 Va. 191, 9 S. E. 984, where there were two complainants before the court, one by original bill and the other by cross bill, it was held, that a provision in the decree giving them the right to have executions severally was both proper and in accordance with the usual practice.

In Whose Name Issued.—After a judgment has been assigned, an execution thereon should be issued in the name of the assignor and not in the name of the assignee, though the court will not permit the former to control the execution. *Reinhard v. Baker*, 13 W. Va. 805; *Clarke v. Hogeman*, 13 W. Va. 718.

A stranger having acquired an equitable right to the benefit of an execution, or to the property upon which it is levied, if he wish to issue the execution he must do so in the name of a legal party to the process or one who can be made so, and his authority to use the name of such party will be so far recognized as to preclude the intervention of the party to the process for the purpose of defeating it. *Wallop v. Scarburgh*, 5 Gratt. 1; *Reinhard v. Baker*, 13 W. Va. 805.

In the Name of Extinct Corporation.—It is clear that if, after judgment in favor of a corporation, the corporation becomes extinct by the expiration of the term of existence granted by the charter, no execution on such judgment can regularly be sued out in the name of the corporation. *May v. State Bank*, 2 Rob. 56.

G. AGAINST WHOM ISSUED.**1. Municipalities.**

A writ of fieri facias may issue against a political public municipal corporation upon a judgment for a debt or damages rendered by a court of competent jurisdiction in the state. *Brown v. Gates*, 15 W. Va. 131.

2. Personal Representatives.

Defendant Dying after Judgment.—

Where the defendant dies after the judgment is entered, since the execution goes only against the personalty, it must issue against the personal representatives. *Maxwell v. Leeson*, 50 W. Va. 361, 40 S. E. 420.

De Bonis Propriis.—See the title EXECUTORS AND ADMINISTRATORS.

Where there is a judgment or decree de bonis propriis against a personal representative, the execution thereon should not be against the goods and chattels of the decedent in his hands to be administered, but against his own goods and chattels. *Moore v. Ferguson*, 2 Munf. 421; *Barr v. Barr*, 2 Hen. & M. 26.

Upon a judgment or decree de bonis testatoris against a personal representative, the execution should issue against the assets of the decedent, in the hands of the personal representative, not against the property of the latter in his own right. *Beale v. Botetourt*, 10 Gratt. 278.

3. Where Judgment Is against Several Parties.

Where There Is a Joint Judgment.—

Ir. Humphrey v. Hitt, 6 Gratt. 523, 52 Am. Dec. 134, there is a dictum by Baldwin, J., to the effect that upon a joint judgment against two defendants, execution may issue against either. See also, *Knight v. Charter*, 22 W. Va. 422.

Where One of Several Defendants Dies.—Where a judgment is rendered against several defendants, and afterwards one of them dies, the execution should still be issued against all. *Holt v. Lynch*, 18 W. Va. 567.

Where There Are Separate Judgments or Claims.—Where separate judgments are obtained in favor of the same plaintiff against several defendants in different suits, the execution should issue severally. *Baltimore, etc., R. Co. v. Vanderwarker*, 19 W. Va. 265.

But in *Walker v. Com.*, 18 Gratt. 13, 50, it was held, that where in a proceeding at law against several parties, judgments against one or more are entered at one time, and against others at another time, one execution may issue against all.

A writ of execution is bad which issues in the name of one person, when it includes two distinct claims decreed to different persons. *Baltimore, etc., R. Co. v. Vanderwarker*, 19 W. Va. 265.

4. Party Discharged under Insolvent Oath.

Where a defendant had availed himself of the insolvent oath, surrendering all his property for the benefit of the commonwealth, a fi. fa. could not be entered after his discharge, because a surrender of all his personal property being a necessary prerequisite to his discharge, there is nothing left upon which a fi. fa. could operate. *Quinling v. Com.*, 2 Va. Cas. 494. See generally, the title BANKRUPTCY AND INSOLVENCY, vol. 2, p. 232.

5. Terre Tenant as Party.

A terre tenant need not be joined in issuing execution, since an execution does not either benefit or injure a terre tenant in West Virginia as his land can not be taken by it and the execution itself has no effect upon him directly. *Maxwell v. Leeson*, 50 W. Va. 361, 40 S. E. 420.

H. TO WHAT PLACE ISSUABLE.

An execution must issue to the county where the defendant lives in the first instance, unless he has removed his effects out of it. *Fleming v. Saunders*, 4 Call 563; *Byrdie v. Langham*, 2 Wash. 72.

I. EFFECT OF INSURANCE.

1. Upon Finality of Judgment.

When execution is issued upon judgment recovered during the term, the issuance of such execution renders the judgment final from the time when the execution may issue. *Enders v. Burch*, 12 Gratt. 64.

In the case of *James River, etc., Co. v. Lee*, 16 Gratt. 424, the case of *Enders v. Burch*, 15 Gratt. 64, is referred to by the judge who delivered the opinion, and it was said by him that "two of the judges who united in the decision entertain some doubt as to its correctness, and the court is therefore of opinion that a reargument of the question ought to be heard whenever it may come up for decision before a full court." *Baker v. Swineford*, 97 Va. 112, 115, 33 S. E. 542.

In *Baker v. Swineford*, 97 Va. 112, 116, 33 S. E. 542, the court said: "We have, then, two seemingly antagonistic principles. The statute law has declared that a court may, after the fifteenth day of its term, direct executions to be issued upon judgments after ten days from their date, although the term at which they were rendered be not ended; but observe the dissimilitude between the language used in § 3600 and that employed in § 3287. In the latter section, which applies to judgments in the office, it is expressly declared that they shall become final or the fifteenth day of the term, or on the last day of the term, whichever shall happen first; while § 3600 is silent as to the effect upon the judgment of the execution when issued. It might have said that, upon the issuing of the execution, the judgment should be final; it should have so said if that effect was intended to follow its issue."

In *Baker v. Swineford*, 97 Va. 112, 33 S. E. 542, the court said: "We are of opinion that § 3600 of the Code was designed by the legislature for the purpose, and has the effect, of conferring upon courts authority to direct executions to issue upon judgments under the conditions therein set forth; but that it was not intended and does not impart to such judgments the quality of finality so as to deprive the court during the term of the power to correct, or if need be, annul an erroneous judgment."

In *Baker v. Swineford*, 97 Va. 112, 33 S. E. 542, the court said: "It is plain that the case of *Enders v. Burch* called for an opinion with respect to the power of courts over office judgments only, and what fell from the learned judge who delivered the opinion, as to the power of courts, after the fifteenth day of the term, with respect to judgments upon which it permits executions to issue after ten days from that date, was an obiter dictum, entitled, it is true, to great respect, but not constituting an authority binding upon us. As a dictum its force is impaired by what was subsequently said by the same court in *James River, etc., Co. v. Lee*, 16 Gratt. 424, above quoted. We are at liberty, therefore, to consider the question as an open one."

2. Upon Property in the Goods.

In *Lusk v. Ramsay*, 3 Munf. 417, the court said: "The delivery of an execution to the sheriff does not alter the property of the goods, for that still continues in the defendant. It, however, binds the property, by which nothing more is meant, than that any subsequent sale by the debtor will be void; the goods being, from that time, in the language of Gilbert (*Law of Executions*, pp. 13, 14), 'attendant to answer the execution,' or, as is more distinctly stated in 2 *Equity Cases Abr.* (p. 381), 'if the defendant makes an assignment of them, unless in market overt, the sheriff may take them in execution.'"

IV. Form and Sufficiency.

A. CONTENTS OF THE WRIT.

Must Describe the Judgment upon Which It Issues.—Section 135, ch. 50, W. Va. Code, provides that the execution must describe the judgment on which it is issued by stating the party in whose favor, and the party against whom, the justice by whom, and the county and district in which such judgment was rendered. *Lowther v. Davis*, 33 W. Va. 132, 10 S. E. 20.

Must Show against Whom It Issues.

—An execution must show on its face against whom it issues. *Taney v. Woodmansee*, 23 W. Va. 709, 714; *Lowther v. Davis*, 33 W. Va. 132, 10 S. E. 20.

Must Show for Whom It Issues.

An execution must show on its face for whom it issues. *Taney v. Woodmansee*, 23 W. Va. 709, 714; *Lowther v. Davis*, 33 W. Va. 132, 10 S. E. 20.

Must Show in What Cause It Issues.

—An execution must show in what cause the judgment or decree was entered. *Taney v. Woodmansee*, 23 W. Va. 709, 710; *Lowther v. Davis*, 33 W. Va. 132, 10 S. E. 20.

Must Conform with Judgment or Decree.—Every execution should conform accurately to the judgment or decree which it is used to enforce. *Snively v. Harkrader*, 30 Gratt. 487; *Taney v. Woodmansee*, 23 W. Va. 709; *Holt v. Lynch*, 18 W. Va. 567; *Baltimore, etc., R. Co. v. Vanderwarker*, 19 W. Va. 265; *O'Bannon v. Saunders*, 24 Gratt. 138; *Moss v. Moss*, 4 Hen. & M. 293; *Beale v. Botetourt*, 10 Gratt. 278, 282.

Irregularity in Caption.—An execution purported in its caption to have been issued by a justice of the peace of Hardy county, when in fact it was issued by a justice of Hampshire county. Held, that the error was immaterial, and that the writ was valid to give authority to an officer in Hampshire county to levy it. *Davis v. Davis*, 2 Gratt. 363.

Endorsement Stating Death of One of Several Defendants.—An execution issues in the name of four judgment debtors, George Lynch, Jr., George Lynch, George W. Silcott and Peregrine Hays; the clerk issuing the execution endorses thereon, "the defendant, George Lynch, has departed this life;" there is no law requiring or authorizing such endorsement; and it is a mere nullity, having no effect upon the execution or the sheriff's duties under it. *Holt v. Lynch*, 18 W. Va. 567, 568.

Where Execution Issued for Benefit

of Other than Plaintiff.—Section 3, ch. 140, of the Code of W. Va. which provides that: "Where an execution issues on a judgment for the benefit, in whole or in part, of any person other than the plaintiff, if the fact appear by the record, the clerk shall, in the execution of an endorsement thereon, state the extent of the interest therein of such person; and he (either in his own name or that of the plaintiff) may, as a party injured, prosecute a suit or motion against the officer," does not apply to an execution in the name of a receiver of a court of equity. *Baltimore, etc., R. Co. v. Vanderwarker*, 19 W. Va. 265.

Interest.—According to the act of April 1, 1805, the clerk in issuing executions is to include interest, even though interest is neither mentioned in the declaration, nor in the promise upon which the action was brought. *Eaird v. Peter*, 4 Munf. 76; *Wallace v. Baker*, 2 Munf. 334.

Issuing against Executor.—The law prescribes no form of execution against an executor. The execution ought, of course, to show that it is to be levied *de bonis testatoris*. *Beale v. Botetourt*, 10 Gratt. 278.

In an action upon the official bond of an executor against himself and his sureties for a devastavit, upon the plea of conditions performed, the execution which issued on the decree *de bonis testatoris*, directed the sheriff to levy the debt of the goods and chattels of B., executor of L., instead of the goods and chattels of L. in the hands of B. to be administered. This is an error of form and not of substance, and the execution having been returned, "no assets in the executor's hands," and no motion having been made to quash it, it must be regarded as an execution against the executor as such, and not in his own right. *Beale v. Botetourt*, 10 Gratt. 278.

B. VALIDITY OF THE WRIT.

Presumption of Validity.—Until an

execution is avoided, it must be regarded as valid. *Beale v. Botetourt*, 10 Gratt. 278; *Fulkerson v. Taylor*, 46 S. E. 309.

Effect of Irregularity.—An irregularity in the issuance of a writ of execution does not render the execution void but merely voidable. *Beale v. Botetourt*, 10 Gratt. 278.

Validity of Execution Issued Contrary to Agreement of Parties.—Until avoided, an execution issued in contravention of the agreement of the parties, is a valid execution, and can not be assailed by plea or proof in a chancery suit to enforce the judgment on which it issued. The chancery suit is a collateral suit. *Fulkerson v. Taylor*, 102 Va. 314, 46 S. E. 378.

An execution issued in contravention of the agreement of the parties is not void, but voidable. *Fulkerson v. Taylor*, 102 Va. 314, 46 S. E. 378.

Insufficient Attestation.—A writ of execution has been held valid although the attestation of the clerk on an execution failed to specifically show the court of which he was clerk but it was apparent from the face of the writ and the law, that he was clerk of the county court in this, that it commanded the officer to "have the same before the justices of our said court at rules to be held in the clerk's office thereof" since only the county court is held by "the justices." *Collins v. Mann*, 15 W. Va. 171.

Correction of Writ by Clerk.—O. and McG. confessed a judgment in favor of W. subject, however, to sundry credits. Execution was issued thereon without endorsing the credits. After a levy had been made, O. & McG. gave notice to W. that they would move to quash the execution because no credits were endorsed, and hence it was a variance from the judgment. Previous to any sale by the sheriff under the levy, the clerk who issued the execution endorsed the credits on it, and they were allowed to O. and McG., by

the sheriff, in the sale of the property and settlement of the execution. It was held, that the endorsement by the clerk cured the defect. *Williamson v. McGrew*, 1 W. Va. 84.

An execution purporting to be issued upon the judgment of a justice, when there is in fact no such judgment, but simply the verdict of a jury, is void. *Lowther v. Davis*, 33 W. Va. 132, 10 S. E. 20.

Conclusiveness in Collateral Suit.—So long as an execution remains unquashed, neither the defendant, nor any other person, can avoid it in any collateral suit, by pleading or proving that it was irregularly issued. *Beale v. Botetourt*, 10 Gratt. 278.

V. Alias or New Execution.

A. WHEN PROPER.

General Rule.—At any time after an execution is issued and before the sale of the property against which the execution is issued, the property remains in fieri and may, in a certain manner and under certain circumstances, be so undone as that the plaintiff may be placed in the same situation in which he was before he sued out the execution and may therefore, sue out a new execution. *Walker v. Com.* 18 Gratt. 13; *Humphrey v. Hitt*, 6 Gratt. 509, 52 Am. Dec. 131, 134.

Until the plaintiff "has gotten to the end of his suit;" in other words, until he has gotten satisfaction of his demand, or what is equivalent thereto, he may continue to prosecute his remedy to judgment and sue out execution after execution thereon; taking care not to oppress or injure the defendant or his sureties, if there be any. *Walker v. Com.*, 18 Gratt. 13, 98 Am. Dec. 631; *Puryear v. Taylor*, 12 Gratt. 401.

Where First Writ Not Returned.—If the first writ of execution be not returned, a second will be granted. *Windrum v. Parker*, 2 Leigh 361.

Where First Execution Partially Satisfied.—If the sheriff returns, that he

can not find sufficient property, but only to a certain value, no new execution can issue, until the officer has proceeded to make what he can by virtue of the first execution. *Ward v. Vass*, 7 Leigh 135.

Under an execution, of which there was no return by the officer, it appeared that some shares of stock belonging to the debtor had been sold to satisfy the judgment; but the stocks did not bring enough to discharge the judgment, and it was held that the plaintiff could have another execution for the balance still due. *Fisher v. March*, 26 Gratt. 765; *Coleman v. Cocke*, 6 Rand. 618, 18 Am. Dec. 757.

Where Valuable Execution Has Been Executed.—Where an execution which is valuable, such as an *elegit*, *levari facias* or *fieri facias*, has been executed on the estate of the defendant, a new execution can never issue on the same judgment, until the first execution is quashed. *Ward v. Vass*, 7 Leigh 135; *Taylor v. Dundass*, 1 Wash. 94, 95.

Where Former Writ Unexecuted.—New executions are authorized to be issued after the return day of the first execution when on a former execution there is a return by which it appears that such former writ has not been executed and fully levied. *Sutton v. Marye*, 81 Va. 329; *Windrum v. Parker*, 2 Leigh 361.

First Writ Executed but Not Returned.—If the first writ of execution be executed, though not returned, a second execution will not be granted. *Windrum v. Parker*, 2 Leigh 361.

Where Sheriff's Return Is Amended.—Where a judgment was obtained on the twenty-first of August, 1847, on which execution issued on the twenty-sixth of August, 1847, which was placed in the hands of sheriff the same day, who returned "money made," but who, afterwards, by leave of the court, made an amended return, from which it appeared that he had received no money, but had taken property and choses in

action and credit upon his own indebtedness to the execution debtors; and after this amended return was made, the plaintiffs sued out a *scire facias* alleging that no execution had issued within a year; it was held, that this being the fact, the plaintiff had no right to sue out a "scire facias" to have execution awarded on the judgment. All he had to do after the sheriff amended his return was to cause another execution to issue and to dismiss his *scire facias*, as well as his proceeding by motion, to recover the amount of the execution from the sheriff and his securities, based upon the first return of the deputy. *Miller v. Cox*, 9 W. Va. 8.

Where Record Shows Sufficient Levy.—Where it appears by the record that the first execution was returned executed by an ample levy, and there being no return thereunder by which it appears that it was not fully and completely executed, there is no ground for the issuance of a new execution. *Sutton v. Marye*, 81 Va. 329.

The commonwealth got judgment against the sheriff of W. county and his sureties, and had a *fi. fa.* issued and levied. Upon return thereof, it had a *venditioni exponas* issued. Instead of this writ going to the sheriff, it was taken in charge by the auditor of public accounts. Nothing was done, and no other process issued for over sixteen years, when, in December, 1884, an alias *fi. fa.* was issued, levied and returned, and thereupon a writ of *venditioni exponas* was issued. It was held, that the alias *fi. fa.* was issued without authority of law. *Sutton v. Marye*, 81 Va. 329.

While Levy in Force.—As a general rule where an execution has been levied upon property, an alias execution is not issuable while such levy is still in force and remains undisposed of. *Bullitt v. Winstons*, 1 Munf. 269; *Windrum v. Parker*, 2 Leigh 361.

After Abandonment of Levy.—A plaintiff may always, with the consent

of all the defendants, abandon a levy upon the property of all or any of them, and afterwards sue out a new execution. *Walker v. Com.*, 18 Gratt. 13, 98 Am. Dec. 631.

If the levy of an execution be abandoned by the sheriff, with the consent of the defendant, without the concurrence or authority of the plaintiff, the latter may sue out a new execution. *Walker v. Com.*, 8 Gratt. 13, 98 Am. Dec. 631.

And if, by a misunderstanding of the directions of the plaintiff by the sheriff and the defendants, the property is released by the sheriff to them, the plaintiff may have a new execution. *Walker v. Com.*, 18 Gratt. 13, 98 Am. Dec. 631.

If the defendants in an execution be a principal and his sureties, and the property levied on be that of the sureties, the plaintiff may, with the consent of the sureties only, abandon the levy, and afterwards sue out executions against all the defendants. *Walker v. Com.*, 18 Gratt. 13, 98 Am. Dec. 631.

Where Payment Made after Return Day.—It seems to be well settled that where the debtor pays to the officer the amount of an execution after the return day thereof, and it does not appear that the execution was levied before the return day passed, and there is no return made upon the execution by the officer, the creditor may disregard such payment and cause another execution to be issued upon his judgment for the amount thereof. *Cockrell v. Nichols*, 8 W. Va. 159.

Where Property Removed after Levy.—Where property, against which an execution has been issued and the levy made, is by the defendant eluded or removed out of the reach of the sheriff, without the consent either of him or the plaintiff, the latter may sue out a new execution. *Walker v. Com.*, 18 Gratt. 13, 98 Am. Dec. 631.

Where Creditor Purchases the Property.—Where, upon the levy of a fi.

fa., the creditor purchases the property levied upon, the defendant is entitled to a credit to the amount; upon proof of which by return or otherwise, a new execution may issue for the balance. *Ward v. Vass*, 7 Leigh 135.

Where Property under Levy Discharged by Legal Process.—New executions will be granted after the return day of the first execution when on a former execution there is a return by which it appears that the property levied on has been discharged by legal process, which does not prevent a new execution on the judgment. *Sutton v. Marye*, 81 Va. 329.

While Forthcoming Bond in Force.—Where an execution has been levied, and a forthcoming or replevy bond given, a new execution can not issue while such bond is in force and has not been quashed. *Taylor v. Dundass*, 1 Wash. 92; *Downman v. Chinn*, 2 Wash. 189; *Randolph v. Randolph*, 3 Rand. 490; *Ward v. Vass*, 7 Leigh 135. If a forthcoming bond though defective is never quashed, the right to levy a new execution upon the original judgment is gone forever. *Trevillian v. Guerrant*, 31 Gratt. 525.

Where Forthcoming Bond Is Quashed.—Where a forthcoming bond has been quashed as faulty, the creditor has the right to resort to the original judgment and sue out a new execution thereon. *Trevillian v. Guerrant*, 31 Gratt. 525.

Where Plaintiff Has Sale Postponed.—A return by the sheriff to the effect that the plaintiff had directed the sheriff to put off the sale of property taken under execution, to a day after the return day and to suffer it to remain in the possession of the principal defendant, will prevent the clerk from issuing a new execution. *Bullitt v. Winstons*, 1 Munf. 269.

B. TIME OF ISSUANCE. In Virginia.

Where There Is Return on First Writ.—Where an execution has issued

on a judgment within a year from the date of the judgment, other executions may issue within twenty years from the return day of an execution on which there is a return by an officer. *Hamilton v. McConkey*, 83 Va. 533, 5 S. E. 724.

Where No Return on First Writ.—When execution has issued on a judgment within a year from the date of the judgment, other executions may issue within ten years from the return day of an execution on which there is no return by an officer. *Hamilton v. McConkey*, 83 Va. 533, 5 S. E. 724; *Serles v. Cromer*, 88 Va. 426, 13 S. E. 859.

In West Virginia.—According to statute in West Virginia, it is held, that where an execution issues within two years, other executions may be issued within ten years from the return day of the last execution on which there is no return, or which has been returned satisfied. *Shipley v. Pew*, 23 W. Va. 487, 494; *Werdenbaugh v. Reid*, 20 W. Va. 588, 596; *Laidley v. Kline*, 23 W. Va. 574; *Handy v. Smith*, 30 W. Va. 195, 3 S. E. 604; *Spang v. Robinson*, 24 W. Va. 327.

C. ABUSE OF RIGHT TO ISSUE.

The right of issuing numerous executions will not be permitted to be used for the purpose of unnecessarily oppressing or injuring the debtor. *Sutton v. Marye*, 81 Va. 329.

D. CHANGE OF EXECUTION.

In *Garland v. Bugg*, 5 Munf. 166, it was held, that the plaintiff might change his execution as often as he pleased, unless in the case of a valuable execution, in which there had not only been a seizure, but a satisfaction.

In *Coleman v. Cocke*, 6 Rand. 618, 18 Am. Dec. 757, it was held, that after the return of a fieri facias which has been satisfied in part only, the plaintiff may take out another kind of execution without pursuing the fi. fa. to a return of nihil. See the title ELEGIT, ante, p. 58.

VI. The Execution Lien.

As to surety's right to appeal from judgment discharging execution lien, see the title APPEAL AND ERROR, vol. 1, p. 471.

A. NATURE OF LIEN.

In *Trevillian v. Guerrant*, 31 Gratt. 525, the court said: "The lien acquired under section 3d and 4th of chapter 188 (Code, 1849), upon the debtor's choses in action, is, in its nature, substantially the same as the lien of the ca. sa. after the debtor had taken the oath of insolvency—a lien complete and unconditional, and in no manner impaired by the death of the debtor. The remedies afforded by the other sections of the same chapter (188) were designed simply to enforce this lien of the execution. The lien itself is as complete and perfect without them as with them. It continues in full force, although the creditor should never resort to those remedies. This is fully settled by the case of *Charron v. Boswell*, 18 Gratt. 216."

In *Humphrey v. Hitt*, 6 Gratt. 528, 52 Am. Dec. 134, it is said that the lien acquired by levying on a fi. fa. "is substantial and enduring, as much so as a mortgage or a pledge."

The lien of an execution upon the debtor's choses in action is a legal lien, and continuing in its nature; it does not cease with the return day, and it is good against all persons except an assignee for valuable consideration without notice. *Puryear v. Taylor*, 12 Gratt. 401; *Evans v. Greenhow*, 15 Gratt. 153; *Charron v. Boswell*, 18 Gratt. 216; *Trevillian v. Guerrant*, 31 Gratt. 525.

The lien which a creditor acquires by a levy of his execution upon personal property is, if not enforced by a sale thereof, only temporary. *Carr v. Glasscock*, 3 Gratt. 343.

B. COMMENCEMENT OF LIEN.

From Teste.—At common law, a fieri facias bound the goods from its

teste. *Turnbull v. Claibornes*, 3 Leigh 392; *Lusk v. Ramsay*, 3 Munf. 417.

By Delivery to Officer.—A fieri facias constitutes a lien from the time it is delivered to the officer to be executed. *Baltimore, etc., R. Co. v. Wilson*, 2 W. Va. 528; *Pegram v. May*, 9 Leigh 176; *Evans v. Greenhow*, 15 Gratt. 153; *Walker v. Com.*, 18 Gratt. 13, 98 Am. Dec. 631; *Purvey v. Taylor*, 12 Gratt. 401; *Trevillian v. Guerrant*, 31 Gratt. 525; *Frayser v. Richmond, etc., R. Co.*, 81 Va. 392; *Hicks v. Roanoke Brick Co.*, 94 Va. 741, 27 S. E. 596; *Boisseau v. Boss*, 100 Va. 207, 209, 40 S. E. 647, 93 Am. Rep. 956; *Huling v. Cabell*, 9 W. Va. 522, 27 Am. Rep. 562; *Wiant v. Hays*, 38 W. Va. 681, 18 S. E. 807; *Turnbull v. Claibornes*, 3 Leigh 392; *Charron v. Boswell*, 18 Gratt. 216; *Crump v. Com.*, 75 Va. 922; *Lusk v. Ramsay*, 3 Munf. 417.

Effect of Conditional Instruction as to Levy.—A creditor delivers a fi. fa. to a deputy sheriff acting in a different district of the county from that in which the debtor resides, in order by such delivery to bind the debtor's property, but with directions to the deputy to hold it till a future day, and then to transfer it to the deputy of the district in which the debtor resides, to be by him levied, unless the deputy should be paid in the meantime, or unless the deputy should bring his property to the district of the first deputy to be sold, in which case the first deputy was to levy the execution upon it. It was held, that the writ became a lien from the time it was delivered to the officer notwithstanding the fact that the officer was instructed not to levy unless the conditions should be carried out. *Pegram v. May*, 9 Leigh 176.

And in *McKenzie v. Wiley*, 27 W. Va. 658, the court said: "Where the creditor has a judgment upon his debt and an execution thereon in the hands of the sheriff, such creditor by the levy of the execution on the property of the debtor acquires a specific lien on such property."

By Levy.—But in *Humphrey v. Hitt*, 6 Gratt. 528, 52 Am. Dec. 134, the court said: "The delivery of the execution to the sheriff is not properly speaking, a lien upon the goods of the debtor. It is the levy which makes the lien; that, it is true, has relation, to some extent (i. e., as against mesne purchasers, but not as against other execution creditors) to the delivery to the sheriff, but in like manner and to the like effect, and upon the same policy that a judgment lien on lands has relation to the first day of the term. There can be no relation of a judgment lien without a judgment, and so there can be no relation of a levy lien without a levy."

After Notice.—The statutes after providing for an execution lien, from the time of its delivery to the officer to be executed, on all the personal property to which the judgment debtor is entitled contain the exceptions, that in the case of husband, or parent, such estate as may have been listed and set apart as exempt from distress and levy under the Codes, and except that as against an assignee of such estate for valuable consideration, or a person making a payment to a judgment creditor, the lien by virtue of these statutes, shall be valid only from the time that he has notice thereof. *Huling v. Cabell*, 9 W. Va. 522; *Evans v. Greenhow*, 15 Gratt. 153. See W. Va. Code, ch. 141, § 2; Va. Code, § 3602.

C. NECESSITY FOR REGISTRY.

The lien of a fi. fa. is not required to be registered since it is not intended that purchasers for value and without notice should be affected by such lien. *Evans v. Greenhow*, 15 Gratt. 153.

D. PROPERTY SUBJECT.

See post, "Property Subject to Levy," IX, D.

1. At Common Law.

Property Subject to Levy.—At common law a fieri facias was a lien on all goods and chattels capable of being levied on from its date and actually

levied on before the return day. *Baltimore, etc., R. Co. v. Wilson*, 2 W. Va. 528; *Evans v. Greenhow*, 15 Gratt. 153.

2. Under the Statutes.

a. General Rule.

In addition to the lien on all the personal estate of the debtor on which the writ is capable of being levied, the issuance of a *fi. fa.* gives a lien on all the personal estate of or to which the judgment debtor is or may afterwards and before the return day of the said writ become possessed or entitled, although not levied on or capable of being levied on before the return day with certain exceptions. *Evans v. Greenhow*, 15 Gratt. 153; *Boisseau v. Bass*, 100 Va. 207, 209, 40 S. E. 647, 93 Am. Rep. 956; *Hicks v. Roanoke Brick Co.*, 94 Va. 741, 749, 27 S. E. 596; *Swann v. Summers*, 19 W. Va. 115; *Frayser v. Richmond, etc., R. Co.*, 81 Va. 388, 392; *Davis v. Bonney*, 89 Va. 755, 760, 17 S. E. 229; *Huling v. Cabell*, 9 W. Va. 522, 27 Am. Rep. 562; *Wiant v. Hays*, 38 W. Va. 681, 18 S. E. 807, 808; *Price v. Thrash*, 30 Gratt. 515; *Crump v. Com.*, 75 Va. 922. See Va. Code, § 3602; W. Va. Code, ch. 141, § 2.

Jurisdiction for Enforcement Immaterial.—The execution lien as provided for under § 2, ch. 141, West Virginia Code, includes choses in action, whether they are capable of being enforced in a common-law court or only in a court of equity. This is rendered still more apparent by the 15th section of chapter 218 of acts of 1872-3, p. 639, which provides for the enforcement of this lien by suit either at law or in equity. *Swann v. Summers*, 19 W. Va. 115.

b. Choses in Action.

The lien of a *fi. fa.* includes all choses in action to which the debtor is entitled. *Huling v. Cabell*, 9 W. Va. 522, 27 Am. Rep. 562; *Swann v. Summers*, 19 W. Va. 115; *Ambler v. Leach*, 15 W. Va. 677, 698; *Evans v. Greenhow*, 15 Gratt. 153.

In *Puryear v. Taylor*, 12 Gratt. 401, the court said: "It was obviously the purpose of the general assembly to save to the creditor the rights which he might have acquired if the former laws (allowing *ca. sa.*) had continued to exist, and to give him a new and adequate remedy to enforce his rights. The revisors in their report to the general assembly, p. 926, say, that 'this chapter (188) is framed to provide for the creditor (in place of taking the debtor under a *capias ad satisfaciendum*, and compelling him to take the oath of insolvency) as efficient remedies (in cases not provided for by the 1st and 2d sections) against all estate not subjected to other process, as he now has when the debtor is discharged by taking the oath of insolvency.' The revisors accordingly reported a section of the statute giving the creditor the remedy indicated by them; and the general assembly in substance adopted the suggestion, which is found embodied in § 3, ch. 188. This section gives to the *fi. fa.* a capacity to bind mere choses in action, by making it a lien thereon, with some exceptions, not material in this case."

In *Huling v. Cabell*, 9 W. Va. 522, the court said: "Now as Code of West Virginia, 1868, ch. 141, § 2, p. 671, makes expressly the lien on choses in action, called 'in this section 'personal estate not capable of being levied upon,' coextensive with the lien on personal property 'not levied on,' I conclude, that the lien of *fi. fa.* attaches to all choses in action of the debtor in existence up to the return day of the *fi. fa.*, except 'that as against a person making a payment to a judgment debtor, the lien shall be valid only from the time he has notice thereof.'"

c. Equitable Estate Generally.

A judgment creditor has a lien in equity on the equitable estate of the debtor, in like manner as he has a lien at law on his legal estate. *Coutts v. Walker*, 2 Leigh 268.

d. Limited to Actual Interest of Debtor.

Equity limits the lien of an execution on personal property to the actual interest of the debtor at the time such lien was acquired and will sell only such interest. *Horner-Gaylord Co. v. Fawcett*, 50 W. Va. 492, 40 S. E. 564.

e. Existing Subjects.

The lien of an execution can affect only such subjects as exist when it is alive. It is impossible to conceive the existence of a lien without a subject for it to operate upon. *Boisseau v. Bass*, 100 Va. 207, 213, 40 S. E. 647.

When a debt has a present existence, although payable at some future day, it is subject to the lien of a fi. fa. *Boisseau v. Bass*, 100 Va. 207, 40 S. E. 647.

f. Future Liability Dependent upon Contingency.

The lien of a fieri facias will not extend to a debt payable at some future date, resting upon a contingency that may or may not happen, and over which the court has no control. *Boisseau v. Bass*, 100 Va. 207, 40 S. E. 647.

In *Boisseau v. Bass*, 100 Va. 207, 40 S. E. 647, the court said: "In the case of *Hicks v. Roanoke Brick Co.*, 94 Va. 741, 27 S. E. 596, one of the questions involved was the right of priority of certain execution creditors of a contractor, by reason of their fi. fa. liens upon a fund in the hands of the city of Roanoke, it being fifteen per cent. of the cost of certain work, which the city had the right to retain until the entire work was completed, the work not being then finished. In delivering the opinion of the court, Judge Riely says that the executions were liens on the amount due by the city to Patterson, although the same could not be enforced until the completion of the work. The learned judge seems to have treated the fund in question as a debt in presenti solvendum in futuro. It does not appear from the opinion

that the question was raised, as to whether the liability of the city rested upon a contingency. Be that as it may, the decision is not approved, to the extent that it may be regarded as authority for the proposition that a future liability which depends wholly upon a contingency that may or may not happen is subject to the lien of an execution."

g. Property of Municipal Corporations.

Taxes and public revenues of a municipal corporation are not subject to the lien of a fi. fa. *Brown v. Gates*, 15 W. Va. 131.

But a corporation may sometimes own some descriptions of property strictly private or interests in such property or have debts of a strictly private nature due it which are subject to the lien of a fi. fa. *Brown v. Gates*, 15 W. Va. 131.

h. Legacies.

If a legacy is bequeathed to the defendant in an execution, a writ of fi. fa. issued in favor of the plaintiff gives him a lien on such legacy. *Swann v. Summers*, 19 W. Va. 115.

i. Percentage Due a Contractor.

A writ of fieri facias against a contractor is a lien upon the amount due by a city for work done between the date the writ was placed in the hands of an officer to be executed and the return day of the writ, although the amount be a per cent. of the contract price reserved as security for the completion of the work, and is not payable until the work is completed. If the work is subsequently completed, the lien may be enforced. *Hicks v. Roanoke Brick Co.*, 94 Va. 741, 27 S. E. 596.

j. Real Estate.

The execution has nothing whatever to do with the lien on real estate; it relates exclusively to liens on personal property. *Renick v. Ludington*, 14 W. Va. 367.

E. PRIORITIES.

As to priority of deeds of trust over

execution liens, see the title **MORTGAGES AND DEEDS OF TRUST**. As to priority of a lien by virtue of deed of trust for the benefit of creditors over an execution lien, see the title **ASSIGNMENTS FOR THE BENEFIT OF CREDITORS**, vol. 1, p. 837. As to priority of distress warrants over other executions, see the title **LANDLORD AND TENANT**.

1. Priority between Several Execution Liens.

General Rule.—As a general rule, where there are several executions against the same property, they take priority in the order in which they were delivered to the officer. *Charron v. Boswell*, 18 Gratt. 216; *Foreman v. Loyd*, 2 Leigh 284, overruling *Jackson v. Heiskell*, 1 Leigh 257.

As Affected by First Discovery of Assets.—According to the general rule, a junior execution creditor, obtains no priority by reason of first discovering assets. *Charron v. Boswell*, 18 Gratt. 216.

Confusion of Goods with After-Acquired Property.—Where executions of different dates are levied on a fluctuating stock of goods the senior execution has preference on all the goods in stock before its return day, and the onus probandi is on the junior execution creditor to show that any special articles came into the stock after the return day. *Carr v. Meade*, 77 Va. 142.

Common-Law Rule.—In *Humphrey v. Hitt*, 6 Gratt. 509, 527, 52 Am. Dec. 134, it was held, that the delivery of the execution to the sheriff was not a lien upon the goods of the debtor; but that it was the levy which made the lien. It followed of course, from this hypothesis, that the execution first levied had priority, even though it was not the first delivered to the officer. This case, however, was decided before the enactment of the statute, declaring that the execution lien should commence from the time of delivery to the officer.

2. As between Assignment for Benefit of Creditors and Execution Lien.

See the title **ASSIGNMENTS FOR THE BENEFIT OF CREDITORS**, vol. 1, pp. 830, 837.

An insolvent debtor may, notwithstanding his insolvency, make a valid assignment of a chose in action owned by him, and the bona fide assignee for value of such chose in action takes title thereto superior to the lien of a fieri facias against such debtor. It is immaterial whether the debtor intended to commit a fraud in making the assignment or not, if the assignee had no notice of such intent, or of the existence of the fi. fa. and pays value. *Shield v. Mahoney*, 94 Va. 487, 27 S. E. 23, 3 Va. Law. Reg. 302.

An assignment for the benefit of certain of their creditors made by an agricultural society of the proceeds arising from an agricultural fair, then advertised to be held on their ground in a few days thereafter, is void as against the lien of a fieri facias which went into the hands of the sheriff before such proceeds had been paid over to such creditors. *Huling v. Cabell*, 9 W. Va. 522.

3. As between Attachment and Execution Lien.

See the title **ATTACHMENT AND GARNISHMENT**, vol. 2, p. 105.

4. As between Distress Warrants and Execution Liens.

See the title **LANDLORD AND TENANT**.

5. As between Execution Creditors and Trust Creditors.

As to priority between execution liens and liens created by deeds of trust, see the title **MORTGAGES AND DEEDS OF TRUST**. As to priority of liens on railroad funds as between trust creditors and execution creditors, see the title **RAILROADS**.

6. As between Execution Lien and Intermediate Alienation.

An execution lien overreaches all intermediate alienations and incum-

branches without notice. *Evans v. Greenhow*, 15 Gratt. 153, 158.

7. As between Landlord's Lien and Execution Lien.

The landlord's lien, for a year's rent on the goods and chattels of his tenant, does not extend to protect them from being taken by virtue of any execution, except in cases where the said goods and chattels shall be in or upon the demised premises. *Geiger v. Harman*, 3 Gratt. 130; *Richmond v. Duesberry*, 27 Gratt. 213; *Wades v. Figgatt*, 75 Va. 573, 578; *Crawford v. Jarrett*, 2 Leigh 620, 638; *Upper Appomattox Co. v. Hamilton*, 83 Va. 319, 2 S. E. 195.

8. As between Mortgages and Execution Liens.

See the title MORTGAGES AND DEEDS OF TRUST.

9. Adjustment of Conflicting Liens.

A conflict of liens may be adjusted by a petition to the court, the force and effect of whose process is in question, or more satisfactorily by a proceeding in equity, to which all persons concerned should be made parties. *Moore v. Holt*, 10 Gratt. 284; *Charron v. Boswell*, 18 Gratt. 216, 220; *Erskine v. Staley*, 12 Leigh 406.

F. DURATION OF THE LIEN.

1. In General.

The execution lien acquired by the delivery of a fi. fa. to the officer continues until the right of the creditor to levy the writ under which the lien arises, "or to levy a new execution on his judgment, ceases, or is suspended by a forthcoming bond being given and forfeited, or by a supersedeas or other legal process." *Puryear v. Taylor*, 12 Gratt. 401; *Charron v. Boswell*, 18 Gratt. 216; *Trevillian v. Guerrant*, 31 Gratt. 525; *Frayser v. Richmond, etc., R. Co.*, 81 Va. 388, 392; *Spang v. Robinson*, 24 W. Va. 327; *Price v. Thrash*, 30 Gratt. 515.

In *Trevillian v. Guerrant*, 31 Gratt. 525, the court said: "It is manifest it was not the design of the fourth sec-

tion (Va. Code, § 3601) to provide for every case in which the lien of an execution might be at an end. It was unnecessary to do so. It was unnecessary to declare that the lien should cease upon the payment of the debt, or upon its discharge or extinguishment by any of the causes which under the general law would have that effect. In such cases the lien would, of course, cease without any special enactment so declaring. The real purpose of the section was to provide that certain causes should have the effect of putting an end to the lien, which perhaps of themselves, without some such provision, would not have accomplished that object. In other words, whenever the right to levy ceased or was even suspended by the forthcoming bond, given and forfeited, a supersedeas, or other legal process, the lien acquired by suing out the execution also ceased."

Until Expiration of Authority to Sell.—In *Carr v. Glasscock*, 3 Gratt. 354, it was held, that the lien which a creditor acquires by a levy of his execution upon personal property is, if not enforced by a sale thereof, only temporary, and expires with the authority to sell under the execution. *Hicks v. Roanoke Brick Co.*, 94 Va. 741, 749, 27 S. E. 596.

As Long as Judgment Can Be Enforced.—But under Virginia Code, § 3602, the lien of a writ of fieri facias continues so long as the judgment can be enforced. *Hicks v. Roanoke Brick Co.*, 94 Va. 741, 749, 27 S. E. 596; *Boisseau v. Bass*, 100 Va. 207, 40 S. E. 647, 92 Am. Rep. 956. See also, *Charron v. Boswell*, 18 Gratt. 216; *Puryear v. Taylor*, 12 Gratt. 401.

As Long as Right to Levy Exists.—"By this third section of ch. 141 of Code of West Virginia the lien of a fieri facias ceases, whenever the right to levy any execution, which may be sued out on the same judgment ceases, and the right to levy can not exist

after the right to sue out a scire facias on the judgment is barred. This bar is fixed by §§ 11 and 12, ch. 139, of the Code of 1869 at ten years, when no execution has ever been issued on the judgment; consequently, the right to levy any execution in such case must cease after ten years from the date of the judgment, and by the statute lien of a fieri facias must cease at the same time." *Werdenbaugh v. Reid*, 20 W. Va. 588, 599, quoted in *Spang v. Robinson*, 24 W. Va. 327, 338.

In *Spang v. Robinson*, 24 W. Va. 327, 338, the court said, the only question remaining to be considered is: Was the lien on all the choses in action of the debtor, James H. Robinson, created by the last execution returned on February 25, 1868, barred when this proceeding, which may be regarded as a proceeding to enforce such lien, was instituted. It was clearly barred, if § 3 of chapter 141 of the Code of West Virginia applies to judgments rendered before this Code went into effect. For its language is: "The lien acquired under the preceding section" (which is precisely the same as the like section in the Code of 1849) "shall cease whenever the right of the judgment creditor to levy the writ of fieri facias, under which said lien arises, or to levy a new execution, or his judgment ceases or is suspended by an undertaking being given and forfeited or by an appeal or otherwise." The only change in this section from that in the Code of Virginia is that the words "or otherwise" are substituted for "or other legal process." But this, as is shown in the case of *Werdenbaugh v. Reid*, 20 W. Va. 588, 599, is a most important change.

2. On Leviable Property.

The lien, created by delivering a fi. fa. to the officer to be executed, on what is capable of being levied on, but is not levied on under the writ, on or before the return day thereof ceases on that day. *Spence v. Repass*, 94 Va. 716, 27 S. E. 583.

According to the rule in West Vir-

ginia, where the property is capable of being levied upon, the lien created by a fieri facias ceases with the return day of the writ, unless there has been a levy of the writ, or a docketing of the lien. *Wiant v. Hays*, 38 W. Va. 681, 685, 18 S. E. 807, 809.

Where Execution Is Levied.—If an execution is levied the lien thereby created will bind the property after the return day of the writ. *Wiant v. Hays*, 38 W. Va. 681, 18 S. E. 807, 809; *Grandstaff v. Ridgely*, 30 Gratt. 1.

Where Writ Is Docketed.—But chapter 141, W. Va. Code, makes the fieri facias a lien on property not leviable, and continues, if it does not create, the lien under chapter 140, on leviable property after its return day, if the fieri facias be docketed, as required by § 2. *Wiant v. Hays*, 38 W. Va. 681, 18 S. E. 807, 809.

3. On Unleviable Property.

But as to property which is not capable of being levied upon, an execution lien does not end with the return day of the writ creating the lien. *Wiant v. Hays*, 38 W. Va. 681, 18 S. E. 807, 809.

4. Continuation after Return Day.

The lien created by a fi. fa. continues after the return day of the execution. *Ambler v. Leach*, 15 W. Va. 677, 698; *Puryear v. Taylor*, 12 Gratt. 401; *Charron v. Boswell*, 18 Gratt. 216, 227; *Trevillian v. Guerrant*, 31 Gratt. 525; *Frayser v. Richmond*, etc., R. Co., 81 Va. 388, 393; *Hicks v. Roanoke Brick Co.*, 94 Va. 741, 749, 27 S. E. 596; *Grandstaff v. Ridgely*, 30 Gratt. 1, 15; *Werdenbaugh v. Reid*, 20 W. Va. 588, 600. See also, *Evans v. Greenhow*, 15 Gratt. 153.

Under § 3602, Va. Code, it is immaterial whether the return day of the execution is past or not. In each case, the lien exists and to the same extent. *Evans v. Greenhow*, 15 Gratt. 153.

In *Puryear v. Taylor*, 12 Gratt. 401, the court said: "It clearly appears that the legislature intended the lien to continue after the return day of

the *fi. fa.*; otherwise, it would have been useless to provide for preserving a lien if the lien should be regarded as already lost."

5. Effect of Death of Either Party.

The lien of a writ of *feri facias* upon the debtor's choses in action, although not asserted in the lifetime of the debtor or creditor, is not defeated or impaired by the death of either or both, and this lien may be enforced in a suit for the administration of the assets, or by the remedies provided in the same chapter, asserted in the proper court. *Trevillian v. Guerrant*, 31 Gratt. 525.

In *Trevillian v. Guerrant*, 31 Gratt. 525, it was held that the lien of an execution upon the debtor's choses in action, though not enforced in his lifetime, continues after his death as against the other creditors of the debtor. See also, *Frayser v. Richmond*, etc., R. Co., 81 Va. 388; *Allan v. Hoffman*, 83 Va. 129, 2 S. E. 602; *Hicks v. Roanoke Brick Co.*, 94 Va. 741, 750, 27 S. E. 596; *Werdenbaugh v. Reid*, 20 W. Va. 588, 599.

G. ABANDONMENT.

See post, "Loss of Lien," VI, H.

The lien acquired by placing a writ of execution in the hands of the sheriff is of so imperfect a nature as that the plaintiff may abandon it at pleasure by withdrawing his execution from the hands of the sheriff or by directing him not to levy it, without discharging the judgment or even affecting the liability of a surety who may be one of several defendants. *Walker v. Com.*, 18 Gratt. 13; *Humphrey v. Hitt*, 6 Gratt. 509. See also, *Rhea v. Preston*, 75 Va. 757, 758.

H. LOSS OF LIEN.

By Expiration.—See ante, "Duration of the Lien," VI, F.

Only by Act of Creditor.—The lien created by levying a *fi. fa.* "can be defeated only by the act of the creditor; for unless he interposes and releases or restores the goods, the money to the value of the levy, will inevitably

be made either out of the goods or out of the sheriff." *Humphrey v. Hitt*, 6 Gratt. 509, 523, 52 Am. Dec. 134.

By Stay of Proceedings under Direction of Creditor.—A mere suspension of proceedings on a levied execution by order of the creditor does not authorize a restoration of the property to the possession of the defendant. *Walker v. Com.*, 18 Gratt. 13, 98 Am. Dec. 631. See also, *Fisher v. Vanmeter*, 9 Leigh 18.

By Improper Instructions to Sheriff.—If a creditor, who has an execution levied on the property of his debtor, directs the sheriff not to sell it, but to leave it in the debtor's possession, his execution is fraudulent, and any other creditor may take the property in execution. *Claytor v. Anthony*, 6 Rand. 285, 305.

By Restoration of Goods.—When goods have been taken in execution under a *fi. fa.*, a direction given by the creditor to the sheriff to restore the goods to the possession of the debtor destroys the lien of the execution on the goods. *Fisher v. Vanmeter*, 9 Leigh 18; *Baird v. Rice*, 1 Call 18; *Bullitt v. Winstons*, 1 Munf. 269; *Patton v. Moore*, 16 W. Va. 428, 37 Am. Rep. 789.

By Change in Nature of Property.—If an engine and boiler, after being levied on under an execution, are with the consent of the execution creditor attached to a mill by the owner, who is the debtor, with the intent that they shall become a part of the realty, the lien of the execution is thereby released. *Patton v. Moore*, 16 W. Va. 428. See the title **FIXTURES**.

Effect of Return Fraudulently Procured.—As between the judgment debtor and the judgment creditor, an execution lien will not be discharged by a return made by the sheriff at the instance of such judgment creditor, where it is shown that the agreement to have the execution on the judgment returned satisfied, was procured by the

misrepresentation and fraud of the judgment debtor. *Renick v. Ludington*, 14 W. Va. 367.

By Abandonment.—Where the property levied on is left with the debtor and the levy abandoned, the lien is discharged, and other creditors may resort to such property in like manner as if no execution has issued. *Rhea v. Preston*, 75 Va. 757, 758. See also, *Walker v. Com.*, 18 Gratt. 13; *Humphrey v. Hitt*, 6 Gratt. 509.

By Levy on Specific Property.—In *Lusk v. Ramsay*, 3 Munf. 417, the court held, that a general lien on the debtor's property, arising from the delivery of the writ to the sheriff, is released by a particular one acquired upon the identical goods seized by a *fieri facias*; the court in its opinion in this case saying: "I infer this, as a corollary, from its being held that, by the seizure to the amount of the execution, the defendant is discharged; for that the plaintiff having made his election and taken his goods, no other remedy could be had against the defendant, but only against the sheriff."

By Forfeiture of Forthcoming Bond.—The lien by virtue of a writ of *fieri facias*, upon the property of the debtor, is not released by his giving a forthcoming bond, but continues until such bond is forfeited. *Lusk v. Ramsay*, 3 Munf. 417; *Purveyor v. Taylor*, 12 Gratt. 401. See the title FORTHCOMING AND DELIVERY BONDS.

Effect of Order to Postpone Sale.—When goods have been taken in execution under a *fi. fa.* a mere order given by the creditor to the sheriff to postpone the sale, without collusion, does not affect the lien of the execution. *Governor v. Vanmeter*, 9 Leigh 18. See also, *Walker v. Com.*, 18 Gratt. 13, 18 Am. Dec. 631.

By Taking Out Second Execution.—If a plaintiff sues out a second execution, before the property taken under the first is disposed of, he waives the first, and destroys the lien on the property taken under the first. *Echols v.*

Graham, 1 Call 492; *McKey v. Garth*, 2 Rob. 33, 40 Am. Dec. 725; *Garland v. Bugg*, 5 Munf. 166. See ante, "Alias or New Execution," V.

Effect of Quashing Second Execution.—The effect of an order quashing an execution on a judgment, because in violation of an express contract between the plaintiff and the defendant that no execution should issue for a given time, can not be construed as impairing or suspending, as against third persons, the lien of a prior execution issued on the same judgment, though in contravention of same agreement. *Baer v. Ingram*, 99 Va. 200, 37 S. E. 905. See post, "Motion to Quash," VIII, F.

I. EVIDENCE TO PROVE LIEN.

On a trial of a suggestion issued in pursuance of a *fieri facias* dated January 4th, 1864, which has been put in evidence, and a *fieri facias* dated December 10th, 1858, between the same parties, which does not appear to have created a lien because it was not in the hands of an officer to be executed, is offered in evidence, it can not be used to show any lien under the *fieri facias* of January 4th, as any lien, created by it, was other and distinct from the one under investigation. *Baltimore, etc., R. Co. v. Wilson*, 2 W. Va. 528.

J. ASSIGNMENT OF PROPERTY SUBJECT TO EXECUTION LIEN.

1. General Consideration.

In *Evans v. Greenhow*, 15 Gratt. 153, the court in commenting upon the question as to whether the purchasers for value and without notice should be affected by an execution lien said: "To give it that effect would not only be unjust to innocent persons, but would very much obstruct the free circulation of personal property, which the public interest requires and the law favors. It will not do to say that an assignee for the security of a pre-existing debt would only be placed in statu

quo, and would therefore not be injured by being deprived of the benefit of his lien. He may have reposed on that security and been thereby prevented from seeking satisfaction in any other way. At all events, having obtained that security bona fide, he ought not to be deprived of it, and is fairly entitled to all the advantages to which he would be entitled in any other case as a bona fide purchaser for value and without notice.

2. Unleviable Property.

a. Bona Fide Purchaser.

General Rule.—The lien of an execution is held, according to statute, not to affect a bona fide assignee of intangible property, for value and without notice of such lien. *Trevillian v. Guerrant*, 31 Gratt. 525; *Charron v. Boswell*, 18 Gratt. 216; *Evans v. Greenhow*, 15 Gratt. 153; *Puryear v. Taylor*, 12 Gratt. 401; *Huling v. Cabell*, 9 W. Va. 522, 27 Am. Rep. 562; *Wiant v. Hays*, 38 W. Va. 681, 18 S. E. 807.

Lien Docketed.—If the subject be unleviable property, like a chose, whether purchased within or after the lifetime of the fieri facias, and if it be docketed, as required in § 2, ch. 141, the lien is good against a purchaser, though he be a bona fide purchaser for value and without notice of the fieri facias otherwise than by the docketing. *Wiant v. Hays*, 38 W. Va. 681, 18 S. E. 807, 809.

Lien Not Docketed.—In *Wiant v. Hays*, 38 W. Va. 681, 686, 18 S. E. 807, 809, it is held, that under § 2, ch. 141, W. Va. Code, if the execution lien is not docketed, the lien will not affect the purchaser if he be a bona fide purchaser for value and without notice of the writ, and it makes no difference so far as the protection of the purchaser is concerned whether he purchase before or after the return day of the writ. *Evans v. Greenhow*, 15 Gratt. 153, 158. See also, *Shurtz v. Johnson*, 28 Gratt. 657, 667.

b. Purchaser without Value.

If the purchaser of intangible prop-

erty which is under the lien created by the issuing of a fi. fa., does not pay value for the property, he is not protected as a bona fide assignee. *Trevillian v. Guerrant*, 31 Gratt. 525; *Charron v. Boswell*, 18 Gratt. 216; *Evans v. Greenhow*, 15 Gratt. 153; *Puryear v. Taylor*, 12 Gratt. 401; *Huling v. Cabell*, 9 W. Va. 522, 27 Am. Rep. 562; *Wiant v. Hays*, 38 W. Va. 681, 18 S. E. 807.

c. Purchaser with Notice.

If the purchaser of intangible property, resting under a lien created by the issuance of a writ of execution, has notice of such lien, he will not be protected as a bona fide assignee. See *Trevillian v. Guerrant*, 31 Gratt. 525; *Charron v. Boswell*, 18 Gratt. 216; *Evans v. Greenhow*, 15 Gratt. 153; *Puryear v. Taylor*, 12 Gratt. 401; *Huling v. Cabell*, 9 W. Va. 522, 27 Am. Rep. 562; *Wiant v. Hays*, 38 W. Va. 681, 18 S. E. 807.

3. Leviable Property.

Purchase before Return Day.—Where the property is leviable, if it is purchased before the return day of the writ, the execution lien though not docketed is good, even against a bona fide purchaser for value and without notice. *Wiant v. Hays*, 38 W. Va. 681, 18 S. E. 807, 809.

Purchase after Return Day.—But, if purchased after the return day of the writ of fieri facias, the lien is not good against a bona fide purchaser for value, unless docketed, or unless he have notice of the writ; but, if either so docketed, or the purchaser have such notice, it is good against him. *Wiant v. Hays*, 38 W. Va. 681, 18 S. E. 807, 809.

Writ Executed.—If property is levied on, the execution lien is good against the purchaser, though for valuable consideration and without notice of the lien. *Huling v. Cabell*, 9 W. Va. 522.

Writ Unexecuted.—If an execution on leviable property be not levied before the return day, the lien created by placing the writ in the hands of an officer to be levied will not bind the

property in the hands of one purchasing it after the return day whether he had notice of the execution or not. *Wiant v. Hays*, 38 W. Va. 681, 18 S. E. 807, 809.

If the personal property subject to levy is not levied on, the execution lien is not good against the purchaser of such property for value and without notice of the lien. *Huling v. Cabell*, 9 W. Va. 522.

Retention of Possession by Buyer.

Where an execution was levied on a slave more than a year after the sale thereof, the seller having continued in possession, and the presumption arising from the inconsistency of the possession with the title claimed by the buyer not being repelled by any circumstances appearing in the case, but the circumstances on the contrary confirming the presumption of fraud, the sale was declared void as to the execution creditor. *Tavener v. Robinson*, 2 Rob. 280.

Necessity for Possession by Buyer.

—Upon a bona fide sale of personal property, though the buyer does not take possession at the time of the sale, yet if he gets possession before an execution is issued against the seller, his title is good against creditors. *McKinley v. Ensell*, 2 Gratt. 333.

Possession by Seller as Agent of Buyer.—A bona fide purchaser of personal property having gotten possession thereof before the issuing of an execution against the seller, his title is good against the creditor though after such possession by the buyer, he employs the seller as his agent to sell the property, and the seller is in possession as agent of the buyer at the time the execution issues and is levied upon it. *McKinley v. Ensell*, 2 Gratt. 333.

4. Docketing as Notice.

In West Virginia, by statute, the docketing of the lien is notice, even against a bona fide purchaser for value, who buys the property after the return day of the writ. *Wiant v. Hays*, 38 W. Va. 681, 685, 18 S. E. 807, 809.

VII. Stay of Execution.

See the titles APPEAL AND ERROR, vol. 1, pp. 433, 434, 516, 524, 527, 529; FORTHCOMING AND DELIVERY BONDS; RESTITUTION.

A. AGREEMENT FOR STAY.

A contract between a plaintiff and defendant in a judgment that no execution shall issue thereon for a given time is a personal matter between the parties, and no advantage can be taken of it by third persons not parties to the contract. *Baer v. Ingram*, 99 Va. 200, 37 S. E. 905.

B. BY SUIT TO ENFORCE CONTRACT FOR SALE OF DEBTOR'S LAND.

Where nonresident judgment creditors are summoned by order of publication and no order is made to suspend the issuing of executions, a suit to enforce a contract for the sale of the judgment debtor's land, is no such "legal process" as suspends judgment creditors' right to sue out executions. *Straus v. Bodeker*, 86 Va. 543, 10 S. E. 570.

C. BY DISMISSAL OF PETITION TO ENFORCE JUDGMENT LIEN.

In *Dabney v. Shelton*, 82 Va. 349, 4 S. E. 605, it was held, that petitions filed during the period of ten years after the rendition of judgment by the judgment creditor in a chancery suit brought to subject the lands of judgment debtor to the payment of judgment liens, and dismissed without any order on it except that of dismissal seven years after it was filed, did not suspend the right to sue out execution upon the judgment.

D. BY GARNISHMENT OF DEFENDANT.

Execution will not be suspended on a judgment against a nonresident on the grounds that the judgment debtor has been garnished as a debtor of the judgment plaintiff in the state wherein

he resided. *Shrewsbury v. Tufts*, 41 W. Va. 212, 23 S. E. 692.

E. BY DELIVERY OF SUSPENDING BOND.

See the title **SHERIFFS' SALES**.

The delivery to the sheriff of a suspending bond, as provided in § 4, ch. 107, of the West Virginia Code, by a claimant of property levied upon under a fieri facias, ipso facto stays the execution. *August v. Gilmer*, 53 W. Va. 65, 44 S. E. 143.

F. BY NOTICE OF MOTION TO QUASH.

The notice of a motion to quash an execution, whatever may be the ground on which the notice is based, does not of itself suspend the execution of the writ. *Snively v. Harkrader*, 30 Gratt. 487, 492.

VIII. Relief against Execution.

A. AUDITA QUERELA.

The audita querela is entirely superseded, in the Virginia practice, by the proceeding by motion to quash, as the latter is the cheaper and more convenient mode. *Windrum v. Parker*, 2 Leigh 361, 367; *Smock v. Dade*, 5 Rand. 644.

B. INJUNCTION.

As to injunction against issuing or enforcing a writ of execution, see the title **INJUNCTIONS**.

C. PROHIBITION.

As to relief against an execution by the writ of prohibition, see the title **PROHIBITION**.

D. WRIT OF ERROR.

Upon an appeal, from the judgment of an inferior court, errors in the execution or replevy bond, issued or taken after the judgment, will not be noticed. They are merely ministerial acts, and must be corrected in the same court upon motion; and if, on such motion, that court give an erroneous opinion, the party injured may then appeal and have it corrected in the appellate court. *Leftwich v. Stovall*, 1 Wash. 304, 306; *Moss v. Moss*, 4 Hen. & M. 293, 314.

E. WHERE JUDGMENT SET ASIDE.

When a judgment is set aside, the execution which issued upon it falls with it, without any express order to quash the execution. *Ballard v. Whitlock*, 18 Gratt. 235.

F. MOTION TO QUASH.

1. The Notice.

a. Necessity for.

The general rule seems to be that it is necessary that notice be given to the opposite party when a motion to quash is to be made. See *Dillard v. Thornton*, 29 Gratt. 392; *Snively v. Harkrader*, 30 Gratt. 487, 492; *Ballard v. Whitlock*, 18 Gratt. 235; *Hendricks v. Dundass*, 2 Wash. 50; *Beale v. Botetourt*, 10 Gratt. 278; *Windrum v. Parker*, 2 Leigh 361; *Reinhard v. Baker*, 13 W. Va. 805; *Ambler v. Leach*, 15 W. Va. 677; *Blair v. Henderson*, 49 W. Va. 282, 38 S. E. 552.

But in *Com. v. Hewitt*, 2 Hen. & M. 181, it was held, that a party may, without previous notice, move the court to quash an execution.

b. Time for Giving.

"Reasonable Notice."—All that is required in the matter of the notice of a motion to quash an execution is that it must be a "reasonable notice." Section 3599, Va. Code. *Dillard v. Thornton*, 29 Gratt. 392; *Snively v. Harkrader*, 30 Gratt. 487, 492; *Ballard v. Whitlock*, 18 Gratt. 235.

The length of notice of a motion to quash an execution is not ten days, but a reasonable time, to be judged of by the circumstances of each case. *Reinhard v. Baker*, 13 W. Va. 805; *Ambler v. Leach*, 15 W. Va. 677; *Hendricks v. Dundass*, 2 Wash. 50.

Before or after Return Day.—The constant practice of the courts is to permit notices, that a motion would be made to quash an execution, to be given as well before as after the return day of the execution, for the reason that the execution might be levied the day before the return day, and the defend-

ant might well be ignorant of its having been issued, till after the return day. *Reinhard v. Baker*, 13 W. Va. 805; *Ambler v. Leach*, 15 W. Va. 677.

c. Form of Notice.

The notice of a motion to quash an execution is not required to be in writing. *Dillard v. Thornton*, 29 Gratt. 392.

d. Evidence of Notice.

It was held, in *Ballard v. Whitlock*, 18 Gratt. 235, that, where the defendants being present by their counsel when the motion to quash an execution was made, they had reasonable notice of such motion.

e. Waiver of Notice.

Where a party appears generally and resists a motion to quash an execution, without objection for want of notice of the motion, he thereby waives the notice thereof required by § 17, ch. 140, of the West Virginia Code of 1899. *Steringer v. Mackie* (W. Va.), 49 S. E. 942.

f. Effect of Notice.

Whatever may be the ground on which the notice is based, the notice does not of itself suspend the execution of the writ. *Snively v. Harkrader*, 30 Gratt. 487, 492.

2. Grounds for Quashing.

Irregularity in Issuance.—It is well settled that a motion to quash is the proper remedy where an execution is irregular and has been issued without authority of law. *Lowther v. Davis*, 33 W. Va. 132, 10 S. E. 20; *State v. Brookover*, 38 W. Va. 141, 18 S. E. 476; *Reinhard v. Baker*, 13 W. Va. 805; *Baltimore, etc., R. Co. v. Vanderwarker*, 19 W. Va. 265, 266; *Taney v. Woodmansee*, 23 W. Va. 709, 714; *McCoy v. Allen*, 16 W. Va. 724; *Farmers' Bank v. Montgomery*, 11 W. Va. 169; *Taylor v. Dundass*, 1 Wash. 92, 94; *Downman v. Chinn*, 2 Wash. 189; *Hendricks v. Dundass*, 2 Wash. 50; *Shackelford v. Apperson*, 6 Gratt. 451; *Snively v. Harkrader*, 30 Gratt. 487, 492; *Beale v. Botetourt*, 10 Gratt. 278; *Steele v.*

Boyd, 6 Leigh 547, 553, 29 Am. Dec. 220; *Crawford v. Thurmond*, 3 Leigh 85; *Windrum v. Parker*, 2 Leigh 361; *Moss v. Moss*, 4 Hen. & M. 293; *Sutton v. Marye*, 81 Va. 329.

Irregular Issuance on Interlocutory Decree.—If an execution is issued on an interlocutory decree by the clerk without an order of the court, or the judge in vacation, the court may quash the execution in term. *Shackelford v. Apperson*, 6 Gratt. 451.

Issuance on Void Judgment or Decree.—A writ of execution which has issued on a void judgment or decree will be quashed. *McCoy v. Allen*, 16 W. Va. 724; *Farmers' Bank v. Montgomery*, 11 W. Va. 169; *Blair v. Henderson*, 49 W. Va. 282, 38 S. E. 552.

Where an office judgment is void because the affidavit was not filed until nearly five years after the time it should have been filed, and the judgment complained of was not entered for nearly two years after the filing of the affidavit, an execution on such judgment will be quashed; and on error an order to that effect will be allowed to stand notwithstanding the fact that the proceedings of the court in this case were coram non judice. *Farmers' Bank v. Montgomery*, 11 W. Va. 169.

Issuance on Erroneous Judgment.—An execution issued on an erroneous judgment will not be quashed by reason of the errors therein contained. *Blair v. Henderson*, 49 W. Va. 282, 38 S. E. 552.

Issuance on Judgment Erroneously Entered as Final.—When a fi. fa. is issued under a judgment which was erroneously entered as final within one month after the defendant was served with process, and there is a proceeding by suggestion against persons indebted to the defendant, such defendant may, upon proper notice, appear in such proceeding and have the judgment vacated and the execution thereunder quashed. *Dillard v. Thornton*, 29 Gratt. 392.

Issuance for Improper Purpose.—

Where a new execution is issued for the purpose of unnecessarily oppressing or injuring the debtor, a motion to quash will prevail. *Sutton v. Marye*, 81 Va. 329.

Issuance after Expiration of Proper Time.—

If an execution be issued without a scire facias, and the defendant move to quash it, the plaintiff may show that another execution was issued within a year and a day from the date of the judgment; or that he was prevented from issuing one by writ of error; injunction, cesset executio, or agreement of the parties, until within a year and a day next before the date of that which is moved to be quashed; and the motion will thereupon be overruled. *Beale v. Botetourt*, 10 Gratt. 278.

As to the necessity for revival prior to the issuance of an execution, see the title JUDGMENTS AND DECREES.

If an execution, irregularly issued without scire facias, be levied on the goods of the defendant, he would have some motive to have it quashed. But if it be returned nulla bona, he would have no such motive, unless he had good cause to show against the revival of the judgment; and would naturally be willing to waive his right to a scire facias. It is at least very doubtful whether he would be allowed to have the execution quashed, after long acquiescence, when the plaintiff may have lost his evidence to show that it was properly issued, and when his judgment may be barred by the act of limitations. *Beale v. Botetourt*, 16 Gratt. 278.

In *State v. Brookover*, 38 W. Va. 141, 18 S. E. 476, it was held, that an execution issued upon a judgment after two years from its rendition, without an order of court allowing its issuance, is properly quashed. *Hendricks v. Dundass*, 2 Wash. 50; *Reinhard v. Baker*, 13 W. Va. 803.

Failure to Conform with Judgment or Decree.—

On a motion to quash the execution, unless it appears that it substantially follows and agrees with the judgment or decree, on which it issues, it will be quashed. *Taney v. Woodmansee*, 23 W. Va. 709, 714.

Lack of Privity between Defendants.

—A decree is rendered against A. for four hundred and forty-three dollars and twenty cents, and against A. & E. for the costs; an execution is issued against A. & B. both for the four hundred and forty-three dollars and twenty cents and the costs; such execution should be quashed, as there is no privity whatever between A. & B. as to the four hundred and forty-three dollars and twenty cents against A., the court saying: "Here is an execution in favor of one against two for two distinct and separate amounts, with one of which the defendant, Lewis, had nothing whatever to do. There was no privity between Woodmansee and Lewis as to the four hundred and forty-three dollar and twenty cent debt, and yet the execution issued against Mrs. Lewis for this as well as for the costs. The court clearly erred in not quashing the execution for this fatal defect." *Taney v. Woodmansee*, 23 W. Va. 709, 710.

Issuance in Name of One against Two.—

An execution in the name of one person, which includes two distinct claims decreed to different persons, should be quashed. *Baltimore, etc., R. Co. v. Vanderwarker*, 19 W. Va. 265, 266.

Issuance against One Not a Party.—

If the clerk of an inferior court misconceive a judgment, and issue execution against any person not properly a party thereto, the remedy is by motion to quash the execution. *Moss v. Moss*, 4 Hen. & M. 293.

Process Not Served on Partner.—

Where a judgment is rendered against two partners on a partnership debt, and one of the partners has not been served

with process, nor appeared to answer the action, such judgment is valid as to the partner served with process; and an execution issued thereon should not be quashed, on his motion, on the sole ground that the process was not served on his copartner. *Lee v. Hassett*, 41 W. Va. 368, 23 S. E. 559.

Supplying Omitted Endorsements.—

Where judgment is confessed for an amount, subject to certain credits, and execution is issued, the credits not having been endorsed thereon, which omission was afterwards corrected by the clerk, the execution can not be quashed on the ground of such omission, the court in its opinion saying: "The objection taken by the defendants in error, was not that the execution was then variant from the judgment, but that it was so at the time it was issued by the clerk, and that the clerk transcended his powers and authority, by making the endorsement on the execution, whereby it was made to correspond with the judgment after the execution had issued and gone into the hands of the sheriff to be levied. But as I can see no possible injury or grievance that resulted to the defendants, by the endorsement of the credits, but on the contrary a positive benefit, I think it would be unreasonable to quash the same for this reason, and require the plaintiff in error to issue another execution, in order to reach the same end which had already been attained without injury to the defendants." *Williamson v. McGrew*, 1 W. Va. 84.

Issuance in Name of Extinct Corporation.—If an execution be sued out in the name of a corporation which has become extinct by the expiration of the term of its existence granted by its charter, after judgment in favor of such corporation, the execution will be quashed on showing the fact of the extinction of the corporation before the issuance of the execution. *May v. State Bank*, 2 Rob. 56.

Former Writ Executed.—A second

execution will be quashed when it is issued after a former one under which there has been levy on property sufficient to satisfy it. *Sutton v. Marye*, 81 Va. 329; *Garland v. Bugg*, 5 Munf. 166; *Beckley v. Palmer*, 11 Gratt. 625.

Where a motion is made to quash an execution on the ground that a previous execution had issued for the same debt, which execution it was alleged had been improperly quashed, the court will not inquire into the validity of the first execution, upon motion to quash the second, since the judgment of a competent court will be considered right until regularly reversed. *Jett v. Walker*, 1 Rand. 211.

Writ Fraudulently Executed.—Every court has a perfect right to watch over the execution of its judgment, and where its process has been fraudulently executed, to quash it, as being the best and speediest mode of doing justice. *Hendricks v. Dundass*, 2 Wash. 50, cited in *Snavely v. Harkrader*, 30 Gratt. 487, 492; *Steele v. Boyd*, 6 Leigh 559, 29 Am. Dec. 220; *Crawford v. Thurmond*, 3 Leigh 85.

Tender of Payment.—A tender of money in payment of a judgment, will not authorize the quashing an execution issued thereon, unless the tender is followed by the payment of the money into court, and a motion to enter satisfaction on the record. *Shumaker v. Nichols*, 6 Gratt. 592.

Payment after Return Day.—Where the debtor pass to the officer the amount of an execution after the return day thereof, and it does not appear that the execution was levied before the return day passed, and there is no return day upon the execution by the officer, such execution will not be quashed by reason of such payment to the officer. *Cockerell v. Nichols*, 8 W. Va. 159.

Where Sale Is Void.—In *Hamilton v. Shrewsbury*, 4 Rand. 427, there is a dictum to the effect that, where the sale, under a valid execution, is void,

or account of the interest or improper conduct of the sheriff, the court from which the execution issued, may correct such abuse of its own process, by quashing the execution. See also, *Hendricks v. Dundass*, 2 Wash. 50.

Proceeds of Sale in Hands of Sheriff.—In *Reinhard v. Baker*, 13 W. Va. 805, it was held, that if the money made by the sale of the property is still in the sheriff's hands, the writ may be quashed.

Judgment Satisfied.—Where a judgment had been paid before an execution thereon has been issued, it is proper to quash such execution upon motion. *Hall v. Taylor*, 18 W. Va. 544; *Howell v. Thomason*, 34 W. Va. 794, 12 S. E. 1088; *Smock v. Dade*, 5 Rand. 639, 16 Am. Dec. 780; *Crawford v. Thurmond*, 3 Leigh 85.

Where an execution has been issued and the defendant claims to have made certain payments in satisfaction of the judgment upon which the execution is issued, to the attorney of the plaintiff, the proper course for such defendant to pursue is to move the court to quash the execution. *Coleman v. Anderson*, 29 Gratt. 425.

3. Parties to the Motion.

In General.—A motion to quash a writ of execution must be made in the name of the party on the record, and must be against the other party on the record; a stranger to the writ can only make the motion in the name of a legal party to the process. *Wallop v. Scarborough*, 5 Gratt. 1.

Either Party.—A motion to quash an execution may be made by either the plaintiff or defendant in the execution. *Reinhard v. Baker*, 13 W. Va. 805; *Ambler v. Leach*, 15 W. Va. 677; *Hendricks v. Dundass*, 2 Wash. 50.

Stranger Holding Equitable Right.—A stranger having acquired an equitable right to the benefit of an execution, or to the property upon which it is levied, will generally have authority to object to its regularity. *Wallop v. Scarborough*,

5 Gratt. 1; *Reinhard v. Baker*, 13 W. Va. 805.

Stranger Must Object in Name of Party.—A stranger having acquired an equitable right to the benefit of an execution, or to the property upon which it is levied, in objecting to its regularity, must do so in the name of a legal party to the process, or one who can be made so; and his authority to use the name of the party to the process of a court of law, will be so far recognized by such court as to preclude the intervention of such party for the purpose of defeating it. *Wallop v. Scarborough*, 5 Gratt. 1; *Reinhard v. Baker*, 13 W. Va. 805.

4. Time for Making.

The motion to quash the execution need not necessarily be made before the writ has been returned, but may as well be made after the return. *Beale v. Botetourt*, 10 Gratt. 278; *Hendricks v. Dundass*, 2 Wash. 50; *Taylor v. Dundass*, 1 Wash. 92; *Reinhard v. Baker*, 13 W. Va. 805; *Claiborne v. Gross*, 7 Leigh 331, 344.

5. Jurisdiction.

In General.—Every court has a perfect right to watch over the execution of its process. *Hendricks v. Dundass*, 2 Wash. 50; *Snively v. Harkrader*, 30 Gratt. 487, 492; *Steele v. Boyd*, 6 Leigh 547, 553, 29 Am. Dec. 220.

By Court Rendering Judgment.—The court in which the judgment is rendered has ample power to superintend and control the execution of process thereon, and will take care to prevent its being perverted to purposes of injustice or oppression. *Walker v. Com.*, 18 Gratt. 13, 98 Am. Dec. 631; *Snively v. Harkrader*, 30 Gratt. 487, 492; *Hendricks v. Dundass*, 2 Wash. 50; *Steele v. Boyd*, 6 Leigh 547, 553, 29 Am. Dec. 220.

By Court Issuing Writ.—The power of a court to order an execution which it has issued to be quashed is an instant of its judicial power, and this power exists regardless of the fact that

the court as a court of original jurisdiction may have had no power over the judgment. *Enders v. Burch*, 15 Gratt. 64.

By Courts of Chancery.—When the statute law authorized the issuing executions on decrees, it clothed the courts of chancery with the power of watching over such process and correcting any abuses arising under it, to the same extent, and by the same means that courts of law use. *Windrum v. Parker*, 2 Leigh 361; *Snively v. Harkrader*, 30 Gratt. 487, 492.

6. Rules Applicable.

In deciding upon all questions in respect to executions on decrees, the courts of chancery are bound to abide by the common law and statutes respecting executions at law. *Windrum v. Parker*, 2 Leigh 361; *Snively v. Harkrader*, 30 Gratt. 487, 492.

7. Questions of Law and Fact.

If on a motion to quash an execution, the relief of the party depends upon a matter of fact, the court has a discretion to direct a jury to try the facts. *Smock v. Dade*, 5 Rand. 639, 16 Am. Dec. 780.

8. Waiver of Motion.

A motion to quash an execution is deemed to have been waived when no exception is taken to the omission to act upon such motion. *Trimble v. Shaffer*, 3 W. Va. 614.

9. Effect of Quashing.

The effect of an order quashing an execution on a judgment, because issued in violation of an express contract between the plaintiff and the defendant that no execution should issue for a given time, can not be construed as impairing or suspending, as against third persons, the lien of a prior execution issued on the same judgment, though in contravention of same agreement. *Barr v. Ingram*, 99 Va. 200, 37 S. E. 905.

10. Appeal from Judgment Quashing.

See the title APPEAL AND ERROR, vol. 1, pp. 452, 543.

The orders of a court in the exercise of its powers to quash an execution are subject to the revision of an appellate court. *Enders v. Burch*, 15 Gratt. 64; *State v. Blair*, 29 W. Va. 474, 2 S. E. 333; *Com. v. Hewitt*, 2 Hen. & M. 181; *Lowther v. Davis*, 33 W. Va. 132, 10 S. E. 20; *Taney v. Woodmansee*, 23 W. Va. 709.

11. Collateral Attack on Right to Enforce Execution.

The right to enforce an execution can only be questioned in a direct proceeding to quash or vacate, and not by a collateral suit. *Reilly v. Clark*, 31 W. Va. 571, 8 S. E. 509.

IX. Levy of Execution.

As to indemnifying bonds required by officers in making a levy where it is doubtful whether the property is liable to levy, see the title INDEMNITY.

A. DEFINITION AND WHAT CONSTITUTES.

1. Definition.

By levying an execution is meant the setting aside of specific property from the general property of the defendant and placing the same in the custody of the law until it can be sold and applied to the payment of the execution. *Walker v. Com.*, 18 Gratt. 13, 98 Am. Dec. 631.

2. What Constitutes.

Necessity for Actual Seizure.—It has been held, that a levy of execution imports the actual seizure of the property against which the execution is issued. *Dorrier v. Masters*, 83 Va. 459, 2 S. E. 927.

Actual Seizure Unnecessary.—But in *Dorrier v. Masters*, 83 Va. 459, 476, 2 S. E. 927, the court said: "In 2 Tucker's Com., at p. 367, it is said, 'To constitute an effectual levy it is not essential that the officer should make an actual seizure; if he have the goods in his power and view, this may suffice; as where certain slaves were in the presence of the officer, on which he declared that he levied the execution,

and thereupon took a list of them, but did not touch them, and went away without removing them from the debtor's custody on his engaging to produce them on the day of sale; this was, nevertheless, deemed a good levy,' citing *Bullitt v. Winston*, 1 Munf. 270, where it was so ruled, and in the case of an execution on a forfeited forthcoming bond where the statute forbade the taking of security of any kind."

And in *Bullitt v. Winstons*, 1 Munf. 269, it was held, that a writ of fieri facias, may be levied upon chattels without touching or removing them, provided they be in the immediate power of the sheriff, and admitted by him to have been taken to satisfy the debt. This is especially true where the debtor waives seizure and requests that the property be left in his possession. See also, *Wardsworth v. Miller*, 4 Gratt. 99, 101; *Dorrier v. Masters*, 83 Va. 459, 2 S. E. 927. In 4 Va. Law Reg. 253, there is a very able editorial on this subject.

Goods within Power and View Sufficient.—To constitute an effectual levy, it is not essential that the officer should make an actual seizure; if he have the goods in his power and view, this may suffice. *Dorrier v. Masters*, 83 Va. 459, 2 S. E. 927, quoting from 2 Tucker's Com., 367; *Bullitt v. Winstons*, 1 Munf. 269; *Poling v. Flanagan*, 41 W. Va. 198, 23 S. E. 685.

Effect of Leaving Property in Custody of Third Person.—The sheriff's permitting the property to remain in the possession of a third person, or of the defendant, under a verbal engagement to produce it on the day of the sale, does not prevent the fi. fa. from having been levied in contemplation of law. *Bullitt v. Winstons*, 1 Munf. 269.

Effect of Forcibly Retaking the Property.—Where the officer had the property within his power and indicated his intention to treat it as taken under an execution from the absolute

control of the owner, such facts constitute a sufficient levy regardless of the fact that the property was retaken by the owner by force. *Collins v. Mann*, 15 W. Va. 171.

B. NECESSITY FOR LEVY.

The second step after the issuance of the execution is to levy the same on specific tangible property, by which such property is set apart from the general property of the defendant and placed in the custody of the law until it can be sold and applied to the payment of the execution. *Walker v. Com.*, 18 Gratt. 13, 43, 98 Am. Dec. 631.

Before there can be a sale of corporeal personal property under execution there must be an actual levy of the writ of fieri facias and the mere delivery of the writ to the sheriff without a levy creates no security for the debt. *Humphrey v. Hitt*, 6 Gratt. 509, 526, 52 Am. Dec. 136; *Walker v. Com.*, 18 Gratt. 13, 43; *Charron v. Boswell*, 18 Gratt. 216, 225.

C. TIME FOR LEVY.

As between Several Executions.—

Where two executions are issued against the same property, it is the duty of the sheriff to levy first the first execution that came into his hands to be levied. *Hartman v. Sheriff*, 5 W. Va. 394, 395.

With Reference to Return Day.—See post, "Presumption as to Levy," IX, L.

It is well settled that the officer can not levy a writ of fieri facias on the property of the debtor after the return day thereof. *Cockerell v. Nickols*, 8 W. Va. 159; *Chapman v. Harrison*, 4 Rand. 336; *Trevillian v. Guerrant*, 31 Gratt. 525; *Grandstaff v. Ridgely*, 30 Gratt. 1; *O'Bannon v. Saunders*, 24 Gratt. 138.

According to the statute and practice in West Virginia, a writ of fi. fa. goes into the officer's hands, to be executed and returned in good faith according to the exigency of the writ, without avoidable delay; and the officer is not required by the statute to hold it

throughout the time the writ has to run, but may properly return it before the return day. *Findley v. Smith*, 42 W. Va. 299, 26 S. E. 370; *Newlon v. Wade*, 43 W. Va. 283, 37 S. E. 244.

Validity of Levy after Return Day.—

A levy of an execution after the return day of the writ is void. *Chapman v. Harrison*, 4 Rand. 336; *Cockerell v. Nichols*, 8 W. Va. 159.

After Death of Either Party.—Since a sheriff derives his authority to levy from the writ of execution and the execution is an entire thing, the sheriff may proceed to levy notwithstanding the death of either party. *Turnbull v. Claibornes*, 3 Leigh 392; *May v. State Bank*, 2 Rob. 56.

D. PROPERTY SUBJECT TO LEVY.

See the titles ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 1, p. 799; EXEMPTIONS FROM EXECUTION AND ATTACHMENT; HOMESTEAD EXEMPTIONS.

As to the right of an agent's creditor to levy on principal's goods, see the title AGENCY, vol. 1, p. 276.

1. Personal Property.

In General.—An execution can operate upon personalty only. *Reilly v. Clark*, 31 W. Va. 571, 8 S. E. 509; *Gill v. State*, 39 W. Va. 479, 20 S. E. 568.

Choses in Action.—Choses in action constitute such property as may be subject to execution and levy. *Miller v. Cox*, 9 W. Va. 8.

Money.—It was held, in *Steele v. Brown*, 2 Va. Cas. 246, that a writ of execution may be levied on ready money in the possession of the defendant. See also, *Norris v. Crummey*, 2 Rand. 323, 330; *Baltimore, etc., R. Co. v. Wilson*, 2 W. Va. 528.

Fixtures.—As to executions on fixtures, see the title FIXTURES.

Interests in Contracts.—Ordinarily, a creditor can only subject the interest of his debtor in existing contracts. *Boisseau v. Bass*, 100 Va. 207, 40 S. E. 847.

Specific Legacy.—After the assent of an executor to a specific legacy, the property is changed, and a creditor obtaining a judgment against the executor, can not levy an execution upon the property in the hands of the legatee. He may pursue the executor at law, or follow the property in equity, making all the legatees parties. *Burnley v. Lambert*, 1 Wash. 308.

Future Interests.—In *Boisseau v. Bass*, 100 Va. 207, 40 S. E. 647, the court said: "After laying down the well-recognized rule of law that an existing debt, not due at the service of the writ, but which is certain to become due at a future period, may be reached both under execution and attachment, it is said: 'This rule has no application to future contingent liabilities; nor to any case where the liability of the defendant to the garnishee depends upon the performance by the latter of some condition precedent, or upon his full compliance with the terms of some unperformed agreement or contract. The debt itself must be in existence at the time of the service of the writ, free from any contingency, and it may so exist, though the time stipulated for its payment be very remote. *Freeman on Executions*, § 165.'"

Real and personal estate settled by deed, to the use and benefit of R. and E., his wife, during their joint lives, and if R. should survive E., his wife, then to his use during his life, and after his death to the children of R. by E., his wife. Held, that although the joint interest of husband and wife during their joint lives, is not subject to the husband's debts, his contingent interest in case he should survive his wife, is so subject. *Roanes v. Archer*, 4 Leigh 500. See also, *Scott v. Gibbon*, 5 Munf. 86.

Interest in Life Insurance Policy.—The interest of an assured in a policy on his life which has no present market value, but is dependent for its continued existence on voluntary pay-

ments to be made in the future by the assured, is not such an interest or estate as can be reached by a *fieri facias*. *Boisseau v. Bass*, 100 Va. 207, 40 S. E. 647.

It is immaterial that the assured, in a given contingency, is allowed to surrender his policy and take in lieu thereof a paid-up policy for a different amount. *Boisseau v. Bass*, 100 Va. 207, 40 S. E. 647.

Property Consigned for Sale.—Personal property consigned to a person who has no license as an auctioneer or commission merchant under unrecorded written contract, or left with him for sale in the course of his business under verbal instructions from the owner, is property "used in such business" within the meaning of § 2877, and is liable for the debts of such person. *Edmund v. Hobbie Piano Co.*, 97 Va. 588, 34 S. E. 472.

Property of Trader Doing Business in His Own Name.—The provisions of § 2877 of the Virginia Code rendering all the property, stock, and choses in action acquired or used in his business by a trader doing business in his own name liable for the payment of his debts, when he has not complied with the terms of that section, are not affected or qualified by § 2465 of the Code, as amended by acts, 1899-1900, p. 89, providing for the recordation of bills of sale of goods and chattels, and certain other writings. The "property, stock and choses in action acquired or used in such business" of said trader are liable for the payment of his debts, notwithstanding a bill of sale thereof may be recorded as provided by § 2465 of the Code, as amended. *Partlow v. Lickliter*, 100 Va. 631, 42 S. E. 671.

Property under Bailment.—Personal property stored with a person who has no license as an auctioneer or commission merchant, such storage being made with no power of sale granted, are not liable for the debts of the per-

son holding such goods in storage. And the same is true of office furniture granted with the building. *Edmund v. Hobbie Piano Co.*, 97 Va. 588, 34 S. E. 472.

Property Loaned.—T makes a parol loan of a slave to C; and the slave remains in the possession of C and C's executors for more than five years, and then T takes possession of him. Held, the slaves may be subjected by the execution creditors of C, to satisfy their claims. But the executors of C having brought an action of detinue for the slave against T, who dies pending the suit, which is revived against his executor, and a verdict and judgment having been given in favor of the defendant, the creditors of C, who having recovered judgments against his executors, can not levy their executions upon the slave. *Taylor v. Beale*, 4 Gratt. 93; *McKenzie v. Macon*, 5 Gratt. 379; *Beale v. Digges*, 6 Gratt. 582; *Garth v. Barksdale*, 5 Munf. 101; *Rose v. Burgess*, 10 Leigh 186, 197; *Beasley v. Owen*, 3 Hen. & M. 449; *Pate v. Baker*, 8 Leigh 80; *Collins v. Lofftus*, 10 Leigh 5; *Boyd v. Stainback*, 5 Munf. 305; *Lightfoot v. Strother*, 9 Leigh 451.

Money bona fide lent to a sheriff, and applied by him to his own use, prior to his receiving a writ of *fieri facias* against the lender is not liable to satisfy such execution, either at law, or in equity; notwithstanding the same money was originally deposited in his hands as a pledge for certain purposes. *Price v. Crump*, 2 Hen. & M. 89.

Property in Custodia Legis.—While property is in the hands of a receiver, or under the control of the court, no execution can be levied upon it, for that would be to interfere with the possession of the court. *Davis v. Bonney*, 89 Va. 761, 17 S. E. 229.

Property once levied on remains in custody of the law and is not liable to be taken by another execution in the

hands of a different officer, and especially by an officer acting under another jurisdiction. *August v. Gilmer*, 53 W. Va. 65, 44 S. E. 143.

Property levied upon by execution is in custodia legis, through and by the court, holding by the hand of its executive officer, acting under the process of the court. The possession of the court is good against all individuals and all other courts and their officers, and the court must necessarily have the power to vindicate and uphold its right of possession. Otherwise, its jurisdiction would fail and it would be powerless to perform its functions under the law. *August v. Gilmer*, 53 W. Va. 65, 44 S. E. 143.

Property Forfeited to State.—Where land is forfeited to the state for non-entry on the assessor's land books the title vests in the state, and the property is not liable to execution under a judgment rendered against the former owner since the forfeiture; but the right of such former owner to the excess of the proceeds of sale after the payment of taxes, etc., is property which he can sell, and which is liable to the lien of an execution. *Wiant v. Hays*, 38 W. Va. 681, 18 S. E. 807.

Levied Property Not Sold.—A sheriff having levied an execution goes out of office without selling the property. In *Carr v. Meade*, 77 Va. 142, it is quæred whether the successor of such sheriff may not levy a junior execution on the same property (without prejudice to the first levy), sell the property, return the money to the court, and have it settle conflicting claims and distribute the proceeds.

Property In Hands of Personal Representative.—If there be two executors, one of whom is a legatee of part of the personal estate; and a division of the testator's property is made according to his will, subsequent to which, the legatee executor dies, a creditor, who afterwards obtains judgment against the surviving executor,

can not levy the execution upon one of the slaves allotted to the deceased executor, in the hands of his administrator. *Chapman v. Washington*, 4 Call 327; *Sampson v. Bryce*, 5 Munf. 175.

Property Left in Debtor's Possession after Sheriff's Sale.—Where there is a bona fide sale of property under an execution and the purchaser levies the property with the execution debtor, the sale, though it be irregular, is valid and the property is not liable to be seized by the creditors of the debtors in execution. *Carr v. Glasscock*, 3 Gratt. 343.

If a creditor, who has an execution levied on the property of his debtor, directs the sheriff not to sell it, but to leave it in the debtor's possession, his execution is fraudulent, and any other creditor may take the property in execution. *Clayton v. Anthony*, 6 Rand. 285, 305.

Property Levied on after Abandonment of Levy.—Where property levied on is left with the debtor, and the levy abandoned, other creditors may resort to it, if they see fit, in like manner as if no execution had issued. *Rhea v. Preston*, 75 Va. 757.

Excess of Proceeds from Forced Sale of Lands.—The right of the former owner of land to the excess of the proceeds of the sale thereof, upon forfeiture for the non-entry on the assessor's land books, after payment of taxes, interest and costs accorded to him by § 5, art. 13, of the constitution of West Virginia, is property in the former owner which is liable to the lien of fieri facias against him. *Wiant v. Hays*, 38 W. Va. 681, 18 S. E. 807.

Property Previously Sold.—Upon a bona fide sale of personal property, though the buyer does not take possession at the time of the sale, yet if he gets possession before an execution is issued against the seller, his title is good against creditors. So, also, where

a bona fide buyer of personal property having gotten possession thereof before issuing of an execution against the seller, his title is good against the creditor, though after such possession by the buyer he employs the seller as his agent to sell the property; and the seller is in possession as the agent of the buyer at the time the execution issues and is levied upon it. *McKinley v. Ensell*, 2 Gratt. 333.

Where a purchaser of property left it in the possession of the original owner, but possession thereof was taken by the administrator of the purchaser before creditors had acquired a specific lien thereon, by judgment and execution, it was held, not to be liable to the original owner's creditors. *Carr v. Glasscock*, 3 Gratt. 343.

Property Fraudulently Conveyed.—
See the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

If property subject to execution be conveyed and such conveyance be either with intent to hinder, delay or defraud creditors, or be upon consideration deemed voluntary in law, execution may still be enforced; for where the conveyance is fraudulent it is void as to both existing creditors, and subsequent purchasers, and where the conveyance is voluntary only, it is void as to antecedent creditors, though it may be sustained as against subsequent purchasers. *Chamberlayne v. Temple*, 2 Rand. 384; *Wright v. Hencock*, 3 Munf. 521; *Harvey v. Fox*, 5 Leigh 444; *Penn v. Whitehead*, 17 Gratt. 503; *Goshorn v. Snodgrass*, 17 W. Va. 717; *Rixey v. Deitrick*, 85 Va. 46, 6 S. E. 615; *Lockhard v. Beckley*, 10 W. Va. 87; *Hunter v. Hunter*, 10 Va. 321; *Beall v. Shaull*, 18 W. Va. 258; *Watkins v. Wortman*, 19 W. Va. 78; *Harden v. Wagner*, 22 W. Va. 356; *Silverman v. Greaser*, 27 W. Va. 550; *Livesay v. Beard*, 22 W. Va. 585; *Knight v. Capito*, 23 W. Va. 639; *Williams v. Blakey*, 76 Va. 254; *Witz v. Osburn*, 83 Va. 227, 2 S. E. 33; *Whitten*

v. Saunders, 75 Va. 563; *Sutherland v. Price*, 75 Va. 223; *Tebbs v. Lee*, 76 Va. 744; *McCormick v. Atkinson*, 78 Va. 8; *Burton v. Mill*, 78 Va. 468; *Saunders v. Waggoner*, 82 Va. 316; *Young v. Willis*, 82 Va. 291; *Wray v. Davenport*, 79 Va. 19; *Fink v. Denny*, 75 Va. 663; *Clay v. Walker*, 79 Va. 92; *Beecher v. Burns*, 84 Va. 813, 6 S. E. 209; *Hatcher v. Crews*, 78 Va. 460; *Williams v. Lord*, 75 Va. 390; *Click v. Green*, 77 Va. 827; *Batchelder v. White*, 80 Va. 103; *Hickman v. Trout*, 83 Va. 478, 3 S. E. 131; *Armstrong v. Lachman*, 84 Va. 726, 6 S. E. 129; *Lucas v. Clafflin*, 76 Va. 269; *Johnson v. Wagner*, 76 Va. 587; *Moore v. Ullman*, 80 Va. 307; *Scott v. Rowland*, 82 Va. 484; *Baker v. Naglee*, 82 Va. 876, 1 S. E. 191; *Waller v. Johnson*, 82 Va. 966, 7 S. E. 382; *Fishburne v. Ferguson*, 84 Va. 87, 4 S. E. 575; *Fisher v. Dickenson*, 84 Va. 318, 4 S. E. 737; *Roanoke Nat. Bank v. Farmers' Nat. Bank*, 84 Va. 603, 5 S. E. 682; *Rucker v. Moss*, 84 Va. 634, 5 S. E. 527.

It is well settled that the ownership of personal property will be taken to be with the possession, and the retaining of possession after a sale is prima facie fraudulent, and the property still subject to execution against the seller. This presumption of fraud may however be rebutted by proof that such possession is consistent with a bona fide sale. *Wray v. Davenport*, 79 Va. 19; *McCormick v. Atkinson*, 78 Va. 8; *Young v. Willis*, 82 Va. 291; *Saunders v. Waggoner*, 82 Va. 316; *Clafflin v. Foley*, 22 W. Va. 434; *Klee v. Reitzenberger*, 23 W. Va. 749; *Curd v. Miller*, 7 Gratt. 185; *Lewis v. Capertin*, 8 Gratt. 148; *Land v. Jeffries*, 5 Rand. 211; *Braxton v. Gaines*, 4 Hen. & M. 151.

A husband had obtained slaves through a sale under a deed of trust fraudulent as to the creditors of the grantor, and one of these slaves had been allotted to his widow, after his death. Held, the slave in her posses-

sion may be taken in execution at the suit of a creditor of the grantor, though the husband and those claiming under him had been in possession of the slave for more than five years. *Snoddy v. Haskins*, 12 Gratt. 363; *Lawrence v. Swann*, 5 Munf. 332; *Lang v. Lee*, 3 Rand. 410; *Wilson v. Buchanan*, 7 Gratt. 334; *Addington v. Etheridge*, 12 Gratt. 436; *Marks v. Hill*, 15 Gratt. 400; *Pratt v. Cox*, 22 Gratt. 330; *Russell v. Randolph*, 26 Gratt. 703; *Perry v. Shenandoah Nat. Bank*, 27 Gratt. 752.

H. made a bill of sale of slaves to C., without any consideration and notwithstanding the deed remained in possession until his death; after five years administration of H.'s estate was committed to the sheriff, who got possession of the slaves, and a creditor of H. who had recovered judgment against the sheriff administrator, levied an execution on one of the sons which was sold to satisfy the same. It was held, that though H.'s bill of sale to C. was good as between the parties, yet being fraudulent as to H.'s creditors and the subject having come to the hands of H.'s administrators, it was liable to execution at the suit of a creditor of H. *Clarke v. Hardiman*, 2 Leigh 347.

Property Received by Commissioner without Authority.—A commissioner having received money without authority to receive it, is liable to the purchaser for the amount so paid, and may be proceeded against by a rule in the cause and an execution of fieri facias may be sued out against him for the money. *Tyler v. Toms*, 75 Va. 116.

Property Conveyed by Marriage Settlement.—It seems that property conveyed by deed of marriage settlement, in trust, that the husband and wife shall be permitted during their joint lives, to enjoy the profits, may be taken in execution to satisfy a debt incurred after the marriage for sup-

plies furnished for the proper support of the husband and wife. *Scott v. Lorraine*, 6 Munf. 117.

A deed of marriage settlement executed before, and recorded after the marriage, but within the time required by law, is conclusive against the creditors of the husband, for debts contracted by him before the marriage. And this, although such deed was recorded upon the acknowledgment of the parties, without any privy examination of the wife. *Scott v. Gibbon*, 5 Munf. 86. See also, *Land v. Jeffries*, 5 Rand. 211, 266; *Roane v. Archer*, 4 Leigh 550; *Nickell v. Handly*, 10 Gratt. 336, 341; *Johnston v. Zane*, 11 Gratt. 552; *Nixon v. Rose*, 12 Gratt. 423; *Armstrong v. Pitts*, 13 Gratt. 235, 243; *French v. Waterman*, 79 Va. 617; *Coatney v. Hopkins*, 14 W. Va. 338; *Lewis v. Adams*, 6 Leigh 320.

Property of Wife for Husband's Debts.—Since, at common law, the personality of a feme sole in possession, passes, upon her marriage, to her husband, it becomes subject to execution for his debts. *Vance v. McLaughlin*, 8 Gratt. 289; *Hill v. Wynn*, 4 W. Va. 453; *Dold v. Geiger*, 2 Gratt. 98. In this last case, it was held that even the choses in action to which the wife becomes entitled during coverture, are liable to the claims of the husband's creditors.

Separate Estate of Married Women.—As to the liability of the separate estate of married women to levy of execution, see the title SEPARATE ESTATE OF MARRIED WOMEN.

Property under Valid Deed of Trust.—The equitable interest of the grantor in a valid deed of trust, before sale thereunder, can not be taken under an execution at law, but can only be subjected in equity. *Clayton v. Anthony*, 6 Rand. 285, 307; *Coutts v. Walker*, 2 Leigh 268. But see contra, *Spence v. Repass*, 94 Va. 716, 27 S. E. 583, and criticism in 4 Va. Law Reg. 255.

Equity of Redemption.—An equity of

redemption, under the common law, was not subject to levy. *Doheny v. Atlantic Dynamite Co.*, 41 W. Va. 1, 23 S. E. 525.

In *Tiffany v. Kent*, 2 Gratt. 231, it was held, that a sale by a sheriff of an equity of redemption in lands surrendered by a debtor in execution, upon his taking the benefit of the act for the relief of insolvent debtors, is legal.

Interest of Cestui Que Trust.—A settlement which gives to the grantor a bare maintenance with his wife, for his life, and provides that the property shall not be subject to his debts thereafter contracted does not vest him with such an interest in the property as can be subjected to satisfy such after-contracted debt. *Johnston v. Zane*, 11 Gratt. 552.

Real estate is vested in a trustee by deed of marriage settlement, in trust to pay the wife an annuity out of the profits, and, subject to the annuity, in trust for a son of the grantor; while the annuitant is yet living, a creditor of the son recovers a judgment against him, and exhibits his bill in chancery, to subject the son's equitable interest in the estate to the debt; it was held, that such an equitable interest can not be taken in execution at law. *Coutts v. Walker*, 2 Leigh 268.

Property of Bankrupt.—The lien of a judgment is not defeated by the discharge of the debtor as a bankrupt, and it may be enforced in the state courts. In such a case the elegit sued out upon the judgment may be in the usual form; and in executing it the sheriff must take notice of the bankruptcy of the debtor, and disregarding all property of the debtor not subject to the lien, levy it upon that which is so subject. *McCance v. Taylor*, 10 Gratt. 580.

Partnership Chattels.—Upon an execution against partnership property for the individual debt of one of two partners, the sheriff must seize all the social effects, and sell a moiety thereof

undivided, for if he seized a divided moiety and sold that the other partner would still have a moiety of such moiety. *Shaver v. White*, 6 Munf. 110, 8 Am. Dec. 730; *Wayt v. Peck*, 9 Leigh 434; *Christian v. Ellis*, 1 Gratt. 396; *Pettyjohn v. Woodruff*, 86 Va. 478, 10 S. E. 715; *Ashby v. Porter*, 26 Gratt. 455; *Robinson v. Allen*, 85 Va. 721, 8 S. E. 835; *Straus v. Kerngood*, 21 Gratt. 584; *Carper v. Hawkins*, 8 W. Va. 291; *Shackelford v. Shackelford*, 32 Gratt. 481, 502; *Morris v. Morris*, 4 Gratt. 293.

Public Property.—In *Brown v. Gates*, 15 W. Va. 131, the court said: "And perhaps under the authorities there is some property belonging to a municipal corporation charged with public trusts, etc., and perhaps other property, which are likewise so exempt, owned and used for public purposes, such as fire engines, etc.; but I do not now decide that question, as it does not fairly arise in this case."

In *Brown v. Gates*, 15 W. Va. 131, the court said: "According to authorities I have cited a political public municipal corporation may sometimes own some descriptions of strictly private property, or interest in such property, or have debts of such private nature due to it, which are subjected to levy and to the lien of a writ of fieri facias."

In *Brown v. Gates*, 15 W. Va. 131, the court said: "But after a careful consideration of all the authorities which I have cited, and to which I have had access, my conclusion is that by implication the taxes and public revenues of a political public municipal corporation such as the city of Charleston are exempt from the operation of the provisions of the 5th section of chapter 140 of the Code of this state (1886), and the 2d and 10th sections of said 141st chapter of said Code, and that such taxes and revenues can not be seized or subjected to a writ of fieri facias in the hands of the taxpayers, or in the treasury of such municipal corporation, or in transit to

such treasury, by virtue of said writ or by reason of any lien of such fieri facias under the 5th section of said chapter 140 or the said 10th sections of said chapter 141."

Property of Private Corporation.—It is well settled that the property of a purely private corporation not serving the general public, though ever so essential to its use, is liable to execution. *Wall v. Norfolk, etc., R. Co., 52 W. Va. 485, 44 S. E. 294.*

Property of Quasi Public Corporation Generally.—In *Wall v. Norfolk, etc., R. Co., 52 W. Va. 485, 44 S. E. 294*, the court said: "Amid the conflict I have concluded that the law is properly stated in 11 Am. & Eng. Ency. L. (2d Ed) 620, as follows: 'In the case of corporations such as railroad or bridge companies, which though not strictly public corporations, are created to serve public purposes, and are charged with public duty, such property as is necessary to enable them to discharge their duties to the public and effectuate the objects of their incorporation, is not, according to the weight of authority, apart from statutory provision, subject to execution at law. But the property of a quasi-public corporation not necessary or not used for the purposes which called the corporation into being is not exempt from seizure or sale under execution.'"

All the cases say that unless statute authorizes, the franchise itself can not be sold under execution, and the major part of legal authority says also that property of such corporations essential to the exercise of such franchise is also not subject to execution. *Wall v. Norfolk, etc., R. Co., 52 W. Va. 485, 44 S. E. 294.*

Property of Railroad Companies.—The road and franchises of a railroad company are liable for the satisfaction of executions against the company. *Winchester, etc., R. Co. v. Colfelt, 27 Gratt. 777.*

The state constitution of West Virginia makes all rolling stock of a

railroad company, whether foreign or domestic, liable to execution when found within the state. *Wall v. Norfolk, etc., R. Co., 52 W. Va. 485, 44 S. E. 294.*

In art. 11, § 8, of the constitution of West Virginia is inserted the following provision: "The rolling stock and all other moveable property belonging to any railroad company or corporation in this state, shall be considered personal property and shall be liable to execution and sale in the same manner as the personal property of individuals." *Wall v. Norfolk, etc., R. Co., 52 W. Va. 485, 44 S. E. 294.*

Locomotives, cars and other personal property held by a railroad company, if not in actual use in the operation of the road, are held by some authorities to be subject to sale on execution, and there seems to be no reason why property of a railroad corporation not essential to the enjoyment of its franchise should not be subject to the payment of its debt. Citing *Elliott on Railroads*, vol. 2, § 52. *Wall v. Norfolk, etc., R. Co., 52 W. Va. 485, 44 S. E. 294.*

Elliott on Railroads, vol. 2, § 520, says: "The franchise of a railroad company, and corporate property essential to the enjoyment of the franchise, are not subject to sale on execution, unless the legislature authorizes or assents to the transfer." *Wall v. Norfolk, etc., R. Co., 52 W. Va. 485, 44 S. E. 294.*

Emancipated Slaves.—Slaves emancipated by will were subject to levy for the payment of decedent's debts, the personal representative having the power to hire them out or sell them for a time in order to raise a fund sufficient for the discharge of their former owner's debts. *Jincey v. Wingfield, 9 Gratt. 708.*

D. made a contract with H. by which he sold to H. his slave S. for three hundred and fifty dollars, estimated to be one-half his value, and when H. was reimbursed this money from the

earnings of S., H. was to emancipate him. H. hired out S. and kept an account of his earnings and expenses; and when he had received all but about twenty-one dollars, H. made an arrangement with M., a resident of the state of Ohio, but then in the county of R., on a visit, by which he received the balance from M. and conveyed S. to him, and M. emancipated S. in the county of R., where S. was duly registered as a freeman. Before H. made the arrangement with M. he had become insolvent, and shortly afterward a judgment was recovered against him in the county of A., and was levied on S. in the county of R. It was held, that as D. might have enforced the contract against H., and compelled him to emancipate the slave upon being reimbursed the amount he had paid, and as H. had been repaid, and S. had been emancipated in pursuance of the contract, he was not liable to be taken in execution for the debt of H. *Shue v. Turk*, 15 Gratt. 256.

Property of Building Contractor.—Where one contracts to build, the materials to be used in such building remain the property of the contractor until actually put into the construction; and hence are liable for the contractor's debts and subject to execution. *Wheeling v. Baer*, 36 W. Va. 777, 15 S. E. 979.

Where Execution Is against Several Defendants.—In *Humphreys v. Hitt*, 6 Gratt. 523, 52 Am. Dec. 134, there is a dictum by Baldwin, J., to the effect that upon a joint judgment against two defendants, execution may be levied upon the property of either. See also, *Knight v. Charter*, 22 W. Va. 422.

2. Real Property.

General Rule.—An execution is not leviable on land in West Virginia. *Maxwell v. Leeson*, 50 W. Va. 361, 40 S. E. 420.

For Debts or Fines Due State.—In a writ of fieri facias upon a judgment or decree against any person indebted

or liable to the commonwealth, or against any surety of his, the clerk has the authority to so word the writ that real estate may be taken and sold to satisfy the execution. W. Va. Code, ch. 35, § 5. *Gill v. State*, 39 W. Va. 479, 20 S. E. 568; Va. Code, § 687.

Moiety in Real Estate Previously Sold.—J.'s devisees and W. were tenants in common of a hotel property, and J.'s executor and W. agreed to sell the property at public auction; the deferred payments to be secured by separate bonds to each one-half of the purchase money, with a lien retained on the real property. The sale was made and W. became the purchaser, but refused to execute the contract, J.'s executor sued W. for specific execution of the contract, and there was a decree in 1868 in his favor for specific execution, a personal decree against W. for the amount due, and for a sale of the whole property. Before the decree, W. sold and conveyed his moiety of the property to M. who paid the purchase money. Upon a bill by the judgment creditors of M. to subject his moiety of the property to the payment of their debts; it was held, that the creditors could take the moiety purchased by him, regardless of the decrees. *Johnson v. Nat. Exchange Bank*, 33 Gratt. 473.

Burden of Proof.—The burden is upon the judgment creditor seeking to subject land in the hands of his debtor's alienee for value to show that the land is liable. *Fulkerson v. Taylor*, 100 Va. 426, 41 S. E. 863.

E. WHO MAY MAKE.

An officer who is interested in an execution can not levy it himself. *Carter v. Harris*, 4 Rand. 199.

F. CONTROL OF LEVY.

In executing a writ of fieri facias the sheriff is the agent of the beneficial plaintiff, and he and his attorney have the right to control the execution of the writ and to say whether the sheriff shall levy it, or return it with-

out doing so. *Rowe v. Hardy*, 97 Va. 674, 34 S. E. 625.

G. LIABILITY OF OFFICER.

As to the liability of the officer for failure to levy a writ of execution, see the title SHERIFFS AND CONSTABLES.

H. INDORSEMENT OF LEVY.

In *Eckhols v. Graham*, 1 Call 492, it was held, that the names of slaves taken upon an execution ought to be endorsed thereon, to prevent purchasers from being deceived.

I. RIGHT OF PROPERTY TRIAL.

Statutory Provision.—Section 5, ch. 107 West Virginia Code, provides that: "When property of the value of more than fifty dollars is taken under a warrant of distress, or when property of any value is taken under an execution issued by the clerk of the court, and any person other than the party against whom the process issued, claims such property, or the proceeds or value thereof, the circuit court of the county in which the property is taken, or the judge thereof in vacation, upon the application of the officer, when no indemnifying bond has been given, or if one has been given on the application of the person who claims such property and has given such suspending bond as is mentioned in the preceding section, may cause to appear before such court, as well as the party issuing such process, as the party making such claim; and such court may exercise, for the decision of their rights all or any of the powers and authority prescribed in the first section of this chapter." *Erb v. Hendricks Co.*, 50 W. Va. 28, 40 S. E. 338. See Va. Code, § 2999.

In *Erb v. Hendricks Co.*, 50 W. Va. 28, 40 S. E. 338, the court said: "The statute makes the remedy for the claimant of property levied upon for the debt of another clear and plain. The writ of fieri facias is given to the court to enable it to enforce its judg-

ments; without it the court would be powerless to carry into effect its judgments when rendered. It will surely not be contended that a proceeding to try the right of property levied upon by virtue of a writ of fieri facias issued by the clerk of a circuit court upon a judgment rendered by such court, could be had before a justice either under chapter 50 or chapter 107 of the Code, and it is provided that an execution issued by the clerk on the judgment of a justice duly certified to him by the justice who has the lawful custody of the docket in which such judgment is entered, shall be with like effect as if the judgment has been rendered by the circuit court. There is a similar proceeding provided also by the statute, chapter 50, Code, whereby the disputed title to property levied upon under process issued by a justice may be determined in a justice's court."

The provision of § 5, ch. 107, W. Va. Code, applies to any execution issue by the clerk of a circuit court, whether issued upon a judgment rendered by said court or by a justice and certified under said § 118, ch. 50. *Erb v. Hendricks Co.*, 50 W. Va. 28, 40 S. E. 338.

Jurisdiction.—H. Co. recovered a judgment before a justice in R. county against H. & E. and had the same certified to the clerk of the circuit court of said county under § 118, ch. 50, W. Va. Code. The clerk of said court issued writ of execution thereon directed to sheriff of T. county who levied the same on property, claimed by J. B. E.; the sheriff demanded and received from H. Co. an indemnifying bond. J. B. E. filed his petition under § 152, ch. 50, before the justice of T. county, who notified the execution creditor and defendants to try the right of the property levied on before said justice. It was held, that the execution having been issued from the clerk's office of a circuit court, the justice was without jurisdiction in the premises. *Erb v. Hendricks Co.*, 50

W. Va. 28, 40 S. E. 338. See the title JUSTICES OF THE PEACE.

J. EFFECT OF LEVY.

As to Title of Property.—The levy of an execution of *fi. fa.* does not divest the defendant in the execution of the property, and transfer the title to the plaintiff or the sheriff. Only a special interest is vested in the sheriff as a mere bailee, to enable him to keep the property safely, and defend it against wrongdoers. It is in the custody of the law, and the sheriff has a naked power to sell it and pass the title of the owner to the purchaser. *Walker v. Com.*, 18 Gratt. 13; *Lusk v. Ramsay*, 3 Munf. 417, 431; *Rhea v. Preston*, 75 Va. 757, 772.

As to Custody of Property.—Property levied upon under a *fi. facias* is in the custody of the law, and the court has power, by attachment, punishment for contempt, and the writ of restitution, to maintain its jurisdiction against its own officers, parties and other persons. *August v. Gilmer*, 53 W. Va. 65, 44 S. E. 143. See the titles ATTACHMENT AND GARNISHMENT, vol. 2, p. 70; CONTEMPT, vol. 3, p. 236; RESTITUTION.

K. EVIDENCE OF LEVY.

Parol evidence is admissible to prove that an execution was levied, though no return was made upon it. *Bullitt v. Winstons*, 1 Munf. 269; *Cockerell v. Nichols*, 8 W. Va. 159.

Upon a motion to quash a writ of *fi. facias*, or to enter satisfaction thereof, in whole or in part, on the ground that a previous writ of *fi. facias* had issued and was placed in the hands of the sheriff of the proper county, and that the debtor had paid to the sheriff upon the first execution the whole, or a part thereof; and it not appearing that any return had ever been made on the first execution, of the levy of the same upon the property of the debtor, although the return day thereof had long since passed; and it appearing that the debtor had made

payments to the sheriff, upon said execution, some time after the return day had passed, it is competent for the plaintiff, in said motion, to prove by parol or other competent evidence, that the first execution was levied upon his property, by the sheriff, before the return day thereof had passed. *Cockerell v. Nichols*, 8 W. Va. 159.

L. PRESUMPTION AS TO LEVY.

As to Fact of Levy.—If a sheriff, before judgment is obtained, makes an arrangement with the defendant, by which he (the sheriff) undertakes, for a valuable consideration, to pay the debt to the plaintiff, when the judgment is rendered, and execution sued out, and returns, "ready to render" he will be considered as having "levied the debt" within the meaning of the statute. *Norris v. Crummey*, 2 Rand. 323.

Rebuttal of Presumptions.—In *Paxton v. Rich*, 85 Va. 378, 7 S. E. 531, it was held, that the presumption, that an execution delivered to an officer has been levied, may be repelled by evidence to show that, about the time when the writ went into the officer's hands, the debtor possessed no leviable property, though there has been a nonreturn of the writ for fourteen years.

As to Time of Levy.—Where it is alleged that a prior execution has been levied on the defendant's property, in the absence of evidence adduced at the hearing, showing such levy of the first execution, or from which such levy may reasonably and properly be inferred, the court is not authorized to presume that such levy was made before the return day of the execution had passed. *Cockerell v. Nichols*, 8 W. Va. 159, 160.

Upon a motion to quash a writ of *fi. facias*, or to enter satisfaction thereof, in whole or in part, on the ground that a previous writ of *fi. facias* had issued and was placed in the hands of the sheriff of the proper

county, and it not appearing that any returns had ever been made on the first execution, of the levy of the same upon the property of the debtor, although the return day thereof had long since past; in the absence of evidence adduced at the hearing, showing such levy of the first execution, or from which such levy may reasonably and properly be inferred, the court is not authorized to presume that such levy was made before the return day of the execution had passed. *Cockerell v. Nichols*, 8 W. Va. 159.

But in *Paine v. Tutwiler*, 27 Gratt. 440, where there was nothing to show whether an execution, placed in the hands of the officer, had been levied or not, it was held that after a great lapse of time the court will presume that the execution was levied before the return day thereof. See also, *O'Bannon v. Saunders*, 24 Gratt. 138.

As to Sufficiency of Levy.—If the sheriff's return is general, that he has levied, it will be presumed, till the contrary appears by the result of a sale, that he has levied to the value. *Ward v. Vass*, 7 Leigh 135.

In the absence of proof to the contrary and especially after a great lapse of time, an execution which has gone into the hands of the sheriff and is indorsed by him as levied on personal property of the debtor will warrant the presumption that the officer levied on sufficient property to pay the debt. *Northwestern Bank v. Hays*, 37 W. Va. 475, 16 S. E. 561.

M. TERMINATION OF LEVY.

1. By Abandonment.

A plaintiff, may always, with the consent of the defendants, abandon a levy upon the property of all or any of them, retaining the right to sue out a new execution against all the defendants. *Walker v. Com.*, 18 Gratt. 13.

Plaintiff's Right to Abandon.—By the levying of the execution, the plaintiff increases his responsibilities and makes it more difficult to withdraw

the execution without endangering the debt. He has thereby acquired a specific and a better lien; still not perfect, but yet so nearly so, as that he can not always safely release it of his own accord. He then becomes a trustee of the execution for the benefit of all parties concerned. The defendant is interested, because a specific portion of his property having been seized and placed in the custody of the law for the payment of the execution, he has a right to be protected against another seizure under a new execution for the same debt, without his consent, or unless there be a necessity for it. The sureties, if there be any, of the defendant on whose property the levy is made, are also interested, in having the property of their principal, thus specifically bound for the payment of that debt, applied to that purpose, in their exoneration in whole or in part, according to the value of the property. They also, therefore, have a right to be consulted by the plaintiff in giving up the levy, and must consent thereto in order to make them liable to a new execution; at least, without having credit for the amount of the first levy. *Walker v. Com.*, 18 Gratt. 13, 98 Am. Dec. 631.

By Issuing Alias Writ.—A previous levy of an execution is waived and abandoned by the issuance of another writ. *Echols v. Graham*, 1 Call 492.

2. By Extinguishment.

Where Debtor Surrenders Title.—After the right and possession of the debtor has expired, and he has surrendered the possession of the property to the trustee, cestui que trust, or mortgagee, the right to levy and seizure is at an end. *Doheny v. Atlantic Dynamite Co.*, 41 W. Va. 1, 23 S. E. 525.

By Death of Either Party.—The death of either party does not abate an execution. *Turnbull v. Claibornes*, 3 Leigh 392; *May v. State Bank*, 2 Rob. 56, 60.

By Suspension of Proceedings.—A mere suspension of proceedings on a levied execution by direction of the plaintiff does not release the levy. *Walker v. Com.*, 18 Gratt. 13, 98 Am. Dec. 631, citing *Fisher v. Vanmeter*, 9 Leigh 18.

X. The Return.

As to compelling the officer to make return and for his liability for failure to make return, see the title **SHERIFFS AND CONSTABLES**.

A. WHAT CONSTITUTES.

A return on a writ of execution is the short official statement of the officer indorsed thereon of what he has done in obedience to the mandate of the writ, or why he has done nothing. He may have been prevented from obeying the mandate of the writ by an injunction, or by a supersedeas, or by the order of the plaintiff or his attorney. A return of any of these facts indorsed on the writ is a sufficient return. *Rowe v. Hardy*, 97 Va. 674, 34 S. E. 625.

B. TIME FOR MAKING.

See ante, "Time for Levy," IX, C.

General Rule.—As a general rule the officer must return the execution before the return day is past. *Bullitt v. Winstons*, 1 Munf. 269.

According to the practice in West Virginia, the officer need not keep a writ of execution until the return day thereof. *Findley v. Smith*, 42 W. Va. 299, 26 S. E. 370; *Newlon v. Wade*, 43 W. Va. 283, 27 S. E. 244.

After the Return Day.—Though as a general rule the officer must return the execution before the return day is past, yet by order of court, a sheriff may be permitted to make a return any time after the return day. *Bullitt v. Winstons*, 1 Munf. 269.

Presumption as to Time.—In the absence of a date, or other evidence showing when the return of an officer on a writ was made, it is presumed to have been made at a time when he

had the right to make it, and in due time, as the prima facie presumption is that the officer has done his duty. *Rowe v. Hardy*, 97 Va. 674, 34 S. E. 625.

C. FORM AND VALIDITY.

1. Formal Contents.

Should Show Manner of Execution.

—The return upon a writ of execution should show the manner in which it has been executed. *McKenzie v. Wiley*, 27 W. Va. 658.

Where There Is Failure to Execute.

—When the officer fails to execute a writ of fi. fa., the return should show the reason or cause for such failure. *McKenzie v. Wiley*, 27 W. Va. 658.

2. Validity.

As Affected by Delay.—The validity of the return of an officer on a writ of fieri facias is not affected by the fact that the writ is not returned to the office till after the return day thereof. The record is incomplete till the writ is returned, but when returned, the return becomes competent evidence of the facts therein stated, and the parties are entitled to the benefit of their legal effect. *Rowe v. Hardy*, 97 Va. 674, 34 S. E. 625.

Returns Based on Stay Law.

Where a writ of fi. fa. is returned "not levied by reason of the stay law," it will be presumed in the absence of an endorsement or proof of the date of its receipt by the officer, that it went into his hands after April 30, 1861 (time when stay law took effect), in which case such return was valid. And where by statute it is required that the officer shall return upon a writ of fi. fa. "whether the money is or can not be made," a return of "not levied by reason of the stay law" is a return substantially that the money "can not be made." *Hamilton v. McConkey*, 83 Va. 533, 2 S. E. 724; *Shipley v. Pew*, 23 W. Va. 487, 495.

"Ready to Satisfy."—It has been held, that the term "ready to satisfy" when in fact the execution had not

been levied, is not a false return. *Kemper v. Kemper*, 3 Rand. 8.

D. AMENDMENT.

1. Necessity for.

A return on a former execution is, generally, very material evidence on the hearing of a motion to quash an execution and it is often important, in the course of the proceedings, to permit the sheriff to make or amend his return according to the truth of the case, and with a view to its effect upon the decision of the motion. Such permission has always been given by our courts. *Walker v. Com.*, 18 Gratt. 13, 98 Am. Dec. 631.

2. Authority to Permit.

When the statute gave to the judge in vacation power to quash an execution, it gave him also, by implication, power to permit the sheriff to make or amend his return, as the case may be, on the former execution. *Walker v. Com.*, 18 Gratt. 13, 98 Am. Dec. 631; *Rucker v. Harrison*, 6 Munf. 181; *Bullitt v. Winstons*, 1 Munf. 269; *Baird v. Rice*, 1 Call 18.

3. When Allowed.

In General.—A sheriff may be permitted, by orders of court, to amend the return upon an execution according to the truth of the case, at any time after the return day. *Bullitt v. Winstons*, 1 Munf. 269; *Baird v. Rice*, 1 Call 18.

Upon Motion to Quash.—Upon a motion to quash a second execution in vacation, the judge may, in vacation, allow the sheriff to amend his return on the first execution. *Walker v. Com.*, 18 Gratt. 13, 50; *Bullitt v. Winstons*, 1 Munf. 269; *Goolsby v. St. John*, 25 Gratt. 146, 160.

After Filing.—A sheriff can not amend his return upon an execution after it has been filed, except by motion to the court, upon notice to the creditor. *Hammen v. Minnick*, 32 Gratt. 249.

But in *Rucker v. Harrison*, 6 Munf. 181, a supersedeas to the execution

having been awarded, the sheriff was allowed by the court to amend his return after a lapse of seven years from its date. See also, on this point, *Smith v. Triplett*, 4 Leigh 590; *Wardsworth v. Miller*, 4 Gratt. 99.

After Notice of Motion against Officer.—A sheriff may have leave to amend his return upon an execution, after notice of a motion against him founded on the original return. And the amended return may be made by a deputy who did not make the first return. *Stone v. Wilson*, 10 Gratt. 529.

Where Decree Entered against Officer on Return.—Having made return on an execution and on that return, in part, a decree having been entered, in subsequent proceedings against him and his sureties, the sheriff will not be permitted to amend his return, so as to explain it away and enable his sureties to escape liability for his default. *Carr v. Meade*, 77 Va. 142.

E. EFFECT OF DELAY.

Neither of the parties to an execution can be deprived of the benefit of the return by the failure of the officer to make it at the return day of the writ. *Rowe v. Hardy*, 97 Va. 674, 34 S. E. 625.

F. RIGHTS OF DEBTOR WHEN RETURN MADE BEFORE SIXTY DAYS.

Where the return on an execution of "no property found" is made before the writ has remained in the officer's hands for sixty days, the debtor will be allowed to show that the return has been made falsely and collusively, in avoidance of the statute, to enable the plaintiff to institute chancery proceedings without exhausting the debtor's personal estate. *Newlon v. Wade*, 43 W. Va. 283, 27 S. E. 244.

G. CONCLUSIVENESS.

In General.—A return upon an execution which the officer has the right to make is conclusive between the parties, and they are interested to have the officer make his return and file

the writ with the proper custodian. But neither of the parties can be deprived of the benefit of the return by the failure of the officer to make it at the return day of the writ. *Rowe v. Hardy*, 97 Va. 674, 34 S. E. 625; *Taylor v. Dundass*, 1 Wash. 92.

Return Stating Reason for Failure to Execute.—The return on a writ of execution stating the reason or cause for failure to execute the same is not conclusive as to parties other than the officer but is prima facie evidence as to all persons affected by it, including the execution creditor. *McKenzie v. Wiley*, 27 W. Va. 658.

In Action under § 3577, Va. Code.—Under § 3577, Va. Code, the question can not be raised as to whether the return of an officer be true or false, sufficient or insufficient. *Hamilton v. McConkey*, 83 Va. 533, 5 S. E. 724.

Contradiction by Sheriff.—It was held, in *Henry v. Stone*, 2 Rand. 455, that a sheriff can not contradict his return, but must obtain leave of the court to amend it.

Evidence.—A sheriff's return may be contradicted by evidence aliunde; in which case the sheriff himself would be a competent witness to prove its truth. But after judgment by default, a party can not object in an appellate court, to the truth of the return. *Cunningham v. Mitchell*, 4 Rand. 189; *Lathrop v. Lumpkin*, 2 Rob. 49; *Norris v. Crummev*, 2 Rand. 323, 329; *Henry v. Stone*, 2 Rand. 455.

H. EXTRAOFFICIAL RETURN.

What a sheriff adds to his official return is extraofficial, and such additional, extraofficial return is not even prima facie evidence of any fact therein stated. *Alexander v. Byrd*, 85 Va. 690, 8 S. E. 577; *Shannon v. McMullin*, 25 Gratt. 211.

XI. Satisfaction of Execution.

A. BY PAYMENT.

1. To Attorney.

In *Harper v. Harvey*, 4 W. Va. 539,

541, the court said: "The payment of a judgment or decree to the attorney of record, who obtained it, before his authority is revoked, and due notice of such revocation given to the defendant, is valid and binding on the plaintiff so far as the defendant is concerned. *Yoakum v. Tilden*, 3 W. Va. 167.

A payment, made to an attorney, to be valid must be a payment of money, or be accepted by the plaintiff as money, or the attorney must have special authority to receive it. *Smock v. Dade*, 5 Rand. 639. See also, *Pidgeon v. Williams*, 21 Gratt. 251; *Johnson v. Gibbons*, 27 Gratt. 632, 637; *Hill v. Bowyer*, 18 Gratt. 364; *Smith v. Lamberts*, 7 Gratt. 138, 141; *Evans v. Greenhow*, 15 Gratt. 153, 159; *Kent v. Chapman*, 18 W. Va. 485; *Gilkeson v. Smith*, 15 W. Va. 44; *Low v. Settle*, 22 W. Va. 387.

2. After Return Day.

a. Execution Unlevied.

A sheriff or other officer has no authority to receive payment under an execution after the return day thereof unless the execution has been previously levied. *Grandstaff v. Ridgely*, 30 Gratt. 1, 15; *Chapman v. Harrison*, 4 Rand. 336; *O'Bonnon v. Saunders*, 24 Gratt. 138; *Cockerell v. Nichols*, 8 W. Va. 159.

Binding Effect on Creditor.—Where it does not appear from the evidence that the execution was levied by the sheriff before the return day thereof had passed, a payment made to the sheriff upon such execution, after such return day had passed, is not binding upon the creditor, unless it appears that such payment was made to the sheriff by the direction or consent of the debtor. *Cockerell v. Nichols*, 8 W. Va. 159; *Chapman v. Harrison*, 4 Rand. 336.

Where it does not appear that the execution was levied before the return day passed, and there is no return made upon the execution by the

officer, the debtor pays to the officer at his peril. *Cockerell v. Nichols*, 8 W. Va. 159.

b. Execution Levied.

But if the officer levies the execution upon the property of the debtor before the return day he may, generally, receive, in such case, payment of the debt, in whole or in part, after such return day and before the sale of the property levied on in relief of the property levied. *Cockerell v. Nichols*, 8 W. Va. 159; *Chapman v. Harrison*, 4 Rand. 336; *Paine v. Tutwiler*, 27 Gratt. 440; *Grandstaff v. Ridgely*, 30 Gratt. 1; *O'Bannon v. Saunders*, 24 Gratt. 138.

3. Remedy Where Payments Not Credited.

A party claiming that he has not been credited for all the money paid by him to the sheriff, on an execution, may have any injustice done to him in that respect corrected by the court from whence the execution issued. *Morrison v. Spear*, 10 Gratt. 228.

4. Presumption of Payment.

In a contest between the debtor and creditor as to the amount due on a writ of fieri facias, the presumption is, in the absence of evidence to the contrary, that the trustee, in a deed to secure the writ, who made sale of the property conveyed, and the sheriff who held the writ and received money thereon from the debtor, did their duty, and paid the money over to the creditor. *Harrison v. Garnett*, 97 Va. 697, 34 S. E. 612.

B. BY LEVY.

1. Presumption of Satisfaction.

A levy on sufficient personal property to satisfy the execution, is prima facie a satisfaction and discharge of the judgment. *Taylor v. Dundass*, 1 Wash. 92, 95; *Bullitt v. Winstons*, 1 Munf. 269, 262; *McKenzie v. Wiley*, 27 W. Va. 658; *Sherman v. Shaver*, 73 Va. 1; *Hoffman v. Fleming*, 43 W. Va. 762, 28 S. E. 790.

A levy of an execution upon the

debtor's property of value sufficient to pay the debt, is a satisfaction of it, unless circumstances which in law defeat such effect are made to appear. *Hoffman v. Fleming*, 43 W. Va. 762, 28 S. E. 790.

As to Debtor.—A levy upon sufficient property to satisfy an execution is a satisfaction of the execution so far as the debtor is concerned unless it is restored to him or lost by his fault. *McKenzie v. Wiley*, 27 W. Va. 658, 662.

2. Rebuttal of Presumption.

This presumption of satisfaction from levy may, however, be rebutted, by showing that it was not so treated by the creditor, and occasioned no loss to the debtor; though to the extent of the latter's loss the levy is conclusively a satisfaction. *Com. v. Byrne*, 20 Gratt. 165, 207; *Walker v. Com.*, 18 Gratt. 13, 47; *Rhea v. Preston*, 75 Va. 757, 758.

3. Mere Levy Only a Step Toward Satisfaction.

The cases show that the mere levy of the execution on property of the defendant is not satisfaction, but only a step towards it. A levy on property is not the object of the execution, but payment of the money. *Walker v. Com.*, 18 Gratt. 13, 98 Am. Dec. 631. See *Rhea v. Preston*, 75 Va. 757.

In *Rhea v. Preston*, 75 Va. 757, the court said: "A mere levy of an execution is not a satisfaction. There must be a sale or some other act divesting the debtor of his title or depriving him of his property." Citing *Walker v. Com.*, 18 Gratt. 13.

The levy of a fi. fa. is generally no satisfaction of judgment unless it has been made available by sale of the property taken and actual payment of the debt. *Ward v. Vass*, 7 Leigh 135. See also, *Sherman v. Shaver*, 75 Va. 1; *Winston v. Whitlocke*, 5 Call 435.

4. When Presumption Becomes Absolute.

The prima facie satisfaction resulting from levy, becomes absolute if the

property be wasted or lost by reason of the fault or neglect of the officer, and the plaintiff must, in such case, seek his remedy against the officer. *Walker v. Com.*, 18 Gratt. 13, 47; *Harman v. Oberdorfer*, 33 Gratt. 497; *Sherman v. Shaver*, 75 Va. 1.

5. Effect of "Stay Law" on Presumption.

An execution was returned endorsed to the effect that on April 14th, 1861, a fi. fa. had been levied on one slave, the property of defendant, and held up by order of plaintiff. On April 30th, 1861, the stay law was enacted, and continued in force until emancipation. Held, it is not to be presumed from the levy that the judgment was satisfied. *Saunders v. Prunty*, 89 Va. 921, 17 S. E. 231.

C. BY RESTORATION OF PROPERTY.

In General.—If the property levied upon is restored to the debtor, the execution is not satisfied as to him. *McKenzie v. Wiley*, 27 W. Va. 658, 662.

Upon New Contract.—It seems very clear, that if the property is restored upon a new contract in satisfaction of the demand, the judgment is thereby satisfied, and the creditor must look to his new contract for redress. *Ward v. Vass*, 7 Leigh 135; *Baird v. Rice*, 1 Call 18.

As Mere Temporary Indulgence.—But where the property is restored to the debtor as a mere indulgence of the creditor, upon an understanding, either that it should be produced at the day of sale for the purpose of being sold by the officer, or that it should be sold by the debtor, and the proceeds paid over to the creditor, there seems to be no just reason to affirm, that there is a new contract between the parties in satisfaction of the antecedent judgment. *Ward v. Vass*, 7 Leigh 135.

By Sheriff without Authority.—At the March term, 1861, of the county court of Monroe, a judgment was ren-

dered at the suit of the bank of V., plaintiff, against W., S. and G., the latter living in the county of Bath. Execution of fi. fa. was issued on this judgment and levied on the property of W., and the sheriff returned, after June 1861, a levy upon the personal property of W., that the property was appraised and offered for sale, and not bringing valuation it was returned. It was held, that the execution was not satisfied by the act of the sheriff, returning the property so levied on to W., in obedience to the ordinance of the Virginia convention of 1861, whether such ordinance was valid or not; said act of the sheriff being entirely his own act, neither prompted nor assisted by the plaintiff in the judgment. *Gatewood v. Goode*, 23 Gratt. 880. See also, *Winston v. Whitlocke*, 3 Call 435.

D. BY TAKING DEFENDANT ON CA. SA.

At common law if the defendant was taken on a ca. sa., it was held, that this constituted no satisfaction of the execution, but a security merely, and if he died imprisoned the plaintiff might have a fieri facias against his goods. *Garland v. Bugg*, 5 Munf. 166. See the title EXECUTIONS AGAINST THE BODY.

E. BY FORFEITURE OF FORTHCOMING BOND.

As to the giving and forfeiting of forthcoming bond, as satisfaction, see the title FORTHCOMING AND DELIVERY BONDS.

F. BY NEGLECT OR MISCONDUCT OF SHERIFF.

The Rule.—But if the property levied on be lost to the defendant by the misconduct or neglect of the sheriff, the execution is thereby satisfied, to the extent of the value of the property; and plaintiff can then only look to the sheriff for indemnity. *Walker v. Com.*, 18 Gratt. 13, 98 Am. Dec. 631.

If the officer fails to sell the property or permits it to be lost or destroyed,

the only remedy of the creditor is against the officer and his sureties. He has no remedy in such case against the execution debtor. *Murfree on Sheriffs*, § 529; *Cranmer v. McSwords*, 26 W. Va. 412; *Campbell v. Wyant*, 26 W. Va. 702; *McKenzie v. Wiley*, 27 W. Va. 658, 662.

Reason for the Rule.—In *Walker v. Com.*, 18 Gratt. 13, the court said: "The reason (for the rule that the plaintiff can look only to the sheriff where the property levied on has been lost to the defendant by the misconduct or neglect of the sheriff,) is plain. The plaintiff, by pursuing his remedy, has caused the defendant's property to be taken out of his hands and placed in the custody of the law for the satisfaction of the debt. If that property be lost by the default of the officer of the law, who in this respect may be said to be the agent of the plaintiff, and without the consent of the defendant, it is reasonable and proper that the loss should not fall on the defendant, and he be thus, to that extent, compelled to pay the debt twice. The plaintiff must incur the risk of ultimate loss in this respect, as the result of an inherent defect of his legal remedy."

G. WHERE CREDITOR PURCHASES THE PROPERTY.

"Still less, where upon the levy, the creditor purchases the property levied upon, could the debtor have any pretext for saying, that the judgment was discharged in toto, when the property fell short of satisfaction. It amounts to nothing more than a sale by consent of parties, instead of a sale by the officer; and the defendant would be only entitled to a credit for the amount of the sale." *Ward v. Vass*, 7 Leigh 135.

H. WHERE DEFENDANT ELOIGNES OR REMOVES PROPERTY.

Where the defendant elognes or removes the property out of the reach

of the officer, without the consent of either him or the plaintiff, there is no satisfaction. *Walker v. Com.*, 18 Gratt. 13, 45.

I. PRESUMPTION OF SATISFACTION.

In the absence of proof to the contrary, and especially after a great lapse of time, an execution which had gone into the hands of the sheriff, and is indorsed by him as levied on personal property of the debtor, will warrant the presumption that the property had been sold, and the judgment and execution satisfied. *Northwestern Bank v. Hays*, 37 W. Va. 475, 16 S. E. 561; *McKenzie v. Wiley*, 27 W. Va. 658; *O'Bannon v. Saunders*, 24 Gratt. 138.

XII. Disposition of Proceeds.

Application to Payment of Other Executions.—Where money made under execution, is in the sheriff's hands, or is brought into court according to the command of a writ of fieri facias, the court may direct it to be paid over in satisfaction of another writ in the hands of the same sheriff, against the goods and chattels of the plaintiff in the first execution, he having the legal and equitable right to receive the same. *Steele v. Brown*, 2 Va. Cas. 246.

The authority of the court to decree that money made in execution be paid over in satisfaction of another writ of fi. fa. in the hands of the same sheriff against the property of the plaintiff in the first execution, is not confined to cases where sufficient effects of the defendant can not be found to satisfy the execution. *Steele v. Brown*, 2 Va. Cas. 246.

XIII. Proceedings in Aid of Execution.

See the title BANKRUPTCY AND INSOLVENCY, vol. 2, pp. 249, 253.

A. ATTACHMENT.

See the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 70.

B. MANDAMUS.

It is well settled that, when a judgment has been obtained against a municipal corporation, and an execution has been issued thereon, and it has been returned "no property found," the creditor has a right to enforce this payment of his judgment by a mandamus issued against the proper municipal authorities compelling them to make a sufficient levy to pay this debt. *Fisher v. Charleston*, 17 W. Va. 595, 615. See the title MANDAMUS.

C. SUIT IN EQUITY.

To Enforce Lien.—The 15th section of chapter 218 of acts of 1872-3, p. 639, provides as follows: "For the recovery of any personal estate, on which a writ of fieri facias is a lien, or the enforcement of any liability in respect to any such estate a suit may be maintained at or in equity in the name of the officer, to whom such writ was delivered. And any person interested may bring such suit at his own costs in the officer's name." The obvious remedy given by this section in such cases is for the plaintiff in the execution to bring the necessary suit in equity in the name of the sheriff to enforce the liability. See § 15, ch. 141, W. Va. Code. *Swann v. Summers*, 19 W. Va. 115, 125.

Where Conflict Exists between Execution Creditors.—A suit may be maintained in a court of equity by or in the name of the sheriff under § 15, ch. 141, W. Va. Code, where there is a conflict between two or more execution creditors in respect to the same fund or property. *Nease v. Aetna Ins. Co.*, 32 W. Va. 283, 9 S. E. 233.

D. SEQUESTRATION OF INTEREST IN TRUST FUND.

Where a trust fund has been created, the annual interest or income from which is directed to be paid to an execution debtor, it is not error for a court of equity to sequester such interest or income, and direct its payment to the execution creditors instead

of directing a sale of the interest of the debtor. *Frank v. People's Nat. Bank*, 95 Va. 500, 28 S. E. 874.

E. BY COMPELLING DEBTOR TO DISCOVER AND SURRENDER ESTATE.

The law has provided as ample means as possible for the enforcement of an execution lien upon property not levied on or capable of being levied on before the return day, by permitting the judgment creditor to file interrogatories to the debtor, who is within sixty days required to file answers upon oath to such interrogatories, thus allowing the creditor to ascertain the property upon which his writ of fi. fa. is a lien. *Evans v. Greenhow*, 15 Gratt. 153.

In *Evans v. Greenhow*, 15 Gratt. 153, the court, in commenting upon the enforcement of an execution lien on personal property of the debtor which is not levied on or capable of being levied on before the return day, said: "And it has provided as ample means as possible for the enforcement of this last-mentioned lien, by enabling him to compel the debtor to discover and surrender his estate, and to compel any other person on whom there is a liability by reason of said lien, to discharge such liability. By resorting to, and pursuing with diligence these means, or some of them, the creditor is generally able to prevent an evasion of his execution lien; and if he be not always able to do so, it is only because rights of others, which the law regards as superior to his, stand in his way."

Object of Filing Interrogatories.—In *Spang v. Robinson*, 24 W. Va. 327, the court said: "The object of filing the interrogatories to the debtor under § 5 of chapter 188 of Code of Virginia or § 4 of chapter 141 of Code of West Virginia is stated on the face of these sections: 'To ascertain the estate, on which a writ of fieri facias is a lien, and to ascertain any real estate in or out of this state, to which a debtor

named in such *fieri facias* is entitled.' When such real and personal estate including choses in action have been discovered by answers to such interrogatories, inasmuch as the creditor can have no means of enforcing his judgment in this state against the lands of the debtor in other states, unless the creditor makes a conveyance thereof for his benefit, § 6, ch. 188, of Code of Virginia of 1860, or § 5, ch. 141, of Code of West Virginia provides, that such debtor may be compelled to convey said land to the officer, in whose hands the *fieri facias* has been or is; and if he refuses to make such conveyance, he can be imprisoned till he does make such conveyance."

Statutory Provision.—The following provision is found in the Virginia Code (§ 3603) and the West Virginia Code (ch. 141, § 4): "To ascertain the estate, upon which a writ of *fieri facias* is a lien, and to ascertain any real estate in or out of this state, to which a debtor named in such *fieri facias* is entitled, the judgment creditor may file interrogatories to the debtor and a copy of the judgment with a commissioner of the court, wherein the judgment is in the circuit or county court of the county in which the defendant resides, who shall issue a summons directed to the sheriff of his county commanding him to summon the defendant to answer said interrogatories at a time and place within the county, to be therein specified, not exceeding sixty days from the date of the summons. A copy of the interrogatories shall accompany the summons and be served therewith on the defendant. The debtor served with such summons and interrogatories shall within the time prescribed therein file answer on oath to such interrogatories. If he fails so to do, or file any answers, which are deemed by the commissioners to be evasive, the commissioner, after the service and return day of the notice to or rule

upon the debtor, issued by such commissioner and returnable to a day and place indicated in the process, to show cause against it, may issue an attachment against such debtor, returnable before him on a day and place certain, set out in it, to compel such debtor to answer the interrogatories aforesaid, or any other which he may deem pertinent. But said commissioner shall enter in his proceedings and report to the court, in which the judgment was rendered, any and all objections taken by such debtor against answering such interrogatories or any or either of them; and if the court shall afterwards sustain any one or more of such objections the answers given to such interrogatories, as to which objections are sustained, shall be held for naught in that or any other cause." *Lewis v. Rosler*, 19 W. Va. 61, 65. See *Trimble v. Shaffer*, 3 W. Va. 614; *Levy v. Arns-thall*, 10 Gratt. 641; *Spang v. Robinson*, 24 W. Va. 327.

Nature of the Provision.—Chapter 188 of the Code of Virginia of 1860 and chapter 141 of the Code of West Virginia, were intended obviously not to confer any new rights on the execution creditor, except in the single case, where the debtor's land lay out of the state, but was intended simply to enable him to compel the execution debtor to discover on oath what the creditor had a lien upon, and then to permit him to enforce his lien in modes provided by the common law or by statute. *Spang v. Robinson*, 24 W. Va. 327, 334.

The remedy provided in W. Va. Code, ch. 141, § 4, and Va. Code, § 3603, is a substitute for the *capias ad satisfaciendum* which existed up to 1850. *Lewis v. Rosler*, 19 W. Va. 61.

In commenting upon the statutory provisions for filing interrogatories to the debtor, the court, in *Lewis v. Rosler*, 19 W. Va. 61, 66, said: "The present remedy under § 4, ch. 218, acts of 1872-3, is a substitute for the *ca. sa.* and much less severe; and it seems

to us if the *ca. sa.* was constitutional, this must be. The present remedy has existed for more than a quarter of a century, and as far as my research or knowledge extends, no one has ever before by habeas corpus or otherwise questioned its constitutionality. The law has been all that time in operation and acquiesced in by the people. It is not a harsh law. If a man has property liable to the payment of his debts, he ought to disclose it. He will not lose his liberty unless he refuses to answer the interrogatories, or evades the truth in his answers. Before the present law was passed, he was in the first instance upon the *ca. sa.* thrown into prison, and he could only come out upon disclosing his property and giving it up for the payment of his debts. Now he need not go to prison at all, if he will give straightforward, honest answers to the interrogatories propounded to him. He is fully protected from the consequences of improper interrogatories being propounded, and being compelled to answer them; for if the interrogatories are improper, the court to whom report must be made, will sustain his objections to them."

Constitutionality of the Statute.—In referring to the validity of the statutory provision for interrogatories, the court, in *Lewis v. Rosler*, 19 W. Va. 61, said: "The remedy now existing would be almost worthless, if the debtor could defy the commissioner and refuse to answer the questions. While the creditor or commissioner was waiting for the court to convene, a debtor might go out of the jurisdiction of the court. I see no objection to the law, and can not point to any provision of the constitution that it violates. It is but enforcing the collection of debts already judicially determined to exist, and in a less harsh manner than was done for more than a century, without its being held to infringe the principles of *Magna Charta* or of any constitution."

To Whom Interrogatories Directed.—Under ch. 141, § 4, W. Va. Code, the interrogatories therein mentioned may be filed to any one or more of the defendants and need not be to all. *Lewis v. Rosler*, 19 W. Va. 61.

Conveyance of Real Estate Lying within the State.—No provision is made for the enforcement of the sale of the land in the state, the primary object of this mode of proceeding being simply to discover on what property the *feri facias* was a lien. When this was done, except in cases where the general law furnished no sufficient remedy to the plaintiff in the execution, no remedy was specially provided for him in this chapter; and, therefore, as the law provided proper modes for subjecting real estate lying in this state to the payment of a judgment, when the answers to the interrogatories discovered that the debtor owned real estate in the state, the plaintiff was left to enforce his judgment against it by a writ of *elegit*, while it was in force, or by a suit in chancery since its abolition. *Spang v. Robinson*, 24 W. Va. 327, 333.

Conveyance of Real Estate Lying without the State.—Under § 5, ch. 141, W. Va. Code, a commissioner may in the manner prescribed in that section compel the debtor to convey his real estate lying outside of the state, to satisfy the creditor's judgment. *Spang v. Robinson*, 24 W. Va. 327.

Surrender of Personal Property.—"But there exists no necessity for permitting or allowing such commissioner to compel the debtor to convey or assign either personal property or choses in action, as this chapter provides for the creditor other and simpler modes of getting such personal property appropriated to the payment of his execution; and such choses in action as to visible personal property and bank-notes or money were to be delivered to the same officer who had held or still held such *feri facias*; or as that might be troublesome, when such visible personal property was in a remote

part of the state, the commissioner might order it to be delivered to some other officer and might prescribe the manner of its delivery; and all this he could compel the debtor to do by imprisonment, if necessary. When thus delivered the court might order the property to be sold under an order of the court and proper application of the proceeds to be made." *Spang v. Robinson*, 24 W. Va. 327, 332.

Illustration.—In *Spang v. Robinson*, 24 W. Va. 327, 333, the court said: "The delivery of such bond, note or open account was not intended to transfer such chose in action to the officer but was intended simply to confer on him an authority for sixty days to collect such chose in action. Or more properly speaking it was intended to authorize the person, who owed the debtor as shown by such chose in action, to pay it to the sheriff or other officer for a period of sixty days and only for that period, for at the end of sixty days the sheriff or other officer was and is bound to return such chose in action, evidence of debt or other security, which may remain in his hands, to the clerk's office of the court, from which the fieri facias issued. This appears to me to be clearly the true meaning to be deduced from §§ 8 and 10 of chapter 188 of Code of 1860 and §§ 5 and 9 of chapter 141 of Code of West Virginia. When this chose in action was returned to the clerk's office in sixty days, he having no title to it by assignment or otherwise and having no authority to collect it any longer, the creditor's mode of collecting it is clearly pointed out and provided for in §§ 11 and 15 of chapter 188 of Code of Virginia of 1860 and in §§ 10 and 14 of chapter 141 of Code of West Virginia."

Choses in Action.—If the defendant in the execution in his answers to the interrogatories disclosed that he had evidences of debt or other choses in action, what was it the duty of the commissioner to do in regard to them?

The answer under § 6 of chapter 188 of Code of Virginia of 1860 or § 5 of chapter 141 of Code of West Virginia is clear. He should order them to be delivered by the debtor to the sheriff or other officer just as any other personal property was to be delivered; and he might, as in the case of visible property, compel the delivery of such evidences of debt, bonds, notes or even open accounts by imprisonment of the debtor, if necessary. But it seems obvious, that he could not compel such debtor to assign either by a writing not under seal or by a writing under seal or by an endorsement of any such bond or note or in any other manner such chose in action to such officer. *Spang v. Robinson*, 24 W. Va. 327, 333.

F. GARNISHMENT TO ENFORCE EXECUTION LIEN.

Statutory Provision.—On a suggestion by the judgment creditor, that, by reason of the lien of his writ of fieri facias, there is a liability on any person other than the judgment debtor, a summons may be sued out of the office of the clerk of the circuit court of the county in which such other person resides, upon an attested copy of said execution being filed with said clerk, to be preserved by him in his office, or if he be a nonresident of the state, in the county in which he may be found, against such person, to answer such suggestion, the return day of which summons may be the next term of said court. Section 10, W. Va. Code. See § 3609, Va. Code. See also, *Brown v. Gates*, 15 W. Va. 131; *Alleman v. Knight*, 19 W. Va. 201.

Where Liability Enforceable at Law.—Under the 10th and 11th sections of chapter 141, Code of West Virginia, providing for a suggestion by a judgment creditor, that by reason of the lien of a writ of fieri facias, there is a liability on any person other than the judgment debtor, and a summons thereon to such third person to answer the suggestion, a judgment can be ren-

dered against such third person, only when he owes a debt to the defendant in the execution or has in his hands personal estate of the defendant in the execution, for which debt an action at law could have been brought against him. *Swann v. Summers*, 19 W. Va. 115.

Where Liability Only Enforceable in Equity.—But when the liability which is sought to be subjected is such that it can only be enforced in a court of equity, no judgment can be rendered against the judgment debtor's debtor in such proceedings as a garnishee. A remedy to enforce such purely equitable liability is provided in § 15, ch. 141, Code of West Virginia. *Swann v. Summers*, 19 W. Va. 115.

Enforceable Either at Law or in Equity.—But if the liability of the garnishee is of such a character that it could have been enforced either at law or in equity, then the plaintiff could, if he chose, enforce it by the garnishee process or by a suit in equity in the name of the plaintiff. *Swann v. Summers*, 19 W. Va. 115.

Parties.—Where, under the statute, a suggestion is issued, it is unnecessary that any other person than the one designated as indebted to, or holding effects of the judgment debtor, should be summoned. *Lanham v. Lanham*, 30 W. Va. 222, 4 S. E. 273.

One Corporation Partly Controlling Another.—If by any legislation one corporation takes charge of a portion of the property and franchise of another and conducts its business in part and by such legislation and action it is responsible to render an account in a court of equity for its actings and doings to the first corporation or its creditors, the creditor of the first corporation who has issued a *feri facias* against the property of the first corporation, can not obtain by the garnishee process, provided for in ch. 141, W. Va. Code, a judgment against the second corporation or any of its debt-

ors. *Swann v. Summers*, 19 W. Va. 115.

Funds in Hands of City Collector.—A collector of the city of Wheeling collected and paid to the city, water rent from a manufacturing company which had not been assessed by the city council as directed by an ordinance, the company having been omitted by the assessor from the separate list which the ordinance required the assessor to make and return to the city clerk to enable the council to assess the water rent. A judgment creditor of said company suggested the collector and summoned him to answer as garnishee. It was held, that there was no liability on the collector, B., which could be reached by suggestion to enforce the *fi. fa. lien* claimed. *Aumann v. Black*, 15 W. Va. 773.

When Summons Returnable.—A summons on a suggestion issued under the provisions of ch. 141, § 10, W. Va. Code, is properly made returnable to the first day of the next term of the circuit court of the county, from the clerk's office out of which said summons is issued, although the first day of the next term of such court comes before the expiration of twenty days from the date of the issuance of such summons. *Miller v. Whites Carver*, 23 W. Va. 10.

Where Parties Summoned File Written Answers.—Where parties summoned under ch. 141, § 12, and ch. 106, respectively, as garnishees, filed written answers without objection, which were subsequently, on motion of the plaintiff stricken from the files, and the court below proceeded to hear evidence as to the indebtedness to the plaintiff and gave judgment against them; it was held that the court should have, instead of striking the answers out, required the garnishees to answer further if desired by the plaintiff, but if further answer was not desired, upon a suggestion that they had not fully disclosed a jury should have been em-

panelled to try the question. *Seamon v. Bank*, 4 W. Va. 339.

Where parties summoned under ch. 141, § 12, and ch. 106, respectively, as garnishees, filed written answers without objecting and the court below proceeded to hear evidence as to the indebtedness to the plaintiff and gave judgment against them, it was held, that the answers must be regarded as accepted by the plaintiff. *Seamon v. Bank*, 4 W. Va. 339.

Where Fi. Fa. Not Delivered.—

Where it does not appear on the trial of a suggestion that the fi. fa. under which an indebtedness to the judgment debtor is sought to be established, has been at any time delivered to any sheriff or other officer to be executed, there is no liability on the part of the garnishee by reason of any lien, although he may be indebted to the judgment debtor. *Baltimore, etc., R. Co. v. Wilson*, 2 W. Va. 528.

Question of Fact.—Where a suggestion is issued, and after the garnishee has answered, it is suggested to the court that he has not fully disclosed his indebtedness, the court will, under the provision of the statute, impanel a jury, without formal pleadings, to inquire whether the garnishee, at the time the suggestion was served on him, was indebted to the judgment debtor, and what amount if any. *Lanham v. Lanham*, 30 W. Va. 222, 4 S. E. 273.

Evidence.—On a trial of suggestion issued in pursuance of a fi. fa. dated in 1864, which had been put in evidence, and a fi. fa. dated in 1858, between the same parties which does not appear to have created a lien because it was not in the hands of an officer to be executed, was offered in evidence, it could not be used to show any lien under the fi. fa. of 1864 as any lien created by it was other and distinct from the one under investigation. *Baltimore, etc., R. Co. v. Wilson*, 2 W. Va. 528.

Effect on Judgment.—The suggestion under the statute is only a pro-

ceeding to enforce the lien of an execution upon a judgment and can add no force to the judgment, nor subject estate which that execution could not reach. *McKay v. McKay*, 33 W. Va. 724, 11 S. E. 213.

An order made by a court upon a suggestion filed by the administrators of a guardian, suggesting that by reason of an execution upon a judgment recovered by the administrator of the guardian against the administrator of the father of the ward for a debt due from him in his lifetime, there is a liability on them as administrators; the order directing such administrators to apply to the payment of such execution any money or estate in their hands as administrators belonging to or for which they are liable to the administrator of the father of such ward can not operate to give such administrators credit against such moneys of the ward in settlement of the guardianship account, any more than the judgment. *McKay v. McKay*, 33 W. Va. 724, 11 S. E. 213.

G. WHERE GARNISHEE FAILS TO APPEAR AND MAKE FULL DISCLOSURE.

Remedy Same as for Attachment Liens.—See the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 70.

Where a judgment on the trial of a suggestion, is that the plaintiff recover of the garnishee the amount of his debt against the execution debtor, it is held to be correct, inasmuch as the remedy in relation to execution liens is the same given for attachment liens in like cases where it is suggested that the garnishee has not fully disclosed his liability. *Baltimore, etc., R. Co. v. Wilson*, 2 W. Va. 528.

Oath of Jury.—The oath of a jury on the trial of a suggestion where want of full disclosure has been suggested, is substantially in conformity to the statute where they are sworn to well and truly inquire whether the garnishee has fully disclosed the debts due by him to,

or effects in his hands of, the debtor, and also to ascertain the indebtedness of the garnishee to the debtor and a true verdict render according to the evidence. *Baltimore, etc., R. Co. v. Wilson*, 2 W. Va. 528.

Evidence.—Where on the trial of a suggestion it has been suggested that the garnishee has not fully disclosed as to debts or effects in his hands due the execution debtor, a copy of the original judgment is offered in evidence by the plaintiff, it is not error to permit it to be read to the jury, although probably not necessary to enable the plaintiff to make out his case; but it is error to permit a certificate of

its recordation or docketing to be read, yet if a bill of exceptions noting the facts be taken, to the admission both of judgment and certificate, the admission of the former being proper it is not error to overrule the objection. *Baltimore, etc., R. Co. v. Wilson*, 2 W. Va. 528.

Rule to Compel Answer.—Where a garnishee has been regularly summoned to answer a suggestion, and having been duly advised by the suggestion as to what he is to answer, and when and where, and he fails to do so the suggestor is entitled to a rule to compel an answer. *O'Brien v. Camden*, 3 W. Va. 20.

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I. Executions against the Body.

A. WRIT OF CAPIAS AD SATISFACIENDUM.

1. Abolition by Statute.

Section 2, ch. 188, Va. Code, 1849,

abolished the writ of ca. sa. in all cases except those provided for in § 1, of the chapter. It was obviously the purpose of the general assembly to save to the creditor the rights which he might have acquired if the former laws

had continued to exist, and to give him a new and adequate remedy to enforce his rights. *Puryear v. Taylor*, 12 Gratt. 401, 407.

The revisors in their report to the general assembly, p. 926, say, that "This chapter (188) is framed to provide for the creditor (in place of taking the debtor under a *capias ad satisfaciendum*, and compelling him to take the oath of insolvency) as efficient remedies (in cases not provided for by the 1st and 2d sections) against all estate not subjected to other process, as he now has when the debtor is discharged by taking the oath of insolvency." *Puryear v. Taylor*, 12 Gratt. 401, 408.

Remedy in Place of Writ.—In the Virginia Code of 1849, for the first time, the writ of *capias ad satisfaciendum* was abolished. Code, 1849, ch. 2, p. 716. But § 5 of the same chapter providing for filing interrogatories to the debtor, and requiring him to disclose upon oath, what estate real or personal he owned, and provided, that if he failed to answer such interrogatories "or file answers which are deemed by the commissioner or alleged by the creditor, his agent or attorney to be evasive, the commissioner shall make report thereof to the court, by which he is appointed; and said court after service of a notice to or upon the debtor to show cause against it may attach him and compel him to answer either in court or before the commissioner the same or any other interrogatories, which it deems pertinent." *Lewis v. Rosler*, 19 W. Va. 61, 65.

2. Nature and Form.

Distinguished from *Capias Pro Fine*.

—"In the original structure of the two writs, the levy of the *ca. sa.* was made a direct satisfaction of the debt; but in the frame of the writ of *capias pro fine* the imprisonment did not purport to be a satisfaction of the fine; it was a part of the punishment; and the fine still remained in full force, and could

only be redeemed by satisfaction of the fine, whenever it might be made.

* * * The levy of the *ca. sa.* was attended with consequences which do not seem to have attended the imprisonment under the *capias pro fine*—such as the voluntary enlargement of the prisoner to discharge the debt, the effect and the liabilities arising under an escape, the privilege of the prisoner to discharge his person from custody under the *ca. sa.*, by making a surrender of his property, thereby in effect converting the *ca. sa.* into a *fi. fa.*" *Wilkinson v. Allan*, 23 Gratt. 16; *Com. v. Webster*, 8 Gratt. 702.

Misnomer.—"The execution must strictly pursue the judgment, and be warranted by it; and therefore if a defendant be sued by a wrong name, and omit to take advantage of the misnomer, he may be arrested on a *ca. sa.* by such wrong name. 1 Archb. Pract. 304; *Crawford v. Satchwell*, 2 Str. 1218. The plaintiff in that case brought trespass and false imprisonment by the christian name of Archibald; the defendant justified under a *capias ad satisfaciendum* upon a judgment against Arthur, and averred that the plaintiff in the then action was the same person who was sued in the former by the name of Arthur: and on demurrer the court held it a good plea, the defendant having missed his time for taking advantage of the misnomer, which should have been by pleading it in the first action. And the court said that in the case of a bond given in a wrong name, the obligor must be sued by that wrong name, and the execution must pursue it." *May v. State Bank*, 2 Rob. 56, 66.

Undated Writ.—A writ which purports to be a *pluries capias*, but which is without date, and is not attested by the clerk, is wholly null and void as process; and an order based thereon directing a proclamation to issue, and all the subsequent proceedings, are without warrant and illegal. *Hickam v. Larkey*, 6 Gratt. 210.

3. Grounds of Issuance.

See also, the title FINES AND COSTS IN CRIMINAL CASES.

At Common Law.—At common law the crown, for the recovery of its debts, could issue executions against the persons, and the goods and profits of the lands, and the goods and chattels, and the lands, of its debtors. That is it might issue an execution of *capias ad satisfaciendum*, or of *levari facias*, or of *feri facias*, or of *extendi facias*; and it might in one combine all these writs. *Com. v. Webster*, 8 Gratt. 702.

To Recover Fine.—A *capias ad satisfaciendum* on behalf of the commonwealth against a person convicted of a misdemeanor, upon a judgment against him for a fine and costs, can not be issued. *Com. v. Webster*, 8 Gratt. 702, 707.

4. Proper Officer to Serve Writ.

See also, the title SHERIFFS AND CONSTABLES.

Sheriff of Another County.—A judgment was rendered in the county court of F. where the defendant resides. It was held, that a *capias ad satisfaciendum* can not be issued to the sheriff of the county of H., and be there served, the defendant happening to be found in that county when the writ was served, but it not appearing that he had removed his property out of the county of F. *Brydie v. Langham*, 2 Wash. 72.

Sergeant of Corporate Town.—An execution against the body directed to the sheriff of the county, may be executed by the sergeant of a corporate town. *Purcell v. Richardson*, 4 Hen. & M. 405.

Constable.—An execution against the body issued upon a judgment by a justice of the peace, from the court of a county or corporation, can not be served by a constable, except in the city of Richmond. *Stokes v. Perkins*, 4 Rand. 356.

5. Lien of Writ.

See also, the titles BANKRUPTCY AND INSOLVENCY, vol. 2, p. 249; JUDGMENTS AND DECREES.

The creditor here resorted to the *ca. sa.*, and after taking out a *ca. sa.* and getting it executed, he can no longer stand on the lien of the judgment. *Rogers v. Marshall*, 4 Leigh 425; *Leake v. Ferguson*, 2 Gratt. 419, 432.

On a joint judgment against several, the service of a *ca. sa.* on one, and the execution and forfeiture of a forthcoming bond by him, does not extinguish the lien of the judgment upon the land of the others. *Leake v. Ferguson*, 2 Gratt. 419.

The *ca. sa.* was a lien only from the time of its execution, and then only a qualified and conditional lien. *Evans v. Grenhow*, 15 Gratt. 153, 159.

Priority of Liens.—A recovers a judgment against B, at August term, and sues out a *ca. sa.* thereon in October, under which B is taken in execution, and in November takes the oath of insolvency, and is discharged, under the statute for the relief of insolvent debtors; in the interval between the date of A's judgment and the service of his *ca. sa.* on B, sundry mortgages are executed by B and duly recorded, to secure sundry debts to other creditors. It was held, that by the actual service of A's *ca. sa.* on B, the lien of A's judgment was destroyed, and A could then stand only on the lien given to the *ca. sa.* executed by the statute of executions, 1 Rev. Code, ch. 134, § 10, and that, therefore, the mortgagees are entitled to the benefit of their mortgagees. *Rogers v. Marshall*, 4 Leigh 425.

Several creditors recover judgments against N., and sue out writs of *ca. sa.* upon which he is taken and charged in execution; then F. recovers judgment against the same debtor, and sues out *elegit* on which his lands are extended, and a moiety delivered to F., and then the debtor is regularly discharged from custody under the writs of *ca. sa.* as an insolvent debtor, putting into his schedule the whole of lands which had been extended under F's *elegit*. Held, the lien of the writs of *ca. sa.* executed,

given by the statute, 1 Rev. Code, ch. 134, § 10, does not overreach and avoid the extent under F's elegit. *Foreman v. Loyd*, 2 Leigh 284, overruling *Jackson v. Heiskell*, 1 Leigh 257.

Waiver of Lien.—If the creditor waives his ca. sa. he can not avail himself of its lien; and if he does not waive it, then the debtor may return to custody, or be taken by the officer, who has a right to sue out an escape warrant himself. *Stuart v. Hamilton*, 8 Leigh 503, 507.

Time When Binding.—It was not a lien at all upon personal estate until by the act of March 2, 1821, it was declared, that "every writ of *capias ad satisfaciendum* shall bind the property of the goods of the party against whom the same is sued forth, from the time that such writ shall be levied." Sess. Acts, p. 35, ch. 34, § 4. *Evans v. Greenhow*, 15 Gratt. 153, 159.

After Debtor's Discharge.—A judgment creditor, whose debtor, after being taken in execution, has been discharged from custody by the jailor, for nonpayment of the jail fees, is remitted to the lien of his judgment, and will be entitled to satisfaction out of the debtor's land, in preference to creditors claiming under a deed of trust executed by the debtor, conveying the land, but not recorded in the county where it lies. *M'Cullough v. Sommersville*, 8 Leigh 415.

B. COMMITMENT.

See also, the title COMMITMENTS AND PRELIMINARY EXAMINATION OF ACCUSED, vol. 3, p. 1.

Jail of County Where Attachment Executed.—The law is, that every person taken by an attachment for not performing any order or decree of this court, shall be committed to the jail of the county where the attachment is executed. *Lane v. Lane*, 4 Hen. & M. 437.

Effect of Bail.—When a sheriff has arrested a defendant and taken appearance bail, and makes a return that the

defendant is committed to jail, he loses his remedy against the bail on the bail bond. *Henry v. Stone*, 2 Rand. 455.

C. JAIL FEES.

When They Can Not Be Demanded of Creditor.—If the debtor be able to pay his own prison fees, the jailor can not demand them of the creditor. *Rose v. Shore*, 1 Call 540.

And the presumption is, that the debtor is able to pay them, until the contrary be shown by the jailor. *Rose v. Shore*, 1 Call. 540.

Where Prisoner Is Insolvent.—In this view, the exception is set up under the act of 1772, ch. 13, § 1 (8 Stat. Larg. 527), "since re-enacted (ch. 134, § 42, Rev. Code, Ed., 1819), declaring, that where any person shall be committed to prison, and shall not be able to satisfy and pay his ordinary prison fees, the sheriff or jailor may demand and receive of the party or parties, at whose suit such insolvent person shall be imprisoned, all such fees as shall become due, until such creditor shall agree to release such prisoner." *Rose v. Shore*, 1 Call 540, 544.

When Creditor Bound to Give Security for Jail Fees.—The creditor of an insolvent prisoner, who has the liberty of the rules, is bound to give security for the prison fees; but the sheriff can not legally discharge him, unless he be actually insolvent, and, being so, the plaintiff having notice thereof, refused to pay his fees, or to give bond for the payment thereof. *Meredith v. Duval*, 1 Munf. 76.

Fees Gaoler May Demand.—"I have carefully examined the acts of assembly to discover what fees a gaoler would have a right to demand of a prisoner within the prison bounds; and I can find none except the fee of 1s. 6d. per day for maintaining him in diet. Now, according to the principles established in the case of *Rose v. Shore*, 1 Call 540, it ought to have been averred and proved that Duval was unable to pay that fee, before the sheriff

could have a right to demand it from the creditor; a fortiori, it is equally necessary that that fact should be established, before the sheriff could be authorized to discharge him out of his custody, and thereby deprive the creditor of the satisfaction which the law allowed him for his debt." *Meredith v. Duval*, 1 Munf. 76.

D. PRISON BOUNDS.

When Entitled to Prison Bounds.—

Under the law in force in Virginia the *capias ad satisfaciendum* issued, upon a judgment for debt, and to somewhat soften the rigor of the remedy, the debtor under certain circumstances was permitted to have a larger prison than the common jail, and was entitled to the "prison bounds." *Lewis v. Rosler*, 19 W. Va. 61, 64.

Still a Prisoner.—A debtor within the prison rules is still a true prisoner in the eye of the law; and, as such, should be transferred by the sheriff to his successor in office. *Meredith v. Duval*, 1 Munf. 76.

In an action on a prison bounds' bond, the plaintiff is only required to show a departure from the rules; the burden of proof then devolves on the defendant to show that the prisoner was discharged by due course of law. *Meredith v. Duval*, 1 Munf. 76.

Bonds.—A bond for keeping the prison rules should be taken to the sheriff for the time being, and his successors in office; not his executors, administrators or assigns. *Meredith v. Duval*, 1 Munf. 76.

Bond May Be Assigned.—But such bond, though taken to the sheriff, as such, and to "his executors, administrators, or assigns," may be assigned by him to the creditor; and a suit may be maintained upon it. *Meredith v. Duval*, 1 Munf. 76.

When Legally in Custody.—Upon a writ of *ca. sa.* sued out for debt, the debtor is taken in execution by the sheriff, who permits him to go at large, upon his giving a bond to the sheriff

with condition that he will surrender himself into custody under the process, on a day certain; the debtor does voluntarily surrender himself into the custody of the sheriff upon the process, accordingly; and, then, wishing to have the benefit of the prison rules, give a prison bounds' bond with sureties; it was held, the debtor was legally in custody of the sheriff at the time the prison bounds' bond was given, and so this bond is good and binding on the sureties. *Carthrae v. Clarke*, 5 Leigh 268.

Measure of Damages.—The measure of damages in an action upon a prison bounds' bond is the debt, interest and costs. *McGuire v. Pierce*, 9 Gratt. 167.

Defense to Action on Bond.—It is no defense to an action on a prison bounds' bond, that the prisoner, after a departure, voluntarily returned to the rules, and there remained, etc.; or that he voluntarily returned to the jail, etc.; or that the jailor made fresh pursuit after the prisoner, and recaptured him and recommitted him to jail; or that the prisoner accidentally walked sixteen feet beyond the limits of the prison bounds, which were bounded on an imaginary line, and thereupon immediately returned, etc. *McGuire v. Pierce*, 9 Gratt. 167.

Duty of Sheriff to Assign Bond.—It is the duty of the sheriff, when a person in execution escapes from the prison bounds, immediately to obtain an escape warrant, and give notice thereof to the execution creditor, and assign to him the bounds' bond, which he is obliged to receive; and the sheriff is then free from all liability, unless the security in the bond was insufficient at the time it was taken. *McGuire v. Pierce*, 9 Gratt. 167.

Joint Execution.—There is a joint judgment and execution against two, who have been arrested and committed to prison. They may jointly execute a prison bounds' bond. *McGuire v. Pierce*, 9 Gratt. 167.

Marks and Bounds of Prison Rules.

—The statute referred to by the counsel of the plaintiff in error, 1 Rev. Code, 1819, p. 251, § 18, requires the marks and bounds of the prison rules, directed to be laid out by the justices of every county and corporation, to be recorded, but does not prescribe the particular book in which they are to be recorded. The marks and bounds in this case were entered only on the order book of the county court, but having been entered therein as part of one of the regular orders of the court, and the order book being certainly a record book, they were recorded within the meaning of the statute. *McGuire v. Pierce*, 9 Gratt. 167.

The boundaries of the prison rules being recorded in the order book of the county court, in the order of the court establishing them, is a sufficient compliance with the statute requiring said boundaries to be recorded. *McGuire v. Pierce*, 9 Gratt. 167.

E. ESCAPE.

See also, ante, "Prison Bounds," I, D.

When Action May Be Maintained.

Under the act, 1 Rev. Va. Code of 1819, ch. 134, § 48, p. 542, a motion may be maintained against a sheriff for an escape: 1st. Where the return on the execution states that the officer has taken the body of the debtor and has it ready to satisfy the execution, and the plaintiff can show the escape aliunde. 2d. When the return shows such a state of facts as would entitle the plaintiff to a verdict in an action of debt for an escape. *Stone v. Wilson*, 10 Gratt. 529.

Failure to Provide Jail.—A return by the sheriff that the county court had not provided a jail, and that he had therefore permitted a debtor taken in execution to go at large, itself shows an escape, and will sustain a motion against the sheriff. *Stone v. Wilson*, 10 Gratt. 529.

The fact that the county court has not provided a jail in which a debtor

taken in execution may be confined, does not authorize the sheriff who has taken a debtor on an execution, to permit him to go at large. If no jail is provided by the county court, it is the sheriff's duty to provide one, and to keep the debtor whom he has taken in execution, in custody. *Stone v. Wilson*, 10 Gratt. 529.

A return by the sheriff that the county court had not provided a jail, and that a debtor taken in execution had escaped without his consent or negligence; without adding that he had used due means to retake him, is not sufficient to protect the sheriff; but a motion may be maintained against him upon the return. *Stone v. Wilson*, 10 Gratt. 529.

Proof and Presumption.—Upon proof of the escape, the jury are bound to presume all that is necessary, under the statute, to be found in their verdict, unless and until the sheriff negatives by his proofs all consent or negligence on his part, and also shows that he has used due means to retake the prisoner. *Stone v. Wilson*, 10 Gratt. 529.

Evidence Necessary to Maintain Action.—In order to maintain the action, it is only necessary for the plaintiff to show the escape, which may be done by evidence aliunde the return on the execution; to defeat the action the sheriff must show that the escape was tortious, and that fresh pursuit was made. *Stone v. Wilson*, 10 Gratt. 529.

Willful or Negligent.—Under the act, 1 Rev. Va. Code of 1819, ch. 136, § 3, an action of debt may be maintained against a sheriff for either a willful or negligent escape. *Stone v. Wilson*, 10 Gratt. 529.

Effect of Escape.—It is said in 2 Bac. Abr. Escape C., p. 515, that "it was formerly held, that where the sheriff suffered a prisoner in execution to make a voluntary escape, the prisoner was, in such case, absolutely discharged from the creditor, and that the

right of action was entirely transferred against the sheriff, who by means of such escape became debtor *ex delicto*." *Carthrae v. Clarke*, 5 Leigh 268, 271.

Action against Lands of Escaped Debtor.—On a bill by a creditor against his debtor who has escaped, and the debtor's alienee, to subject lands devised to the debtor after his escape, and conveyed away by him while at large, a court of equity will decree a sale of so much as is liable to the *elegit* lien, to wit, a moiety, if it appear that the profits are insufficient to keep down the interest of the debt. But it will go no farther. It will not decree a sale of the whole lands. *Stuart v. Hamilton*, 8 Leigh 503.

Second Execution against Escaped Debtor.—If a debtor in custody under a *ca. sa.* be permitted to escape, the creditor is entitled to another execution against the debtor as well as to an action against the sheriff for the escape. *Windrum v. Parker*, 2 Leigh 361.

If a debtor charged in execution escape, the creditor may sue out a *scire facias* to have a new execution; and after judgment on such *scire facias*, an *elegit* may issue to have delivered to the creditor a moiety of all the lands whereof the debtor was seized at the date of the original judgment or at any time afterwards. *Stuart v. Hamilton*, 8 Leigh 503.

If a debtor charged in execution escape, the creditor may obtain new execution, either by *scire facias*, or upon motion after reasonable notice. *Fawkes v. Davison*, 8 Leigh 554.

Release before Expiration of Twenty Days.—This was an action against the (appellant) sheriff, for an escape, and upon a special verdict, the case was; the plaintiff (respondent) had judgment against one Gilmet in custody, and prayed him in execution. He had been in custody thirty-two days before at another suit, and the defendant knowing him to be insolvent, de-

manded of the plaintiff's attorney, security for the prison fees, who refused to give him security, and thereupon the sheriff discharged him. The question in this case was, whether the sheriff was obliged to keep him twenty days before he discharged him; and the court was of opinion that he ought to have done so, and affirmed the county court's judgment. *Webb v. Ellisgood*, Jeff. 59.

F. DISCHARGE.

Must Disclose Property.—Before the present law was passed, a debtor was in the first instance upon the *ca. sa.* thrown into prison, and he could only come out upon disclosing his property and giving it up for the payment of his debts. *Lewis v. Rosler*, 19 W. Va. 61, 66.

In the W. Va. Code of 1819, ch. 134, § 31, the rigor of the remedy was still further softened, and the debtor could be discharged from prison by surrendering his effects and executing conveyance of his lands. *Lewis v. Rosler*, 19 W. Va. 61, 64.

By Insolvent Debtor's Oath.—If a defendant, against whom a judgment has been rendered for a fine, or amercement, in a prosecution for a misdemeanor, being in custody under a *capias pro fine*, or a *capias ad satisfaciendum*, take the oath of an insolvent debtor, surrendering his property, and be thereupon discharged; such discharge is an exoneration from all further liability on such judgment as to the said fine, or amercement. *Quinling v. Com.*, 2 Va. Cas. 494.

No other *ca. sa.* can afterwards be obtained against him, by motion to the court, or otherwise; nor can a *fi. fa.* be issued against his after-acquired goods and chattels. *Quinling v. Com.*, 2 Va. Cas. 494.

By Injunction.—If a debtor in execution obtain an injunction, the sheriff is bound to discharge him from custody. *Ross v. Poythress*, 1 Wash. 120. The reason is much stronger in the

case of an execution against the body, where the injunction would have no effect at all, if it did not operate to discharge the body from confinement. *Ross v. Poythress*, 1 Wash. 120, 123.

Released after Twenty Days' Detention.—A debtor, being surrendered to the sheriff by his special bail (after judgment against him in a county court), can not legally be detained in jail, or within the prison bounds, on a bond given for that purpose, more than twenty days from the time of such surrender, if the creditor, his attorney, or agent, do not, within that time, charge him in execution in writing. *Green v. Garrett*, 3 Munf. 339.

Property in Discharge.—It seems, that where a *capias ad satisfaciendum* is executed at any time before the return day thereof, the sheriff may receive property tendered by the debtor, in discharge of his body out of custody, and appoint a day of sale posterior to the return day; and that a bond for the forthcoming of such property is good in law, though dated after such return day. *Dix v. Evans*, 3 Munf. 308. See also, the title **BANKRUPTCY AND INSOLVENCY**, vol. 2, p. 250.

Discretion as to Administering Oath.—A county court, or justices of the peace in the country, to whom a debtor in execution applies to have the oath of insolvency administered to him, and to be thereupon discharged, have no discretion to administer or refuse to administer the oath, but are bound to administer it, though they may be of opinion, that the debtor has effects not put into his schedule to be surrendered, which he fraudulently conceals. *Harrison v. Emmerson*, 2 Leigh 764.

Mandamus to Compel Administration of Oath.—And if the justices being asked to administer the oath, and order a discharge of the prisoner accordingly, refuse to do so, a mandamus lies from the circuit court to compel them. *Harrison v. Emmerson*, 2 Leigh 764.

Illegal Discharge.—If the prisoner depart from the rules by illegal discharge from the sheriff, the creditor, having an assignment of the bond, has his election to bring suit upon it, or to sue the sheriff. *Meredith v. Duval*, 1 Munf. 76.

Debtor Divested of Entire Estate.—Before such debtor could be so discharged, he was required to surrender every thing of value (with a few specified exceptions) owned by him, including debts due to him, to be applied in a designated mode to the satisfaction of the creditor's demand. If the debtor failed to surrender his estate as the law required, still, by mere operation of law he was divested of all title thereto, and the estate applied, in a way pointed out, to discharge the debt. *Puryear v. Taylor*, 12 Gratt. 401, 407.

Effect of Discharge.—If a debtor be arrested on a *ca. sa.* and discharged by order of the creditor or his agent, no other execution can be had on the same judgment or decree. *Windrum v. Parker*, 2 Leigh 361.

Discharge by Magistrate's Order.—A sheriff, who has released a debtor, taken in custody upon a *ca. sa.* by authority of a warrant of discharge from a magistrate under the act for the relief of insolvent debtors, is not liable to the judgment creditor in an action of debt for an escape, although it is shown that the notice by the debtor to the creditor, of his intention to apply for the benefit of the act, was insufficient. *Price v. Holland*, 1 Pat. & H. 289.

Lands Become Vested in Sheriff of County.—Where a person taken in execution is discharged as an insolvent debtor, the estate in lands belonging to him at the time of such discharge is, by the act in 1 Rev. Code of 1819, ch. 134, § 34, p. 538, so completely vested in the sheriff of the county wherein such lands lie, that an ejectment for such lands can not afterwards be maintained on the demise of the insolvent

debtor, while the execution remains unsatisfied. *Syrus v. Allison*, 2 Rob. 200. See also, the title BANKRUPTCY AND INSOLVENCY, vol. 2, p. 251.

On the 25th of July, 1801, A. conveys a moiety of a tract of land to G. in trust to secure a debt, with power, if the debt should remain unpaid on the 25th of June, 1805, after having a division of the tract in the manner pointed out by the deed, to sell the moiety allotted to G. and with a proviso that if payment were made before the day, the deed should be void; on the 8th of September, 1801, A. conveys to R., and P. ten acres of the tract, by metes and bounds; before the 25th of June 1805, the debt secured by the deed of trust is paid; and in 1813, P. being charged in execution, is discharged by taking the oath of insolvency. It was held, 1. that the deed to R. and P. only gave them an equitable title: 2. That if it passed a legal title, that of P. upon his taking the oath of insolvency, became vested in the sheriff of Kanawha county, wherein the land lay. *Ruffners v. Lewis*, 7 Leigh 720.

II. Arrest in Civil Cases.

A. PRIVILEGED PERSONS.

1. Members of the Assembly.

Can Not Be Noted Ex Officio.—The privilege of a member of assembly, can not be noticed by the courts ex officio. As it may be waived, it must be claimed. And it can only be claimed by plea; or on motion tendered, or made at the proper period. Thus, if a member of assembly allows a judgment to be rendered against him during the existence of his privilege, and does not seek during the progress of the proceedings, either to abate or suspend them, he will be deemed to have waived his privilege, and he can not afterwards be allowed the writ of error coram vobis to reverse the judgment. *Prentiss v. Com.*,

5 Rand. 697, 16 Am. Dec. 782; *Johnson v. Johnson*, 4 Call 38, 39.

May Waive Privilege.—A member of assembly may waive his privilege, and let the cause proceed to trial. *Johnson v. Johnson*, 4 Call 38.

2. Judges, Attorneys and Suitors While Attending Court.

Judges, attorneys, witnesses, and suitors are exempt from arrest in civil suits during their attendance at court. *Com. v. Ronald*, 4 Call 97.

Suitors.—1. That a suitor, whilst attending court upon his own cause, is privileged from arrest. 2. That such suitor who has been attending court, can not be arrested by a *capias ad satisfaciendum*, or other process, until he has had a reasonable time to return home. *Richards v. Goodson*, 2 Va. Cas. 381.

B. BAIL IN CIVIL CASES.

See the title BAIL AND RECOGNIZANCE, vol. 3, p. 198.

Under the statute, Va. Code of 1873, ch. 148, § 33, to authorize the holding the parties to bail, the plaintiff affiant must have believed when he made his affidavit that the facts sworn to therein were true—that is, that the plaintiffs in their suit had cause of action against the defendants in that suit for the amount stated in the affidavit, and that there was probable cause for believing that the said defendants were about to quit the state unless forthwith apprehended. And taking him for a man of common prudence, he must have been justified in so believing from the circumstances then known to him. It was not necessary that the facts should be actually true, but it is necessary that he should have believed them to be true; and that as a prudent man, under the circumstances then known to him, he was warranted in entertaining that belief. *Forbes v. Hagman*, 75 Va. 168.

Execution Sales.

See the title SHERIFFS' SALES.

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See the title CONSTITUTIONAL LAW, vol. 3, p. 158.

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EXECUTORS AND ADMINISTRATORS.

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As to the duty of the executor to have a copy of the will admitted to record, see the title WILLS. As to the liability of the estate of a deceased partner to social creditors, see the title PARTNERSHIP.

I. Definitions and Distinctions.

A. REPRESENTATIVES OR PERSONAL REPRESENTATIVES.

The words "personal representative" shall be construed to include the executor of a will or the administrator of

the estate of a decedent, the administrator of such estate with the will annexed, the administrator of such estate, unadministered by a former representative, whether there be a will or not, a sheriff, sergeant, or other officer who

is, under the order of the court of probate, to take into his possession the estate of a decedent and administer the same, and every other curator or committee of a decedent's estate, for or against whom suits may be brought for causes of action which accrued to or against the decedent. Va. Code, 1887, ch. 2, § 5, cl. 4.

The primary sense of the word "representatives," when used in a bequest of personal property, is the same as that of "legal representatives" or "personal representatives." Each of them is equivalent to executors or administrators. *Brent v. Washington*, 18 Gratt. 536. But this primary sense of the word "representatives" may be controlled, where an intention is clearly indicated to employ it in a different sense. *Brent v. Washington*, 18 Gratt. 526.

B. EXECUTOR.

"An executor is the person to whom the execution of the last will and testament of the personal estate is, by the testator's appointment, confided." 11 Am. & Eng. Ency. Law (2d Ed.) 741.

C. ADMINISTRATOR.

"An administrator is a person authorized to manage and distribute the estate of an intestate or of a testator who has no executor." 11 Am. & Eng. Ency. Law (2d Ed.) 741.

D. DEEMED A TRUSTEE.

The personal representative of a decedent is deemed a trustee exercising a continuing trust as to legatees. *Jones v. Jones*, 92 Va. 590, 24 S. E. 255.

E. SIMILARITY TO ASSIGNEE IN BANKRUPTCY.

See generally the title BANKRUPTCY AND INSOLVENCY, vol. 2, p. 232.

An assignee in bankruptcy, in many respects, stands in the same relation towards the bankrupt's estate as that of an executor towards the personal

estate of his testator. *Dillard v. Collins*, 25 Gratt. 343.

F. ADMINISTRATORS DE BONIS NON.

See post, "Administrators De Bonis Non or with the Will Annexed," V.

G. PUBLIC ADMINISTRATORS.

See the titles PUBLIC OFFICERS; SHERIFFS AND CONSTABLES.

"A public administrator has been defined as an officer authorized by the statute law of several of the states to effect a settlement of estates of persons dying without relatives entitled to administer. It seems, however, that this definition is too narrow in the limitation to the settlement of the estates of persons 'dying without relatives entitled to administer,' because, as a general rule, the estate may be committed to the public administrator whenever for any reason it is not otherwise administered, whether there are persons entitled to administer or not." See 11 Am. & Eng. Ency. Law (2d Ed.) 806; Va. Code (1887), § 2645.

II. Appointment, Qualification and Tenure of Office.

A. EXECUTORS.

See post, "Administrators," II, B.

1. Source of Authority.

An executor derives his power from the will; and, at common law, nothing was required to invest him with the full exercise of that power, for almost every possible purpose, but his acceptance of the trust. By any intermeddling with the estate, which amounted to a partial administration, he was considered as having accepted the trust, and taken upon himself the whole administration; and he became thereby, ipso facto, complete executor. But by our statute, to the confidence reposed in the executor by the testator, there is superadded the necessity of giving bond and security for the faithful discharge of the duties of the office. The refusal or failure to give security

is expressly declared to amount to a refusal of the executorship; and the court shall, thereupon, grant letters of administration with the will annexed to the person to whom administration would have been granted if there had been no will. In this country, therefore, he is not, as in England, complete executor by mere partial administration of the estate. To make him complete executor, it is indispensably necessary that he shall qualify by giving bond and security. *Monroe v. James*, 4 Munf. 194. See post, "Qualification," II, B, 5.

2. Appointment by Implication from Terms of Will.

The testator devises that his book shall be given up to A and that he shall receive all the debts due, and pay all the testator owes; this is an appointment of A to perform the office of executor, but does not entitle him to the surplus of the debts due the testator nor does it discharge him from a debt, which he himself owed. *Fleming v. Bolling*, 3 Call 75.

3. Nomination in Codicil.

A duly executed codicil in the following terms: "I, [A] do make this a codicil to my will made on the 6th day of August, 1895, I do nominate and appoint [X] as one of the executors of my will and do hereby revoke the appointment of [Y] to said will," revives the will therein referred to. *Francis v. Marsh*, 54 W. Va. 545, 46 S. E. 573.

4. Delegation of Power of Appointment.

See the title POWERS.

It seems that a testator may delegate the power to appoint executors, and such appointment is as valid as if made by the testator himself. See 11 Am. & Eng. Ency. Law (2d Ed.) 747; note 4 Va. Law Reg. 265.

5. Revocation of Appointment.

The nomination and appointment of an executor in the will may be revoked by a duly executed codicil.

Francis v. Marsh, 54 W. Va. 545, 46 N. E. 573.

6. Renunciation.

See post, "Administration Bond," IV, M.

a. Form and Manner of Renunciation.

(1) Renouncement May Be Made Expressly or Impliedly.

The renunciation of an executorship may not only be made expressly, but may also be implied from the acts or conduct of the executor, such as refusing or neglecting to qualify. *Thornton v. Winston*, 4 Leigh 152; *Burnley v. Duke*, 1 Rand. 108; *Geddy v. Butler*, 3 Munf. 345; *Thompsons v. Meek*, 7 Leigh 428; *Nelson v. Carrington*, 4 Munf. 332.

(2) Necessity of Renouncing by Matter of Record.

The renunciation of the executorship need not be by matter of record. *Geddy v. Butler*, 3 Munf. 345; *Thornton v. Winston*, 4 Leigh 152, 157; *Thompsons v. Meek*, 7 Leigh 428.

(3) Sufficiency of Renouncement by Matter in Pais.

In General.—A renunciation by an executor may be proved by declarations in pais, or presumed from circumstances. *Geddy v. Butler*, 3 Munf. 345; *Thornton v. Winston*, 4 Leigh 152, 157; *Thompsons v. Meek*, 7 Leigh 428; *Nelson v. Carrington*, 4 Munf. 333.

Failure to Give Bond.—The statute seems to regard the refusal of the executor to give the required bond as being equivalent to a renunciation of the trust. See Va. Code (1887), § 2637.

Failure to Qualify.—In *Burnley v. Duke*, 1 Rand. 108, it is decided that a renunciation of the executorship of a will may be presumed from the facts of an executor's failing to qualify, and joining another who had qualified as administrator in a sale of land directed by the will to be sold, such joining being not in his character of executor but as heir of the testator. Thus a testator, in the year 1874, having directed that

his executors should sell all his real and personal estate for the payment of his debts, and having appointed four executors, three of whom qualified, a sale in 1794, by two of the acting executors, was held, valid, and the third executor, as well as the fourth, who never qualified, was presumed to have renounced his right to administer, as at the date of the sale in question. *Nelson v. Carrington*, 4 Munf. 333.

Consent to Issuance of Letters to Another.—Where the executrix named in the will did not qualify, but consented that letters of administration with the will annexed should be granted to her daughter, stating, however, that she reserved the right to qualify after the death of her daughter, it was held that by such consent at the grant of administration she renounced the executorship and could not qualify after the death of her daughter, notwithstanding such reservation. *Thornton v. Winston*, 4 Leigh 152.

b. Effect of Renunciation.

Upon the renunciation of the sole executor, or all of several executors, the administration becomes vacant, and administration with the will annexed may be granted. *Thornton v. Winston*, 4 Leigh 152.

c. Retraction of Renunciation.

Where an executor renounces the executorship, he does not lose the right to qualify until the renunciation has been acted upon, but has a right to retract his renunciation at any time before the grant of administration with the will annexed, but not afterwards. *Thornton v. Winston*, 4 Leigh 152.

d. Effect on Grant of Administration of Failure to Record Renunciation.

See ante, "Necessity of Renouncing by Matter of Record," II, A, 6, a, (2).

e. Evidence.

See generally, the title EVIDENCE, ante, p. 295.

If the grant of administration with the will annexed be alleged to be irregular, upon the ground that the ex-

ecutor had not renounced, the fact of such renunciation may be established by parol evidence. *Thompsons v. Meek*, 7 Leigh 419.

B. ADMINISTRATORS.

See post, "Curators," VII.

1. General Consideration.

Sovereign Power of State to Confer Power of Appointment.—Each independent sovereign considers itself competent to confer, whenever there is occasion, a probate authority, whether by letters testamentary or of administration, which shall operate exclusively and universally within its own sovereign jurisdiction, there being property of the deceased person, or lawful debts owing, within reach of its own mandate and judicial process. *McClung v. Seig*, 54 W. Va. 467, 46 S. E. 210.

Discretion Exercised in Making Appointment.—The court exercises a sound discretion in the appointment of administrators. *Bridgman v. Bridgman*, 30 W. Va. 212, 3 S. E. 580.

2. Who May Be Appointed Administrators.

a. Public Administrators.

See generally, the titles PUBLIC OFFICERS; SHERIFFS AND CONSTABLES.

(1) Who Are Public Administrators.

In Virginia and West Virginia a sheriff or sergeant is ex officio public administrator. Va. Code, 1887, § 2645; W. Va. Code, 1899, ch. 85, § 10, p. 731; *Hutcheson v. Priddy*, 12 Gratt. 85.

(2) Propriety of Committing Estate to Sheriff.

In vacation, more than three months after the death of a decedent, two of the distributees, who were nonresidents of the state, applied to the clerk of the county court to be appointed administrators of the decedent's estate. They were appointed and executed the bond. The clerk, under the statute, reported his action at the next term of the county court, at which time a resi-

dent distributee appeared, and filed objections to the confirmation of the appointment, and then applied himself to be appointed. The court refused to confirm the appointment of the non-resident applicants, and also refused to appoint the resident applicant, and, on motion of the latter, committed the estate to the sheriff of the county for administration. Held, that the order committing the estate to the sheriff was proper. *Bridgman v. Bridgman*, 30 W. Va. 212, 3 S. E. 580.

(3) Extent of Power and Authority.

One of the executors having died and the other having been removed, and the administration with the will annexed having been committed to the sheriff, he was under the act of 1819, 1 Rev. Va. Code, ch. 104, § 32, p. 388, authorized as such administrator to execute the power and trust, and was therefore bound to account for the rents and profits, the case, though not within the letter of the statute, being within its spirit and meaning. *Mosby v. Mosby*, 9 Gratt. 584.

Where the administration of an estate has been legally cast upon a sheriff, "he is thenceforward entitled to all the rights, and bound to perform all the duties, of such administration," which include as well all actions and suits brought against the estate as the prosecution of all proper actions and suits for the collection of claims and demands due the estate. *Brewer v. Hutton*, 45 W. Va. 106, 30 S. E. 81.

(4) Effect of Commission of Estate to Sheriff on Appointment of Legatee.

Where an estate has been committed to the sheriff, the county court can not grant the administration to a distributee, without notice to the sheriff of the application; nor is it imperative on the court to grant the administration to the distributee, but there is a legal discretion in the court. *Hutcheson v. Priddy*, 12 Gratt. 85.

(5) Tenure of Office—Successor Not Entitled to Pending Administration.

As the statute makes no provision for transferring an estate committed to a sheriff for administration to his successor in office, he must proceed with the administration till completed, whether his official term has ended or not, and for abuse of the trust, his sureties as well as himself will be liable. *Tunstall v. Withers*, 86 Va. 892, 11 S. E. 565; *Dabney v. Smith*, 5 Leigh 13; *Tyler v. Nelson*, 14 Gratt. 214; *Cocke v. Harrison*, 3 Rand. 494. See also, *Douglass v. Stumps*, 5 Leigh 392.

b. Nonresidents.

See post, "Disqualifying Conditions," II, B, 3, a, (3), (b), ee.

"The applicant being a citizen and resident of another state, furnishes no legal objection. It is a matter of sound discretion. If there were creditors of the deceased in this state, and if the distributees lived in this state, it might be indiscreet and improper to give administration to a nonresident, but where the facts are otherwise, as in this case, the objection does not lie." *Ex parte Barker*, 2 Leigh 719.

c. Infants.

See generally, the title INFANTS.

It seems that a minor, although a distributee, is incompetent to administer upon the estate of a decedent. *Thompson v. Nowlin*, 51 W. Va. 346, 41 S. E. 178.

"It is laid down in Bacon's Abridgment, vol. V, p. 109: 'An infant may be appointed executor, but he can not administer until he is of the age of seventeen; * * * but an infant can not be an administrator before the full age of twenty-one years, because before that age he can not give bond, as required by the statute, to administer faithfully.'" *Saum v. Coffelt*, 79 Va. 510.

"The case of *Hindmarsh v. Southgate*, 3 Russell 324, is on all fours with

the case at bar. That was a case in which creditors sued for the administration of the assets of an intestate. A female infant had obtained letters of administration to the estate. The bill alleged that the administratrix had converted the assets to her own use. She answered her infancy; and the chancellor, Lord Lyndhurst, held: 'If letters of administration be granted to an infant, under which he receives and disposes of assets of the intestate, an account can not be directed in respect of his receipts during infancy.' See *Allen v. Minor*, 2 Call 70; *Tyler on Infants and Coverture*, § 7, p. 41." *Saum v. Coffelt*, 79 Va. 510.

d. Creditors.

See post, "Creditors," II, B, 3, b, (2).

e. Debtors.

It seems that a debtor may be nominated as executor of his deceased creditor, and be competent to act, unless otherwise disqualified, or, is incompetent to receive the appointment of administrator of the estate of his deceased creditor. *Fleming v. Bolling*, 3 Call 75; *Utterback v. Cooper*, 28 Gratt. 233.

Effect of Appointment as Relinquishing Debt.—Although at common law the appointment by a creditor of his debtor as executor operated, as against legatees and distributees with certain exceptions, as a release of the debt, this rule never applied to a debtor who was appointed administrator of his creditor. *Utterback v. Cooper*, 28 Gratt. 233.

Where a testator devises that his book shall be given up to a certain person and that such person shall receive all the debts due and pay all the testator owes, this is an appointment of such person to perform the office of executor, but does not entitle him to the surplus of the debts due the testator, nor does it discharge him from a debt which he himself owed. *Fleming v. Bolling*, 3 Call 75; Va. Code, 1887, § 2648; W. Va. Code, 1899, ch. 85, § 13, p. 731.

f. Trustee of Deceased Cestui Que Trust.

Trusts and Trustees.—It seems that where a beneficiary in a deed of trust dies, a surviving trustee may be appointed administrator of such decedent. *Nichols v. Campbell*, 10 Gratt. 561.

3. Order of Appointment.

a. Distributees and Next of Kin.

See generally, the title WILLS.

(1) In General.

By statute it is provided that administration shall be granted to the distributees who apply therefor. W. Va. Code (1899), ch. 85, § 4, p. 730; Va. Code (1887), § 2639; *Thornton v. Winston*, 4 Leigh 152; *Cutchin v. Wilkinson*, 1 Call 1, 3; *Haxall v. Lee*, 2 Leigh 267.

If there be no executor appointed by the will, or if all the executors therein named refuse the executorship, or fail, when required to give such bond, which shall amount to such refusal, the court, or clerk, may grant administration, with the will annexed, to the person who would have been entitled to administration if there had been no will, upon his taking such oath and giving such bond. (Code 1849, p. 541, ch. 130, § 2; 1902-3-4, p. 594.) Va. Code, 1904, ch. 119, § 2637, p. 1351.

(2) As between Creditor and Distributee.

Where a distributee and a creditor apply for administration at the same time, the distributee is entitled to preference. *Haxall v. Lee*, 2 Leigh 267.

But if a distributee and a creditor ask appointment, and the applying distributee is wholly unfitted for the trust, and the creditor is in every respect a suitable person, and the court appoints the creditor, it would seem that the discretion reposed in the court is properly exercised. *Bridgman v. Bridgman*, 30 W. Va. 212, 3 S. E. 580.

(3) Preference as among Distributees.**(a) Widower or Widow.**

See generally, the title **HUSBAND AND WIFE**.

aa. Preference by Statute.

By statute it is provided that grant of administration as among the distributees of an intestate shall be given first to the husband or wife. Va. Code (1887), § 2639; W. Va. Code (1899), ch. 85, § 4, p. 730; *Bridgman v. Bridgman*, 30 W. Va. 212, 3 S. E. 580.

bb. When Blood Relatives Preferred to Husband.

See generally, the title **HEIR, HEIRS AND THE LIKE**.

Where the personal property of the wife is so settled, by a deed executed before marriage and duly recorded, that, upon her dying intestate in her husband's lifetime, the trustee is to convey the same to her legal heirs, her nearest blood relative is, in such event, entitled to the administration of her estate, in preference to her husband. *Bray v. Dudgeon*, 6 Munf. 132.

cc. Effect Where Husband Has Relinquished Marital Rights.

If the husband has relinquished his marital rights to his wife's property, he is not entitled to administration upon her estate. *Charles v. Charles*, 8 Gratt. 486, 56 Am. Dec. 155.

(b) Distributees Having Preference after Husband or Wife.**aa. Rule Stated.**

After the husband or wife of the intestate the grant of administration shall be made under the Virginia statute to such of the other distributees entitled to distribution as the court or clerk shall see fit, or as provided by the statute in West Virginia, as the court shall see fit. Va. Code (1887), § 2639; W. Va. Code (1899), ch. 85, § 4, p. 730.

Grandmother.—Where the grandmother of an intestate is the nearest of kin at the time competent to accept the appointment, she may be legally appointed administratrix. *Thompson*

v. Nowlin, 51 W. Va. 346, 41 S. E. 178.

bb. Appointee Where Husband Administers on Estate of Wife and Dies.

Upon the death of a husband, who survives his wife, and administers upon her estate, his executor, or it seems his administrator, is entitled to be administrator de bonis non of the wife, in preference to her next of kin. *Hendren v. Colgin*, 4 Munf. 231.

cc. Appointee Where Wife Administers on Estate of Husband and Dies.

Upon the death of a wife, who survived her husband and administered upon his estate, it was held that the brother of the widow was entitled to be administrator de bonis non of the husband, in preference to the brother of the husband. But it seems that if the executors of the widow had applied, the administration would have been committed to them. *Cutchin v. Wilkinson*, 1 Call 1.

dd. Discretion of Court in Appointing.

As between distributees, the county court must judge as to fitness for the trust, and should exercise a sound discretion in the interest of the distributees generally of the estate. *Bridgman v. Bridgman*, 30 W. Va. 212, 3 S. E. 580.

ee. Disqualifying Conditions.**(aa) Prejudice or Hostility.**

If one of the distributees applying is hostile to the others, or a part of them, this will ordinarily be sufficient to justify the court in refusing to appoint him. *Bridgman v. Bridgman*, 30 W. Va. 212, 3 S. E. 580.

(bb) Nonresidence.

While nonresidence is not in itself an objection which would, under all circumstances, justify the court in refusing to appoint a nonresident distributee the administrator of an estate, yet it is a serious objection for obvious reason. It is a matter of sound discretion. If there are creditors of the

deceased in this state, and if the distributees live in this state, it might be indiscreet and improper to give administration to a nonresident; but when the facts are otherwise, there may be no valid grounds for objection. *Bridgman v. Bridgman*, 30 W. Va. 212, 3 S. E. 580; *Ex parte Barker*, 2 Leigh 719.

(4) Effect When No Distributees Apply.

See post, "Persons Other than Distributees," II, B, 3, b.

(5) Waiver of Right to Appointment.

Any of the distributees entitled to appointment may at any time waive their right to qualify in favor of any other person to be designated by them. Va. Code (1887), § 2635.

(6) Effect of Appointment Prior to Lapse of Thirty Days.

The fact that a person other than a distributee, as for instance the nearest of kin at the time competent to accept the appointment, is appointed administrator or administratrix, prior to the lapse of thirty days after the death of the intestate, is not sufficient grounds to render the appointment invalid, although if there be no distributee who is of age, such distributee upon proper application may be substituted if a resident of the state, and not otherwise disqualified. *Thompson v. Nowlin*, 51 W. Va. 346, 41 S. E. 178, citing *Bridgman v. Bridgman*, 30 W. Va. 212, 3 S. E. 580.

b. Persons Other than Distributees.

(1) In General.

Should one or more of the distributees fail to apply for a grant of administration upon the estate of an intestate within thirty days of the decease of the latter, it seems that the court, or clerk, as provided in Virginia, may grant administration to one or more of the creditors or to any other person. Va. Code (1887), § 2639; W. Va. Code (1899), ch. 85, § 4, p. 730.

Meaning of Term "Any Other Person."—In *Hutchinson v. Pretty*, 13 Gratt. 89, Lee, J., after quoting the

statute: "The court may, however, at any time afterwards revoke such order, and allow any other person to qualify as executor or administrator,"—said: "But these terms, 'any other person,' must necessarily have some limitation, and this is to be found only in the sound discretion of the court to which must be referred the fitness or suitability of the party applying, and the time and circumstances of his application." See also, *Bridgman v. Bridgman*, 30 W. Va. 212, 3 S. E. 580.

(3) Creditors.

A creditor, since the act of 1792, has no preference over any other person, in an application for administration upon an intestate's estate; but every case must depend upon its own circumstances. *McCandlish v. Hopkins*, 6 Call 208.

By statute it is provided that if no distributees apply for administration within thirty days from the death of the intestate, the court, or, as provided by the Virginia statute, the clerk, may grant administration to one or more of the creditors, or to any other person. Va. Code (1887), § 2639; W. Va. Code (1899), ch. 85, § 4, p. 730.

After the expiration of the thirty days, within which by statute the husband or wife is first entitled to administration, a wider discretion is vested in the court, and it may appoint a creditor or a stranger, if no distributee applies; but, if a distributee then applies, he is entitled to the preference. *Bridgman v. Bridgman*, 30 W. Va. 212, 3 S. E. 580.

(3) Executors of Deceased Administratrix.

It seems that where a widow, who administers upon the estate of her deceased husband, dies, the executors of the widow upon due application will be entitled to have the estate of the husband which has not been administered committed to them. *Cutchin v. Wilkinson*, 1 Call 1. See also, *Hendren v. Colgin*, 4 Munf. 231.

(4) Executrix Nominated in Will on Death of Administratrix.

An executrix declined to qualify as such and agreed that administration with the will annexed should be granted to her daughter, reserving the right to qualify after her daughter's death. Held, that the nomination of the executrix in the will did not give her any preferable right to the administration de bonis non with the will annexed on the death of her daughter. *Thornton v. Winston*, 4 Leigh 152.

4. Application.

Time for Application.—Where an executor has been removed from office and an administrator de bonis non has been substituted in his place, another person having equal right with the substituted administrator can not come in at a subsequent term and be allowed to administer, the power of the court over the subject having ceased. *Ex parte Clarke*, 2 Va. Cas. 230.

C. QUALIFICATION.**1. Necessity and Manner of Qualifying.**

In order that a person appointed by a will executor thereof shall have the full powers of an executor, it is essential that he shall qualify as such by taking an oath and giving bond in which or before the clerk by whom the will or an authenticated copy thereof is admitted to record. Va. Code (1887), p. 379.

2. Oath.

See the title OATH.

Executors and administrators are also required to take an oath of office, the form of which is prescribed by statute. Va. Code, 1887, § 2638; W. Va. Code, 1899, ch. 85, § 3, p. 729.

3. Bond and Security.

An administrator is required to give bond with security for the faithful discharge of the duties of his office. By statute an executor is also required to give bond with security, but the secu-

rity may be dispensed with by the will. See post, "Administration Bond," IV, M.

4. Powers before Probate or Grant of Administration.

See post, "Sales, Mortgages and Pledges," IV, F.

The common-law rule as to the powers of an executor or administrator before qualification has been greatly modified by statute, and is restricted in Virginia to the burial of the decedent, payment of reasonable funeral expenses, and the performance of such acts as are necessary for the preservation of the estate. *Monroe v. James*, 4 Munf. 194. See Va. Code (1887), p. 593.

Sale before Qualification.—The provision of the Code of 1879, §§ 21, 23, p. 379, ch. 104, were construed so as to mean that a sale by an executor named, who had not qualified and died before qualification, was void as against an executor who afterwards qualified. *Monroe v. James*, 4 Munf. 194.

Thus a sale of property belonging to the estate of a testator by a person named as one of the executors, but who, at the time of such sale had not qualified, and who afterwards died without having qualified, is void against the executor who did qualify, although such sale was made for valuable consideration and at a time when there was no qualified executor. *Monroe v. James*, 4 Munf. 194.

To conform to the judicial construction, in this case the law has been amended to its present form. *Gibson v. Beckham*, 16 Gratt. 321, 323.

Sale by Part of Duly Qualified Executors.—Where two out of three nominated executors qualify and sell and convey real estate to the purchasers, who pay the purchase money in full, and after the sale the third qualifies and consents to the sale by sharing the commissions, the title of the purchaser is valid, at least in equity. *Mills v. Mills*, 28 Gratt. 442, 491; Va. Code (1887), § 2663.

5. Effect of Failure to Qualify.

Where an executor refuses or fails to qualify, he is considered as having altogether refused the executorship; and this refusal relates to the death of the testator. As to him, the will is considered as having never been made; and, thus, the only foundation of his authority being done away with, all his acts are invalidated. *Monroe v. James*, 4 Munf. 194.

6. Injunction to Restrain Qualification.

See generally, the title INJUNCTIONS.

A, named in the will of B as executrix, being insane, C was appointed administrator with the will annexed. The said A being afterwards restored to sanity, moved the county court of X county to revoke the letters of administration granted to C and to permit her to qualify as executrix under the will, of which motion C had due notice. C, having theretofore instituted a suit in equity in the circuit court of X county to construe the will and deed, and for directions of the court in the disbursement of the funds of the estate in his hands, filed his petition in said suit, praying an injunction restraining A from further prosecuting the motion. Held, that the circuit court did not have jurisdiction to enjoin the qualification as executrix of A under the will. *Stone v. Simmons* (W. Va.), 48 S. E. 841.

7. Appeal from Judgment Refusing to Permit Executor to Qualify.

An appeal as of right lies to the circuit court from the judgment of a county court refusing to permit a person named as executor in a will to qualify as such without giving security. *Fairfax v. Fairfax*, 7 Gratt. 36.

D. JURISDICTION AND VENUE.
See generally, the titles JURISDICTION; VENUE.**1. Conflict of Laws.**

See generally, the title CONFLICT OF LAWS, vol. 3, p. 100.

Where a resident of Kentucky died

intestate there, having no estate in Virginia but a claim on the commonwealth of Virginia for moneys, it was held, that the circuit court of Henrico county, wherein was the seat of government, had jurisdiction to grant administration of such decedent's estate. *Com. v. Hudgin*, 2 Leigh 248.

2. Particular Courts Having Jurisdiction.

In the state of West Virginia the county court, and the clerks thereof, in vacation, formerly had exclusive original jurisdiction in all probate matters involving the probate of wills, and the ordinary administrative proceedings involved in the administration of estates. *Stone v. Simmons* (W. Va.), 48 S. E. 841.

Formerly the county court in Virginia was a court of general jurisdiction in regard to probates and the grant of administrations; it had jurisdiction of the whole subject matter, and if error was made in taking jurisdiction of a particular case, the order was not generally void, but only voidable on citation or appeal, and could not be questioned collaterally. The only exception to the above rule was where the supposed testator or intestate was alive, or where, if dead, he had a personal representative in being when administration was granted upon his estate. *Andrews v. Avory*, 14 Gratt. 229, 73 Am. Dec. 355.

In the case of a person dying intestate, the jurisdiction to hear and determine the right of administration of his estate shall be in the same court or before the same clerk who would have jurisdiction as to the probate of his will, if there was a will. Va. Code, 1904, ch. 119, § 2639, p. 1352.

In case of a person dying intestate, the jurisdiction to hear and determine the right of administration of his estate shall be in the court which would have jurisdiction as to the probate of his will, if there was a will. W. Va. Code, 1899, ch. 85, § 4, p. 730.

3. Grant of Administration d. b. n.

See post, "Administrators De Bonis Non or with the Will Annexed," V.

When administration of a decedent's estate has been duly granted by any court of competent jurisdiction, that same court only, upon the death of the administrator, has jurisdiction to grant administration de bonis non. *Ex parte Lyons*, 2 Leigh 761.

Upon Death of Administrator d. b. n. Where Court Appointing Had No Jurisdiction.—Upon the death of an administrator de bonis non, to whom administration was granted by a court having no jurisdiction, there being no conflicting right in existence, it is competent for the court to grant administration which might in the first instance have rightfully exercised jurisdiction. *Burnley v. Duke*, 2 Rob. 102.

4. Venue.**Place of Residence as Determining.**

—In granting administration, the place of residence of the intestate gives jurisdiction to the local courts. If the intestate had no known place of residence, then the place of his death gives jurisdiction, or the place where his estate lies. *Ex parte Barker*, 2 Leigh 719.

E. VALIDITY AND EFFECT OF APPOINTMENT.**1. Presumption as to Regularity of Grant.**

In a suit in equity by devisees against an administrator with the will annexed and a purchaser from him, the court will presume the grant of administration to be regular, unless its regularity be drawn in question by the pleadings. *Thompsons v. Meek*, 7 Leigh 419.

2. Appointment under Authority of Confederate Government.

See generally, the title CONFEDERATE STATES, vol. 3, p. 53.

Where an administrator was appointed in Greenbrier county, West Virginia, under the authority of the

confederate government of Virginia, it was held, that he could lawfully perform the functions of his office as such, and that his acts were valid until he was succeeded by a lawfully constituted administrator appointed under the laws of West Virginia. *Clay v. Robinson*, 7 W. Va. 348.

In *Caperton v. Ballard*, 4 W. Va. 420, it was held, that the granting of letters of administration by the county court of Monroe county in 1863 was an act of a tribunal in rebellion against the United States, and hence illegal and void.

3. Grant Where Will Exists Containing Appointment.

In *Manns v. Flinn*, 10 Leigh 93, the court held, that the grant of administration as upon an intestacy where a will exists, though not ostensible, was void, or a nullity quoad the executor. See also, *Gibson v. Beckham*, 16 Gratt. 321, 325.

A suit was instituted in Virginia against a citizen of Louisiana, who appeared and filed his answer but died before a final decree was rendered. On motion of the complainant, representing that the defendant had died intestate out of Virginia, leaving property in Virginia, an administrator was duly appointed, the suit revived, and a decree rendered against him. On the faith of this decree, a judgment was rendered against the executors of the decedent in Louisiana by the court of probate of New Orleans and was partly satisfied by them. Held, that in a suit in Virginia against the heirs for the balance of the judgment, the executors having fully administered and paid over to them, the court will not take notice of any false suggestion or irregularity in the appointment of the Virginia administrator, even though it should appear that the decedent did not die intestate, and left no estate in Virginia. *De Ende v. Wilkinson*, 2 Pat. & H. 663. See generally, the title JUDGMENTS AND DECREES.

4. Where Decedent Lived and Died Out of State without Estate in It.

Administration granted where the deceased lived and died out of the state, and left no estate within it, is not void but voidable. *Andrews v. Ivory*, 14 Gratt. 229, 73 Am. Dec. 355. See post, "Foreign Executors and Administrators," VII.

5. Failure to State of Record Fact of Renunciation of Executor as Affecting.

A court of probate receives proof of a will and admits it to record, and six months afterwards grants administration with the will annexed; and it does not appear by the record of the court of probate that the executors named in the will had ever renounced. Held, the failure to state such renunciation upon the record does not make the grant of administration absolutely void. *Thompsons v. Meek*, 7 Leigh 419.

6. Validity of Acts under Irregular Appointment.

It seems that an administrator appointed and qualified by a court of competent authority is the lawful representative of the personal estate until his appointment is rescinded, though another had a better right to be administrator. *Royall v. Eppes*, 2 Munf. 479.

Where the appointment of a personal representative is merely voidable, but not void, acts done under such appointment are valid, though the appointment is afterwards revoked as having been improperly made. *Fisher v. Bassett*, 9 Leigh 119, 33 Am. Dec. 227.

7. Effect upon Debt of Grant of Administration to Debtor of Intestate.

See ante, "Debtors," II, B, 2, e.

8. Effect of Appointment by Clerk, and Necessity of Confirmation.

See generally, the title CLERKS OF COURT, vol. 2, p. 834.

Where the clerk of the county court, during the recess of the regular sessions of court, appoints an administra-

tor, taking from him the necessary bond, the powers of such administrator are not inchoate, needing confirmation by the court before he can act; but he becomes at once administrator as of right and in fact for the time being, and who may and should at once proceed to discharge the duties of his office. If his appointment is not confirmed, yet, if valid in the beginning, the order of appointment made by the clerk should not be set aside and annulled, but the court should revoke his letters of administration, or, rather, order that his powers cease. *Rayburn v. Rayburn*, 34 W. Va. 400, 12 S. E. 493.

9. Collateral Attack.

It was formerly well settled that the county court was a court of general jurisdiction in regard to probates and the grant of administrations; that it had jurisdiction in regard to the whole subject matter; and that though it might err in taking jurisdiction of a particular case, yet the order was generally not void, but only voidable on citation or appeal, and could not be questioned in any collateral proceeding. *Burnley v. Duke*, 2 Rob. 102; *Fisher v. Bassett*, 9 Leigh 119, 33 Am. Dec. 227; *Cox v. Thomas*, 9 Gratt. 323; *Schultz v. Schultz*, 10 Gratt. 358, 60 Am. Dec. 335; *Hutcheson v. Priddy*, 12 Gratt. 85; *Andrews v. Ivory*, 14 Gratt. 229, 73 Am. Dec. 355, overruling *Ex parte Barker*, 2 Leigh 719.

Where a county court, having general jurisdiction to grant administration, commits an estate to the sheriff for administration before the expiration of three months from the death of the testator or intestate, the act of the court in so committing the estate can not be questioned in any collateral proceeding. *Hutcheson v. Priddy*, 12 Gratt. 85.

But the appointment of an administrator is absolutely void, and may be collaterally attacked, where the letters of administration previously granted

are still in force, or where there is a will naming an executor who is alive and competent to act, or where the grant of administration was made on the estate of a person supposed to be dead, but who was in fact alive. *Andrews v. Avory*, 14 Gratt. 229, 73 Am. Dec. 355.

10. Review of Order of Appointment or Refusal.

The court, to which an appeal is taken from an order granting letters of administration, ought not to take into consideration, in deciding upon such appeal, the comparative merits of the grantee, and of the party who opposed him, as candidates for the office, unless it appear by some evidence from the record, that a motion for the appointment of such opposing party was substantially made in the court below. *Bohn v. Sheppard*, 4 Munf. 403.

An appeal from an order of court granting administration of an estate, being taken before the court has proceeded to direct bond and security to be given, or to prescribe the amount of the bond, is premature, and ought to be dismissed as improvidently allowed. *Bohn v. Sheppard*, 4 Munf. 403.

11. Letters of Administration—Necessity.

The certificate of probate or of administration, granted by a court of this state and attested by the clerk, will enable the executor or administrator to act, and may be given in evidence in any court of this commonwealth. *Dickinson v. McCraw*, 4 Rand. 158. See also, Va. Code, 1887, § 2646.

F. TERMINATION OF OFFICE.

1. Removal or Revocation of Letters.

a. Jurisdiction.

Although the court of probate has jurisdiction to revoke letters of an executor or administrator, this power is sometimes exercised by a court of equity, where it has acquired jurisdiction of the estate on other grounds. 11

Am. & Eng. Ency. Law (2d Ed.) 815. See also, *Walters v. Hill*, 27 Gratt. 383.

b. Necessity of Notice.

It was formerly held, that the county court could not revoke a sheriff's appointment as administrator and grant administration to a distributee without notice to the sheriff. *Hutcheson v. Priddy*, 12 Gratt. 85.

c. Necessity of Setting Aside Letters Where Grant Void.

The granting of letters of administration by the county court of Monroe county in 1863 was held to be an act of a tribunal in rebellion against the United States, and hence illegal and void. Consequently, it was not necessary to set aside such letters of administration by a competent court in order to give effect to an administration granted by a competent tribunal. *Caperton v. Ballard*, 4 W. Va. 420.

d. Grounds for Removal or Revocation of Letters.

Negligence in Defending Suits against Estate.—Upon a proceeding to remove an executor, it appeared that two suits had been brought against the estate of the testator by the brother of the executor upon claims purporting to have been due to the father of the executor, and to have been assigned by him to his brother. These claims would, if successfully asserted, have consumed the whole estate of the testator. The executor failed and refused to defend these suits. Held, that these facts warranted the order of removal. *Reynolds v. Zink*, 27 Gratt. 29.

Person Other than Distributee Appointed Prior to Lapse of Thirty Days from Death of Intestate.—The fact that a party, who is the nearest of kin at the time competent to accept the appointment, is granted administration upon the estate prior to the lapse of thirty days subsequent to the death of such intestate, does not make the appointment invalid, and would seem not to be a ground for removal. *Thomp-*

son v. Nowlin, 51 W. Va. 346, 41 N. E. 178.

Where Appointment by Clerk Not Confirmed.—Where the appointment of an administrator by the clerk of the county court, during the recess of the regular sessions of such court, is not confirmed, yet, if valid in the beginning it should not be set aside and annulled; but the court should revoke his letters of administration, or rather order that his powers cease. *Rayburn v. Rayburn*, 34 W. Va. 400, 12 S. E. 493.

Request as Furnishing Grounds.—The plaintiff being both heir and administrator, and seeking to be relieved as administrator, will not be entitled to such relief, unless he will do equity as heir. *Haydon v. Goode*, 4 Hen. & M. 460.

2. Appeal from Order Revoking Letters.

An appeal as of right lies from the county to the superior courts in the case of an order revoking, absolutely or conditionally, the powers of an executor or administrator, with a view to the appointment in his stead of an administrator de bonis non, or to the committing of the estate to the sheriff. *Atkinson v. Christian*, 3 Gratt. 448.

G. REAPPOINTMENT.

Since the orders of a court remain within its breast during the session of the court or during the same term, a probate court may, during the same term, appoint an administrator, revoke his appointment, and reappoint him with additional administrators. *Lingle v. Cook*, 32 Gratt. 262.

III. Assets.

See post, "Collection of Assets," IV, E, 4.

A. GENERAL CONSIDERATION.

1. Realty and Personalty as Constituting.

Since the Code of 1849 of Virginia the real as well as the personal estate

of the decedent is made assets for the payment of all classes of debts. While the personal estate is the primary fund for that purpose, the real estate is not only the secondary fund but it is equally liable with the personal fund for the payment of all debts. Therefore, since the adoption of the Code, there can be no right of substitution or subrogation against the real estate by creditors who have, by reason of the bar of the statute of limitations, lost their right to charge it directly, although they may have a subsisting judgment against the personal representative of the decedent and be thus entitled to charge the personal fund if there be one. *Saddler v. Kennedy*, 26 W. Va. 637.

2. Judgment as Admission of Assets.

Although a judgment at law against an executor amount to an admission of assets, and a court of equity will not relieve against that consequence, yet it would not, by an original decree, charge an executor on that ground. *White v. Bannister*, 1 Wash. 166.

B. PERSONALTY.

1. In General.

The personalty of a decedent is by statute made assets for the payment of all classes of debts. *Saddler v. Kennedy*, 26 W. Va. 637.

2. Nature of Title.

See post, "Title and Control over Personalty," V, C, 2, a.

The legal title to a decedent's assets in the personal representative's hands for administration, whencesoever arisen, is in the personal representative. *Brockenbrough v. Turner*, 78 Va. 438; *Richardson v. Donehoo*, 16 W. Va. 683; *Laidley v. Kline*, 8 W. Va. 218.

Personal property on the death of the owner does not devolve upon the distributees, but upon the executor or administrator. *Brent v. Washington*, 18 Gratt. 526.

3. Character in Which Acquired.

The personal representative of the

accommodation endorser of a negotiable note protested for nonpayment, can only acquire the note, whether by purchase or payment, in his fiduciary character. *Burton v. Slaughter*, 26 Gratt. 914.

4. Choses in Action.

a. Salary Due.

A was on March 25th, 1875, elected judge of the eighth judicial circuit, to fill a vacancy in a term which would have expired December 31st, 1878. The term of a circuit judge is eight years. In December, 1872, the legislature passed an act that all judges elected to fill vacancies should be for the unexpired terms of their predecessors. When A was elected, a circuit judge's salary was \$2,000; but in March, 1878, an act of assembly was passed reducing it to \$1,600 after January 1st, 1879. At a re-election of circuit judges, in December, 1878, A was re-elected judge of that circuit; was commissioned, received the reduced salary without objection after January 1st, 1879, till his death, which occurred March 4th, 1880. On petition by his administrator against the auditor, to recover the difference between the original and the reduced salaries from January 1st, 1879, until March 4th, 1880, it was held, that the administrator of A was entitled to recover. *Montague v. Massey*, 76 Va. 307.

b. Debt Secured by Trust Deeds.

See generally, the title MORTGAGES AND DEEDS OF TRUST.

Where a debt is secured by a trust deed, an heir at law of the creditor is not entitled to a part of the debt secured by the trust because he is one of the heirs at law. Upon the death of the cestui que trust, the debt secured by the trust deed goes to the personal representative and not to the heir. *Curry v. Hill*, 18 W. Va. 370.

c. Bond Taken for Proceeds of Sale of Estate.

A bond taken by an administrator for proceeds of sales of his intestate's

estate, is to be considered as the property of the estate, at least until the administrator has settled his account and a balance is found in his favor. *Puliam v. Winston*, 5 Leigh 324.

d. Choses of Wife Reduced into Possession by Husband.

See generally, the title HUSBAND AND WIFE.

A guardian and administratrix who had executed official bonds, made a settlement with the husband of her ward and the distributee, and executed her bond to the husband for the amount found due on the settlement. The husband afterwards died, his wife surviving him, and the bond remained unpaid. The court, consisting of four judges, equally divided upon the question, whether this was a reduction of the chose in action of the wife into possession by the husband, so that his administrator would be entitled to the debt; or whether it survived to the wife. *Yerby v. Lynch*, 3 Gratt. 460, cited in *Harcum v. Hudnall*, 14 Gratt. 369, 380; *White v. Gouldin*, 27 Gratt. 503, 507; *Ware v. Ware*, 28 Gratt. 670, 673, 676; *Smith v. Blackwell*, 31 Gratt. 291, 298; *Sherrard v. Carlisle*, 1 Pat. & H. 31, 32; *Bank v. Holland*, 99 Va. 495, 39 S. E. 126; foot-note to *Dold v. Geiger*, 2 Gratt. 98; *Governor v. Hinchman*, 1 Gratt. 156.

e. Claims against the Government.

The executor of a deceased officer and his widow preferred conflicting claims at the treasury of the United States for the arrears of pay accrued to the officer during his life, under the act of congress of May 15, 1828. The officers of the treasury rejected the claim of the executor and paid the money to the widow. Held, that even if the payment to the widow was wrong, the executor could not maintain an action for the money against her, there being no privity between them, but his remedy was against the treasury. *Burton v. Burton*, 10 Leigh 597.

5. Damage Recovered by Administrator for Wrongful Death of Intestate.

See generally, the title DEATH BY WRONGFUL ACT, vol. 4, p. 226.

Under Va. Code, 1873, ch. 145, § 9, providing for the distribution of damages recovered in an action by an administrator for the killing of his intestate, money received on compromise of such action, after paying costs and attorney's fees is assets in the hands of the administrator to be disposed of according to the statute of distributions. *Powell v. Powell*, 84 Va. 415, 4 S. E. 744.

6. Property Purchased with Funds of Estate.

Where a widow executrix purchases slaves for the estate of her husband with money left by him for that purpose but afterwards holds them as her own and applies their profits to her own use, she is to be considered a trustee for the benefit of his estate and responsible, in equity but not at law, to his legatees. *Redwood v. Riddick*, 4 Munf. 222.

7. Debts Due from Executor or Administrator.

A debt due from an executor or administrator is not released or extinguished, as at common law, by his appointment, but immediately becomes assets in his hands. See ante, "Effect upon Debt of Grant of Administration to Debtor of Intestate," II, D, 7.

8. Partnership Assets.

See generally, the title PARTNERSHIP.

In General.—Upon the death of a partner the legal title to the partnership property passes to the surviving partner, and he becomes invested with the exclusive right to its possession, control, and disposition, for the following purposes: To convert the same into money; to pay the debts of the partnership; and to distribute the surplus between himself and the estate of the deceased partner. While not a

trustee properly so-called, he is, nevertheless, a trustee in a certain sense, and subject to the rules and principles of equity governing such, and may be compelled by creditors of the partnership and the representative of the deceased partner to fulfill his obligations as surviving partner. *Tennant v. Dunlop*, 97 Va. 234, 33 S. E. 620.

Good Will.—See generally, the title PARTNERSHIP.

The good will and trade marks of a partnership are partnership property, and must be accounted for by the surviving partner the same as the other assets of the firm. *Tennant v. Dunlop*, 97 Va. 234, 33 S. E. 620.

Estoppel to Deny Title.—Where one of two partners qualifies as administrator of the other, and there is personal property belonging to the partnership, which had been bought and used for partnership purposes, the administrator can not question the title of his intestate to his moiety of the property, on the ground that it was bought and used for gambling purposes. *Watson v. Fletcher*, 7 Gratt. 1.

Equitable Relief.—It seems that a bill in equity properly lies to subject the estate of a secret partner in trade, to the payment of a debt contracted by the ostensible members of the firm. *Cocke v. Upshaw*, 6 Munf. 464.

9. Legacies and Distributive Shares.

See generally, the title WILLS.

In General.—Upon the death of a residuary legatee, the right to sue for his share of the residuum devolves upon his personal representatives, not upon his children. *Hays v. Hays*, 5 Munf. 418.

Bequests by One to Executors of a Decedent for Children of Latter.

Where a testator bequeathed a sum of money to the executors of his daughter's husband to be divided among her children by him, it was held to be a legacy to them from their grandfather, and not assets belonging to the estate of their father although it was stated

in the will that the object of the bequest was to make up their mother's fortune, part of which was not paid in her lifetime, nor to her husband after her death. *Patton v. Williams*, 3 Munf. 59.

10. Funds Arising from Special Charges on Realty.

Where a testator devises land with the provision that the devisees shall pay certain sums annually to the executors for a number of years, to be paid by the executors to certain persons named, the legacies to such person are not general and payable out of the personal assets, but are payable only by means of the charge on the land; and the funds arising from such charge do not belong to the personal estate of the testator, and are not, therefore, subject to the general executorial power of the executor. *Jackson v. Updegraffe*, 1 Rob. 107.

11. Balance of Trust Fund Assigned by Creditors for Benefit of Debtor's Family.

See generally, the title TRUSTS AND TRUSTEES.

A debtor conveyed all of his property to a trustee for creditors with the usual power of sale. The trustee paid all of the expenses of executing the trust, and some of the debts in full. Of the other debts he paid about \$1,600, leaving about \$550 unpaid. The creditors entitled to this unpaid balance assigned it to the trustee for the benefit of the family of the debtor, who was then dead. There was then remaining in the hands of the trustee about \$440 of the trust fund. Held, that such balance belonged to the family of the debtor, and was not assets which would go to his administrator. *Tennant v. Headlee*, 31 W. Va. 585, 8 S. E. 544.

12. Insurance Funds.

As to the right of the personal representative to insurance money, see generally, the titles ACCIDENT INSURANCE, vol. 1, p. 71; FIRE INSURANCE; LIFE INSURANCE; MARINE INSURANCE.

a. Life Insurance.

If a third party holding a policy of insurance on the life of a decedent collects and retains more on account of it than he is entitled to under the law, it is the duty of the administrator to require him to account for the excess, and if, through his failure to do so, any loss has resulted to the estate of the decedent, the administrator should be charged with such loss in his administration account. *Beaty v. Downing*, 96 Va. 451, 31 S. E. 612.

b. Fire Insurance.

Insurance against loss by fire payable to the legal representatives of the insured is assets which it is the administrator's duty to collect, although the property insured was real estate, and was destroyed after the owner's death. *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88.

A testator left his plantation to his wife for life, with remainder to his children. The buildings were insured for the benefit of the testator, his heirs and assigns. The widow occupied the house and the policy was kept in force. She married a second time, and afterwards the buildings were entirely destroyed by fire. Held, that the insurance money was not a part of the inheritance, but was personalty belonging to the owners of the building according to their respective rights. *Haxall v. Shippen*, 10 Leigh 536, 34 Am. Dec. 745.

Where the personal estate of a decedent is insufficient to pay all his debts, his administrator has an insurable interest in his real property and a right to recover on the policy in case of a loss by fire though when the loss occurs there are abundant real assets to pay all the decedent's debts. *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368.

A house was insured against fire, as being leasehold property held for ninety-nine years, renewable forever, but it was, in fact, held by the assured in fee simple. After the death of the

assured, the house was destroyed by fire. Held, that the money due for the loss belonged to the heirs of the assured, and not to his administrator. *Harrison v. Harrison*, 4 Leigh 371.

13. Voluntary Assignment Not Perfected.

See generally, the titles **ASSIGNMENTS**, vol. 1, p. 745; **ASSIGNMENTS FOR THE BENEFIT OF CREDITORS**, vol. 1, p. 799.

An administrator may recover, as assets of the estate, the subject of a voluntary assignment which was not perfected by his decedent. *Spooner v. Hilbish*, 92 Va. 333, 23 S. E. 751.

14. Money in Possession of Wife Prior to Husband's Death.

See generally, the title **HUSBAND AND WIFE**.

A wife leaves her husband's house, without his consent, during his absence from home, and goes to reside with her brother, carrying away with her a sum of money belonging to her husband, which she applies to her own use; the husband dies, and his administrator exhibits a bill in chancery against her, praying a discovery of the amount so taken away by her, and a decree for the same. Held, that the husband during his life would not be and his administrator is not, entitled to such relief. *M'Cormick v. M'Cormick*, 7 Leigh 66.

15. Fixtures.

See the title **FIXTURES**.

A still, not fixed to the freehold, in a house which might be injured by its removal, is personal property, and goes to the executor, not to the heir. *Crenshaw v. Crenshaw*, 2 Hen. & M. 22.

16. Stock.

See generally, the title **STOCK AND STOCKHOLDERS**.

That stock stands on the transfer books of a corporation in the name of the deceased person, is not conclusive evidence that it belongs to his estate. As it is equally consistent with his having held the stock as collateral, cir-

cumstances clearly indicating that it was so held are sufficient to support a finding to that effect by a commissioner, especially when it is shown that the deceased person kept a careful book account of his investments which does not disclose an investment in such stock. *Van Winkle v. Blackford*, 54 W. Va. 621, 46 S. E. 589.

17. Slaves.

See generally, the title **SLAVES**.

Formerly it was held, that slaves from their nature were chattels. And, though in the hands of executors they were exempted from the payment of debts, they were nevertheless deemed assets. They were real estate only in particular cases, such as for instance, descents. *Layne v. Norris*, 16 Gratt. 236; *Jones v. Brown*, 4 Leigh 252; *Godwin v. Godwin*, 4 Leigh 410; *Parker v. Hewlett*, 9 Leigh 511; *Ruddle v. Ben*, 10 Leigh 467; *Boyd v. Stainback*, 5 Munf. 305; *Patty v. Colin*, 1 Hen. & M. 519; *Crenshaw v. Crenshaw*, 2 Hen. & M. 22; *Anderson v. Fox*, 2 Hen. & M. 245; *Harrison v. Harrison*, 1 Call 419; *Woodley v. Abbey*, 5 Call 336; *Tucker v. Sweny*, Jeff. 5; *Walden v. Payne*, 1 Hen. & M. 519.

18. Legal and Equitable Assets.

There has been much confusion in the decisions as to the distinction between legal and equitable assets, but it is now well settled that assets which go to the executor *virtute officii*, and which may be reached in a court of law by creditors of the estate, fall within the designation of legal assets; and this is true whether the property is real or personal, and whether the decedent's interest in it was legal or equitable. An equity of redemption in personal property is legal assets. *Harvey v. Steptoe*, 17 Gratt. 289.

In Virginia the moneys arising from the sale of personal property are called legal assets in the hands of an executor or administrator, and those which arise from the sale of real property are denominated equitable assets.

By the law the executor or administrator is required, out of the legal assets, to pay the creditors of the estate according to the dignity of their demands, but the equitable assets are applied equally to all the creditors in proportion to their claim. *Backhouse v. Patton*, 30 U. S. (5 Pet.) 160, 8 L. Ed. 82.

The equity of redemption of personal chattels is equitable assets, though the executor redeems them. *Jones v. Lackland*, 2 Gratt. 81.

Where a testator by his will charges his real estate with his debts, the real estate so charged will be equitable assets. *Nimmo v. Com.*, 4 Hen. & M. 57. See also, *Block v. Scott*, 3 Fed. Cas. 514.

A having subjected his whole estate to the payment of his debts, his general creditors must take the real estate under the charge in the will; and must take it in the plight and condition in which he held it; and it is equitable assets, though the statute would have subjected it to the payment of his debts if there had been no such charge in the will. *McCandlish v. Keen*, 13 Gratt. 615, 616.

The surplus proceeds of land conveyed in trust to secure debts after the payment of the debts secured are equitable assets which must be distributed rateably among the creditors of the grantor. *Jones v. Lackland*, 2 Gratt. 81.

The proceeds of the sale of land, directed by the will of the testator to be sold for the payment of his debts, are equitable assets, and should be distributed among all the creditors *pari passu*; nor are such assets proper subjects for the recognizance of a court of law. *Nimmo v. Com.*, 4 Hen. & M. 57.

19. Property Not Deemed Assets.

Where an ancestor conveys land in trust to secure debts, and it is sold after the death of grantor, a surplus remaining after payment of the debts se-

cured, the heir is entitled to the interest on the surplus as against creditors of the grantor, up to the time of the decree directing its distribution. *Jones v. Lackland*, 2 Gratt. 81.

C. REAL ASSETS.

1. In General.

Law of Alexandria from June, 1812.

—The act of 5 Geo. II, ch. 7, § 4, subjecting lands, slaves, etc., to the payment of debts, was the law of Alexandria county from June 24, 1812. *Suckley v. Rotchford*, 12 Gratt. 60.

2. Statutory Rule.

Under the statute, Va. Code, 1887, § 2665, real estate descended or devised, not charged by the will with debts, is legal assets for the payment of debts in the hands of the heirs and devisees; but there would seem to be the same lack of privity now as before between the personal representatives and the heirs or devisees. The executor is charged as such with the administration of the personal assets, and such real assets as may be charged with the payment of debts by the will; but otherwise his relations to the real estate, to the land descended or devised, remain as heretofore; that is, as such, he has no concern with them whatever. *Peirce v. Graham*, 85 Va. 227, 7 S. E. 189; *Brewis v. Lawson*, 76 Va. 36; *McCandlish v. Keen*, 13 Gratt. 615. See also, *Scott v. Ashlin*, 86 Va. 581, 10 S. E. 751.

The act, Va. Code, ch. 131, § 3, p. 545, which declares that all the real estate of a party dying, which he has not subjected by his will to the payment of his debts, shall be assets for the payment of debts in the order in which personal estate is to be applied, does not apply, except subject to the charge, to the real estate on which the debtor has created a bona fide lien, which is good against himself. *McCandlish v. Keen*, 13 Gratt. 615, 616.

Rights of Heir.—The heir is entitled to the real estate, though charged with debts, until convicted of mismanage-

ment, or misapplication of profits. *Trent v. Trent*, Gilmer 174.

The heirs are entitled to the rents and profits of the real estate descended, until deprived thereof by decree of court. *Hobson v. Yancey*, 2 Gratt. 73.

The real estate of an intestate in no wise, and for no purpose, goes into the possession or control of the administrator, but the legal title to the same descends directly to the legal heirs, subject, of course, to the just debts of the intestate, in so far at least as the personalty falls short of paying the same. *Laidley v. Kline*, 8 W. Va. 218.

3. Homestead.

See the title HOMESTEAD EXEMPTIONS.

Decedent's entire estate may be subjected to a homestead-waived debt, but the portion not embraced in the homestead deed shall be first subjected. Va. Code, 1873, ch. 183, § 3. *Strange v. Strange*, 76 Va. 240.

4. Debt Secured by Mortgage.

See generally, the title MORTGAGES AND DEED OF TRUST.

Upon the death of a cestui que trust, the debt secured by the trust goes to the personal representative, and not to the heir. *Curry v. Hill*, 18 W. Va. 370.

5. Interest in Public Lands.

See generally, the title PUBLIC LANDS.

An inchoate right to land, held by entry and survey only, is real estate and descends to the heirs and not to the executors. *Morrison v. Campbell*, 2 Rand. 206.

6. Spendthrift Trust.

See generally, the title SPENDTHRIFTS AND SPENDTHRIFT TRUSTS.

A will sets apart in trust in the hands of an executor certain realty and directs its profits to be applied for the use of testatrix's husband during life with remainder over, and provides that neither the real estate nor its profits shall be bound for the husband's

past or future debts other than respectable and comfortable support. This clause of exemption is valid and the husband's interest, under the devise in the profits, is not liable for his debts. *Guernsey v. Lazear*, 51 W. Va. 328, 41 S. E. 405.

7. Purchase by Executor of Property Sold for Debt Due Estate.

The defendant was employed by the personal representatives of an intestate to go to Mississippi for the purpose of collecting certain debts due the intestate. Upon his arrival in that state, he ascertained that it would be necessary to qualify as administrator in order to collect the debts; and upon a sale of the lands for the payment of debts, he became the purchaser. Held, that the defendant was not bound to keep the land and account for the price, but that it should be treated as assets of the estate. *Powell v. Stratton*, 11 Gratt. 792.

8. Crops and Products of Land.

See generally, the title CROPS, vol. 4, p. 94.

Crops growing at the time of the testator's death, he having died in September, do not pass to the devisees under the word "appurtenances," but go into the surplus of the personal estate, and belong to the executor. *Shelton v. Shelton*, 1 Wash. 53.

The provision of 1 Rev. Va. Code, 1819, p. 388, that emblements severed between the 1st of March and 31st of December in any year shall be assets in the hands of the executor, did not apply to an estate for life held under a marriage contract dated in 1766; though the tenant for life died in 1801, and that section, originally enacted in 1785, took effect on the 1st of January, 1787. *Thompson v. Thompson*, 6 Munf. 514.

The common law gives to the executors of a tenant for life such emblements only as were seeded in his life. As to crops put in after his death, the executors should be charged a rea-

sonable rent for the land to be paid to the persons entitled in reversion or remainder. *Thompson v. Thompson*, 6 Munf. 514. See post, "Rents and Profits," III, C, 9.

8. Rents and Profits.

In General.—On the death of the testator, it was the right of the executors to enter upon the land and take the rents and profits. *Bell v. Humphrey*, 8 W. Va. 5. See also, *Mosby v. Mosby*, 9 Gratt. 584; *Taliaferro v. Burwell*, 4 Call 321.

Rents of Realty Accruing after Death of Owner.—In a suit to settle a decedent's estate, it was held error to adjudge the administrator entitled to recover rents accruing after the intestate's death for a farm occupied by one of the parties, such rents belonging to the heirs, who asserted no claim thereto. *Lightner v. Speck*, 2 Va. Dec. 557.

A holding certain salt wells, etc., in fee, contracted to manufacture and deliver to B a certain quantity of salt yearly, for three years, at certain stipulated prices; to secure fulfillment of the contract on his part, A made a lease of his salt wells, etc., to B for a term of three years, and it was covenanted, that until default of performance of the contract, A and his heirs should remain in possession of the premises; before any salt is delivered by A to B under the contract, A owing a debt to X draws an order on B requiring them to pay this debt to X out of the first moneys to become due from them to him, for salt to be delivered under the contract, and soon after dies. The order is never presented to B. Administration of A's estate is taken by Y and Y though not one of A's heirs, takes charge of the salt wells, etc., manufactures and delivers to B the quantity of salt stipulated by A's contract, and receives of the proceeds thereof, more than enough to pay the debt due to X for which A's order on B was

drawn. Held, X's only remedy is a suit in equity against A's heirs, to enforce payment of the debt due him out of the proceeds of the salt, which are profits of real estate, descended and belong to the heirs. *Brooks v. Hatch*, 6 Leigh 534.

Growing Crops as Constituting.—It seems that the growing crops are included in the rents and profits. *Engle v. Engle*, 3 W. Va. 246. See ante, "Crops and Products of Land," III, C, 8.

Set Off by Tenant.—See generally, the titles LANDLORD AND TENANT; SET-OFF, RECOUPMENT AND COUNTERCLAIM. See also, post, "Set-Off, Recoupment and Counterclaim," IV, O, 4.

A tenant having leased land from an executor can not set off debts due him by the testator against the rent. It might be otherwise, if the executor has acknowledged that he had a sufficiency of assets. *White v. Bannister*, 1 Wash. 166; *Pulliam v. Winston*, 5 Leigh 324, 327; *Brown v. Garland*, 1 Wash. 221.

In *Washington v. Castleman*, 31 W. Va. 832, 834, 8 S. E. 603, it is said: "But if the contract, out of which the debt sued on arose, was made with the decedent, and the set-off was acquired before his death, then they may be set off against each other in an action on such contract by or against the administrator."

D. PROPERTY FRAUDULENTLY CONVEYED.

See generally, the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

As a general rule a personal representative can not be heard to impeach as fraudulent a transaction of his decedent in his lifetime. It would be unimpeachable on such ground by the decedent himself, if alive, and it is equally so by those in privity with him. The personal representatives simply succeeds to the decedent's title,

and hence stands on no better ground than his decedent. *Spooner v. Hilbish*, 92 Va. 333, 23 S. E. 751.

Although, in the case of an absolute deed of slaves, where the grantor remains in possession after the execution and recording of the same, such deed is to be regarded as fraudulent and void as to creditors and subsequent purchasers, yet the same is obligatory, and can not be impeached, as between the grantor and grantee and their representatives. *Thomas v. Soper*, 5 Munf. 28.

But a personal representative, nevertheless, has the right, and it is his duty, to recover as assets of his decedent's estate the subject of a gift, or voluntary assignment which was not perfected by the decedent in his lifetime. *Spooner v. Hilbish*, 92 Va. 333, 23 S. E. 751.

A personal representative can not impeach a voluntary assignment by his decedent of a chose in action as in fraud of his creditors. *Spooner v. Hilbish*, 92 Va. 333, 23 S. E. 751.

An administrator, in his individual capacity, as creditor of the estate, and as administrator, may sue to set aside a voluntary assignment of a chose in action by his decedent, as in fraud of creditors, especially where the bill also alleges that the assignment was not completed. *Spooner v. Hilbish*, 92 Va. 333, 23 S. E. 751.

An absolute bill of sale of slaves, being executed for valuable consideration, the vendor notwithstanding the deed, retained uninterrupted possession, and died in possession, of the slaves, and the vendee took possession after his death, and then a creditor of the vendor took administration of his estate. On a bill in equity by the administrator of the vendor against the vendee, to subject the slaves to the debt due to the administrator it was held, that the bill of sale was fraudulent and void as against the administrator, being also a creditor of the vendor; and that the rights of vendor's creditors at-

tached on the subject immediately on vendor's death, and therefore before vendee's possession commenced. *Shields v. Anderson*, 3 Leigh 729.

The distributees of a deceased person may maintain a bill in equity, to impeach and set aside a deed of gift of personal estate made by the decedent in his lifetime, as fraudulent; and the court may, at their suit, declare the deed fraudulent, and annul it; but the subject itself can only be decreed to the personal representative of the decedent, or to the distributees in a case in which the personal representative is a party. *Samuel v. Marshall*, 3 Leigh 567.

IV. Powers, Duties and Liabilities.

A. GENERAL CONSIDERATION.

1. General Scope of Administrative Powers.

An administrator is invested by law with full dominion over the assets, and with full discretion for the liquidation and settlement of all claims due to or from the estate. He may make settlements and compromises with creditors, and give them confessions of judgments. *Boyd v. Oglesby*, 23 Gratt. 674. See post, "Particular Administrative Acts," IV, D.

2. Degree of Skill and Diligence Required.

See generally, the title TRUSTS AND TRUSTEES.

General Principles Governing Liability.—An executor or administrator must perform the duties of his office with the highest fidelity and utmost good faith, but he is only required to exercise that degree of diligence and skill which an ordinarily prudent man would, under the circumstances, exercise in the management of his own affairs. *Kee v. Kee*, 2 Gratt. 116; *Elliot v. Carter*, 9 Gratt. 541; *Southall v. Taylor*, 14 Gratt. 269; *Davis v. Harman*, 21 Gratt. 194; *Williams v. Skinker*, 25 Gratt. 507; *Lingle v. Cook*, 32 Gratt.

262; *Douglass v. Stephenson*, 75 Va. 747; *Cooper v. Cooper*, 77 Va. 198; *Watkins v. Stewart*, 78 Va. 111; *Lovett v. Thomas*, 81 Va. 245; *Turpin v. Chesterfield, etc., R. Co.*, 82 Va. 74; *Trevelyan v. Lofft*, 83 Va. 141, 1 S. E. 901; *Whitehead v. Whitehead*, 85 Va. 870, 9 S. E. 10; *Harris v. Orr*, 46 W. Va. 261, 33 S. E. 257.

If an executor honestly exercise the discretion conferred on him by the will, he can not be held liable for any loss which may have been occasioned by mere error of judgment. *Jones v. Jones*, 86 Va. 845, 11 S. E. 426; *Wayland v. Frank*, 79 Va. 602; *Hooper v. Hooper*, 77 Va. 198; *Lingle v. Cook*, 32 Gratt. 262; *Mills v. Mills*, 28 Gratt. 442; *Staples v. Staples*, 24 Gratt. 225. See post, "Loss of Assets," IV, E, 6.

Where a fiduciary has acted in good faith for the protection of the estate which he represents, a court of equity will always protect him from liability unless loss has been occasioned by his laches or negligence. *Wick v. Dawson*, 48 W. Va. 469, 472, 37 S. E. 639.

"The inquiry * * * where a fiduciary is called to account and a liability is sought to be fixed upon him, is, did he act in the particular transaction which is questioned, within the scope of his powers, with good faith and ordinary prudence—not with 'sharp-sighted vigilance,' as Chancellor Kent says, but with the same prudence and discretion that a prudent man under like circumstances is accustomed to exercise in his own affairs. If he did so act, 'he is not responsible for the consequences of his act, even though it result unexpectedly in the loss of the trust subject, or any part of it.'" *Douglass v. Stephenson*, 75 Va. 747.

"These principles have been the guide of this court in the decision of the numerous confederate cases which have come before it, and when it is said, as sometimes it has been, that 'each case must depend on its own facts and circumstances at the time surrounding the executor (Williams

v. Skinker, 25 Gratt. 507, 519), all that is meant is, that the facts and circumstances, which are seldom, if ever, precisely the same in any two of these cases, but are more or less variant, must determine in each particular case whether the fiduciary has acted with that discretion and prudence which the rules of law require under these circumstances. If a fiduciary act within the scope of his powers, besides good faith, all that is required of him in any case is the exercise of ordinary prudence taken in reference to the circumstances under which its exercise is demanded." *Douglass v. Stephenson*, 75 Va. 747.

Liability for Judgments Recovered against Them as Executor.—After the death of A, his executor paid a judgment recovered against W. as executor of B. He then settled A's administration account before the probate court; by which it appeared that A was a creditor of B's estate. His executor then sued the surviving executors of B., for the balance of the judgment he had paid, and recovered judgment against them, which was satisfied by a sale of the slaves of the estate. Afterwards, upon a suit brought by B's children for a settlement of the administration accounts, it appeared that when the account of A was properly stated, instead of being a creditor he was a large debtor of B's estate. Held, that there being no evidence of collusion on the part of the surviving executors with the executor of A, by which his judgment was obtained, they were not liable for the amount of the judgment recovered against them and satisfied out of the slaves. *Boyd v. Boyd*, 3 Gratt. 114.

3. Presumption as to Manner of Discharging Duty.

Fiduciaries are presumed to have acted in good faith and performed their duty, and not to have committed breaches of trust. *McCreery v. Bank*, 55 W. Va. 663, 47 S. E. 890.

B. DELEGATION OF POWERS.

See generally, the titles AGENCY, vol. 1, p. 240; POWERS; TRUSTS AND TRUSTEES.

It seems that a testator may delegate the power to appoint executors, and such appointment is valid as if made by the testator himself. 11 Am. & Eng. Ency. Law, 2d Ed. (747); 4 Va. Law Reg. 265.

C. INVENTORY AND APPRAISAL.

See generally, the title ACCOUNTS AND ACCOUNTING, vol. 1, p. 82.

1. Property to Be Inventoried.

An inventory relates to the time of the decedent's death, and therefore only the goods of which he was possessed at the time of his death, and not the subsequent profits, need be included in the inventory. *McCall v. Peachy*, 3 Munf. 288.

Disposition Directed by Testator.—

An executor is not required to inventory goods which the testator directed should be disposed of in the same manner as if he were living. *Cary v. Macon*, 4 Call 605.

2. Effect of Omitting Items.

An executor or administrator omitting to insert in the inventory certain credits belonging to the estate of the testator or intestate, is not to be charged on that account with more than shall be proved to have been received by him, or lost by his negligence. *McCall v. Peachy*, 3 Munf. 288.

3. Validity of Inventory.

When Not Signed.—An inventory not signed by an administrator is no inventory as to him, and so no ground on which to charge him. *Parks v. Rucker*, 5 Leigh 149; *Carr v. Anderson*, 2 Hen. & M. 361. See also, *Atwell v. Milton*, 4 Hen. & M. 253, 562.

But an appraisement of a decedent's estate, though not signed by the executor or administrator, and therefore not to be received as an inventory, is admissible as *prima facie* evidence of the value of the estate. *Rogers v. Chandler*, 3 Munf. 65.

4. Effect.

Executors are to be charged with the items in the appraisement bill, unless they can show that the property did not belong to the testator at the time of his death, or in some other manner account for the disposition of such items. *Hooper v. Hooper*, 29 W. Va. 276, 1 S. E. 280.

Cash in Testator's Safe.—Executors must be charged with the cash in the testator's safe at the time of his death, which came into their hands, and will not be allowed to rely on the appraisement bill for such items, which is much less than the cash actually received. *Hooper v. Hooper*, 29 W. Va. 276, 1 S. E. 280.

5. Appraisal in Another State.

See post, "Foreign Executors and Administrators," VIII.

Effect as Evidence.—An appraisement of property in Maryland, by appraisers appointed in West Virginia, where the will was admitted to probate, will not be *prima facie* evidence of the amount and value of such property. *Hooper v. Hooper*, 29 W. Va. 276, 1 S. E. 280.

D. PARTICULAR ADMINISTRATIVE ACTS.**1. Submission to Arbitration.**

See generally, the title ARBITRATION AND AWARD, vol. 1, p. 687.

An executor has a right to submit any claim for or against his testator's estate to arbitration; and the award made pursuant to such submission binds the estate; but if injustice is done the estate, the executor may be chargeable personally, as for a *devastavit*. *Wheatley v. Martin*, 6 Leigh 62; *Merritt v. Smith*, 6 Leigh 486; *Nelson v. Cornwell*, 11 Gratt. 724. See also, *Tennant v. Divine*, 24 W. Va. 391.

An administrator has authority to submit to arbitration any matter of controversy with regard to the estate of his intestate, without having first obtained the permission of the court in the manner prescribed by statute;

and an award made pursuant to such submission will not be set aside merely because the submission was made without a compliance with the directions of the statute. *Wamsley v. Wamsley*, 26 W. Va. 45.

The power which an executor or administrator has to submit to arbitration results from his power to settle all claims in favor of or against the estate he represents. *Nelson v. Cornwell*, 11 Gratt. 724.

The deputy of a sheriff to whom the administration of an estate has been committed is not authorized to submit to arbitration a suit revived in the name of the sheriff as administrator, to which the decedent in his lifetime was a party. *Thompson v. Thompson*, 6 Munf. 514.

If one of two executors submits to arbitration a matter in his own right together with one in right of his testator and the arbitrators thereon award a sum of money to himself, and another to him and his coexecutor, the award is good. In such case he may sue in his own name upon the covenant in the articles of submission, it being personal with himself, taking care to set forth in his declaration as much of the covenant and award as is necessary to show his right to recover. *Macon v. Crump*, 1 Call 575.

Where an executor made an improvident submission to arbitration, as to part of his testator's property which had been specifically bequeathed, and the result of the submission was that the property was left in his hands as his own property, he being compelled to pay for it, the legatee was held not precluded by the award from recovering the specific property. *Nelson v. Cornwell*, 11 Gratt. 724.

Where a submission is made by rule of court, and a party to the submission dies, the suit may be revived by the personal representative of the party and the cause may be proceeded in without any new submission. *Wheatley v. Martin*, 6 Leigh 62.

2. Compromise or Release of Claims.

See generally, the title COMPROMISE, vol. 3, p. 37.

An administrator or executor may make settlements and compromises with creditors. *Boyd v. Oglesby*, 23 Gratt. 674, 684; *Braxton v. Harrison*, 11 Gratt. 54; *Wheatley v. Martin*, 6 Leigh 62.

An administrator may settle or compound a debt; but if he compounds or releases debts, actions or demands for less than he ought, he will be liable as for a devastavit. *Richardson v. Donehoo*, 16 W. Va. 685.

An administrator is invested by law with full dominion over the assets, and with full discretion for the liquidation and settlement of all claims due to or from the estate. He may make settlements and compromises with creditors and with the surviving partner of his intestate, with a view to the interest of the estate he represents. And if he acts fairly, in good faith, and with a due regard to the interests of the estate, the distributees will be bound by his acts, and he will be protected. *Boyd v. Oglesby*, 23 Gratt. 674.

Binding Effect of Act.—Where an administrator settles a debt and lien therefor due the estate, and receives payment of the amount ascertained to be due in full satisfaction of the debt, such settlement, in the absence of fraud or mistake, is, as to the party settling and so paying the debt and lien, generally valid and binding, not only as to the administrator, but as to the heirs of the administrator's intestate. *Richardson v. Donehoo*, 16 W. Va. 685.

With Surviving Partner.—An administrator of a deceased partner may settle and compromise with the surviving partner, with a view to the interest of the estate he represents. And if he acts fairly, in good faith, and with a due regard to the interests of the estate, the distributees will be bound by his acts, and he will be pro-

tected. *Boyd v. Oglesby*, 23 Gratt. 674.

Doubtful Claims.—Where an administrator, acting in good faith, within the scope of his powers, and with ordinary prudence, compromises a doubtful and uncertain claim due the estate of his intestate, he can not be held liable for a devastavit. *Turpin v. Chesterfield*, etc., Min. Co., 82 Va. 74.

Thus where an administrator in good faith compromised a doubtful claim at fifty cents on the dollar in confederate money it was held not to be a devastavit twenty years afterwards. *Turpin v. Chesterfield*, etc., Min. Co., 82 Va. 74.

For Purpose of Obtaining Possession of Assets.—An executor is justified in making a compromise with a person having assets of the estate in his hands, for the purpose of getting possession thereof. *Kee v. Kee*, 2 Gratt. 116.

To Prevent Prejudice from Personal Liability.—With a view to protect himself in the event he should be held liable for bank stock which perished on his hands, an executor made a compromise with the creditors, who, in advance of the legatees, would be entitled to the bank stock, whereby the creditors assigned to him for value their interests therein, but the stock having become valueless, there remained nothing out of which he could derive any advantage. Held, that such agreement did not, under the circumstances, come within the rule which forbids a fiduciary from availing himself of his fiduciary character to make personal profits or advantage. *Cooper v. Cooper*, 77 Va. 198.

Aid of Equity to Enforce.—A court of equity will not assist in carrying into effect compositions of claims by executors or other fiduciaries, unless the party praying it will first disclose all the circumstances of the case, that the court may see that there has been no fraud. *Clay v. Williams*, 2 Munf. 105, 5 Am. Dec. 453.

3. Confession of Judgment.

See generally, the title **CONFESSION OF JUDGMENT**, vol. 3, p. 64.

Confession of Judgment.—An administrator is invested by law with full dominion over the assets, and with full discretion as to the liquidation and settlement of all claims due to or by the estate. He may make settlements and compromises with creditors, and give them confessions of judgments. *Boyd v. Oglesby*, 23 Gratt. 674; *Braxton v. Harrison*, 11 Gratt. 54; *Wheatley v. Martin*, 6 Leigh 62.

An administrator who has no notice of a specialty debt may confess judgment to a simple contract creditor. *Mayo v. Bentley*, 4 Call 528. In a given case the judges were equally divided as to whether a very quick confession of judgment to a simple contract creditor is fraudulent as to bond creditors. *Mayo v. Bentley*, 4 Call 528.

Where an executor confesses judgment for a debt of the testator upon a miscalculation of the amount of assets in his hands, and with a full understanding of his personal liability in case of a deficiency of assets, he will not be relieved in equity against the judgment in case the assets are insufficient to satisfy it. *Freelands v. Royall*, 2 Hen. & M. 575.

Estoppel to Creditor.—See generally, the title **ESTOPPEL**, vol. 5, p. 191.

A creditor of a decedent accepting from the administrator a confession of judgment when assets, is thereby estopped at law from alleging that the administrator at the time of the judgment had assets applicable to the demand. *Dupuy v. Southgates*, 11 Leigh 92.

Thus, a creditor of a decedent, by specialty, after accepting from the administrator a confession of judgment when assets, filed a bill in equity against the administrator for a discovery and account, and upon taking the account it appeared, that at the time of the judgment there were assets in the hands of the administrator, which

he afterwards applied in discharge of another specialty, on which he was bound as the indorser or assignor thereof. Held, that under such circumstances, a technical estoppel would avail in equity as a defense against the creditor's claim. *Dupuy v. Southgates*, 11 Leigh 92; *Orcutt v. Orms*, 3 Paige 459.

4. Tender of Insurance Premiums.

See generally, the title **INSURANCE**.

In case of the death of the insured pending the war, his personal representative would be under no obligation to make such a tender, for then there would be in the hands of the insurer a fund of the insured out of which he could deduct the unpaid premium. Nothing more would then be necessary on the part of the insured than that the insurer should within a reasonable time from the ending of the war be informed of such death and of its date. *Mut. Ins. Co. v. Duerson*, 28 Gratt. 630.

E. CARE AND MANAGEMENT IN GENERAL.

1. General Consideration.

The executor or administrator is charged with the care and management of the estate. *Boyd v. Oglesby*, 23 Gratt. 674.

2. Investments.

a. Duty to Invest.

Where an executor or administrator has funds in his hands which can not be paid out to the parties entitled, it is his duty to invest in safe interest-bearing securities. If he is unwilling to assume any risk, the courts are always open to him for guidance and instruction. *Leake v. Leake*, 75 Va. 792.

b. Investment Should Be Made in Name of Executor.

Where an executor is directed to invest money in stock, he ought to have the investment made in his own name as executor, in order that the stock may be readily converted into

money to pay the debts of his testator. *Carter v. Cutting*, 5 Munf. 223.

c. Character of Investments.

(1) Where Will Designates.

A direction by a testator to his executors to invest money upon good and sufficient securities in Virginia or Maryland as his executors should think proper, authorized them to invest the same in loan-office certificates or other public securities. *McCall v. Peachy*, 3 Munf. 288.

Unsafe Securities Named in Will.—

Executors were directed to invest certain funds in Virginia state stocks and bonds, in trust for a certain legatee. The testator died during the period of reconstruction after the civil war, and the executors, fearing to make the investment designated by the will, retained the money, paying the cestui que trust interest thereon, she agreeing to this and receiving the interest. Held, that the executors had only exercised a sound discretion and were not liable. *Perry v. Smoot*, 23 Gratt. 241.

(2) Confederate Securities.

See generally, the title **CONFEDERATE STATES**, vol. 3, p. 53.

It was provided by statute in Virginia that whenever a fiduciary had in his hands money received in the due exercise of his trust, which, from the nature of his trust, or from any other cause whatever, he was unable to pay over to the parties entitled thereto, or to dispose of the funds in accordance with the directions of the instrument creating the trust, it should be lawful for him to apply by motion or petition to any judge of a circuit court for instructions to invest the fund thus remaining in his hands, in confederate states bonds. But it was held, that before a party could avail himself of these provisions, he must have had in his hand the same money, or its equivalent in value, which he received in his fiduciary character; he must have received the currency which he proposed to invest in the exercise of his trust.

and for some cause he must have been unable to pay it over to the parties entitled or to invest it in accordance with the directions of the instrument creating the trust. *Campbell v. Campbell*, 22 Gratt. 649; *Crickard v. Crickard*, 25 Gratt. 410; *Kirby v. Goodykoontz*, 26 Gratt. 298; *Ammon v. Wolfe*, 26 Gratt. 621; *Carter v. Dulaney*, 30 Gratt. 192; *Crawford v. Shover*, 29 Gratt. 69. See also, *Ferguson v. Epes*, 77 Va. 499; *Fultz v. Brightwell*, 77 Va. 742; *Sharpe v. Rockwood*, 78 Va. 24; *Knight v. Watts*, 26 W. Va. 175; *Waller v. Catlett*, 83 Va. 200, 2 S. E. 260; *Douglass v. Stephenson*, 75 Va. 749.

A testator died in 1856, and by his will directed that any funds of his estate remaining after the payment of his debts and funeral expenses should be invested by his executor, and the interest applied to the payment of an annuity left to his wife. In January, 1860, the executor had in his hands \$4,991.84. In 1862, he invested in his own name \$5,900 in confederate eight per cent. bonds. In December, 1864, he obtained from the court an order authorizing him to invest \$5,900, which he held in his hands as executor, in confederate bonds, and he invested the amount in February, 1865. Held, that the statute did not authorize the investment of the fund in his hands which was, in fact, good money, in confederate bonds in 1865. *Carter v. Dulaney*, 30 Gratt. 192.

A testator died in 1863, and by his will directed his executors to sell his property, and to hold the money in their hands or to loan it out as they thought best, and to pay the children as they came of age. The executors, with the concurrence of the adult children, sold for confederate money and paid over the proper amounts to all the legatees who were of age. Two of the legatees, however, were infants, having no guardian, and the executors, under an order of court, invested \$5,000 in confederate bonds, which were a complete loss. Held, that the executors

were not liable. *Fugate v. Honakers*, 23 Gratt. 409.

Where an administrator, having gold belonging to the estate in his hands before the Civil War, invested the same in confederate bonds under an order of the court, this fact did not excuse him from accounting to the legatees for both principal and interest in good money. *Sharpe v. Rockwood*, 78 Va. 24.

An executor fully administered an estate and, in 1860, had in hand money to pay the legacies. One of the legatees was an infant with merely a life estate in the legacy, and there was no one to whom to pay the money. The executor, in 1863, under an ex parte order of the court, invested the legacy in confederate bonds, which were delivered to the life tenant when he came of age. Held, that the executor had no right, in 1863, thus to invest the legacy, and was therefore liable to the remainderman as for a devastavit. *Ferguson v. Epes*, 77 Va. 499.

An executor, under an order of court authorizing him to invest funds of the estate in confederate or state bonds, invested in confederate bonds, which were lost by the results of the war. Held, that the executor was not responsible, under the circumstances, for the failure to invest in bonds of the state of Virginia. *Crouch v. Davis*, 23 Gratt. 62. See also, *Walker v. Page*, 21 Gratt. 636.

Where an executor, who was also a member of a firm, deposited money of the estate in a bank to the credit of the firm, which, on an ex parte order of the court, was invested on the firm's check in confederate bonds, it was held, that the investment was either the investment of the executor or of the firm, and that the executor was liable for the loss as for a conversion of the money. *Leake v. Leake*, 73 Va. 792.

Where an estate is being settled by the court, the administrator can not be charged with investments in confederate bonds made by order of the

court. *Fauber v. Gentry*, 89 Va. 312, 15 S. E. 899.

An administrator was held responsible for the loss where, in 1863, without an order of the court or of the judge in vacation, under act of March 5, 1863, he invested the decedent's funds in confederate bonds, especially as it appeared that such funds might have been applied to pay the debts of the estate, or divided among those entitled thereto. *Frazier v. Frazier*, 77 Va. 775.

Where administrators invested confederate notes, which had come into their hands in the execution of their duty, in confederate bonds, and it appeared that they were unable by reason of the war and the scattered condition of the legatees to distribute the funds, the investment was sustained. *Lingle v. Cook*, 32 Gratt. 262.

Where executors were authorized by the will to sell real property and invest the proceeds, and they, acting in good faith, invested the same in confederate bonds, they were not liable for the consequent loss. *Mills v. Mills*, 28 Gratt. 442. See also, *Jones v. Jones*, 86 Va. 845, 11 S. E. 426.

An executor received confederate treasury notes in satisfaction of a bond for the amount of a legacy ordered to be loaned, and so loaned by him, before the Civil War, without coercion on the part of the debtor. Having invested the same in confederate bonds at the instance of his counsel, he sought to be relieved from loss of the fund, on the ground that he had acted under advice and as a prudent man would have done. Held, that he was not entitled to relief, since the investment in confederate bonds was per se illegal, and no court should excuse or exonerate a fiduciary from loss or liability resulting from his own acts which were in themselves not only illegal but in contravention of public policy. *Copeland v. McCue*, 5 W. Va. 264.

In the progress of a suit brought by the executor to have the estate administered, the court authorized him to

invest funds of the estate in his hands, in confederate bonds. He paid large sums of confederate money to one of the residuary legatees, but the parties entitled to the other half of that legacy being unascertained, he paid nothing to them. Held, that the loss sustained by the investment in confederate bonds must be borne rateably by all the parties entitled to the residuum. *Skipwith v. Cabell*, 19 Gratt. 758.

d. Liability of Executor or Administrator.

Losses Resulting from Failure to Invest.—Where the will directs the estate to be put out at interest, and the executor does not choose to do so, he is to be considered as a borrower, and annually charged with interest, and such interest and not the principal is to be applied to disbursements. *Handly v. Snodgrass*, 9 Leigh 484; *Garrett v. Carr*, 3 Leigh 407; *Lomax v. Pendleton*, 3 Call 538. See post, "Accounting," IV, L.

Where a fiduciary disobeys an order of the court having jurisdiction over him and the trust fund to make particular investments, he will be held individually responsible for all losses resulting from such misconduct. *Whitehead v. Whitehead*, 85 Va. 870, 9 S. E. 10.

Care and Prudence Required in Making Investments.—In making investments, an executor or administrator is bound to exercise that degree of care and prudence which careful and intelligent men would deem reasonable discretion in their own affairs. And where he has exercised such discretion and has acted in good faith, he will not be held liable for losses resulting from mere errors of judgment. *Watkins v. Stewart*, 78 Va. 111; *Cooper v. Cooper*, 77 Va. 198; *Jones v. Jones*, 86 Va. 845, 11 S. E. 426. See ante, "Degree of Skill and Diligence Required," IV, A, 2; post, "Loss of Assets," IV, E, 6.

Personal Supervision of Investments.

—An executor was directed by will to

invest a specific sum of money in interest-bearing bonds and to pay the interest thereon to a legatee for life, and after her death to divide the fund among her children. The executor applied to the cashier of a bank, who agreed to sell him United States bonds, and he, without seeing the bonds or knowing that they were in the bank paid the cashier for them with the understanding that they were to be held by the bank subject to his order. No bonds were in fact ever put in the bank on special deposit in the name of the executor, or as his property, but the cashier paid to him, as the interest matured on such bonds, a sum equal to their interest. No inquiry was made by the executor for the bonds until after the failure of the bank nearly two years thereafter, when it was ascertained that there were no bonds there; and if such bonds had ever been deposited there, they had been appropriated by the cashier long before the failure of the bank. Held, that the executor was liable for the trust fund. *Key v. Hughes*, 32 W. Va. 184, 9 S. E. 77.

e. Retaining Investments Made by Decedent.

Where an estate is to be invested to await distribution at a distant day, a bond executed to the testator well secured on real estate, or even secured by undoubted personal security, may be continued as an investment by the personal representative; but this can not be done with a bond without security either real or personal, especially where there is a large amount of interest due on it at the death of the testator. *Lacy v. Stamper*, 27 Gratt. 42.

Among the assets which came into the hands of an administrator in 1875, there were railroad bonds for \$6,000, worth at the time \$4,200, which were paying a good rate of interest. Two out of the four legatees, one having been absent for seven years and supposed to be dead, requested that these

bonds should not be sold, as it was thought they would appreciate. The administrator held them until 1877, when, by the railroad's sudden collapse, they became worthless. Held, that the administrator was not liable for the loss. It was also held, that he was not liable for the loss of \$4,000 secured by the pledge of \$12,000 of similar bonds, the payment of which had been frequently demanded and promised. *Watkins v. Stewart*, 78 Va. 111.

f. Under Order of Court.

In 1862, an administrator, acting under an order of court authorizing him to loan money belonging to the estate to any undisputed creditors thereof, made a loan of confederate money to one of the creditors. Held, that the loan should not be scaled, but should be applied, as of its date, as a payment of a debt due the borrower. *Robertson v. Trigg*, 32 Gratt. 76.

3. Deposit of Funds.

See generally, the title **BANKS AND BANKING**, vol. 2, p. 254.

Deposit with Private Funds.—See post, "Mingling Assets with Private Funds," IV, E, 8.

Where an executor deposited money in the loan office in February, 1778, drew it out in April, 1778, and deposited it again on the same day, he should be allowed the nominal amount of the debts, notwithstanding the great depreciation between the first and second deposits. *Cary v. Macon*, 4 Call 605.

Bank Ruined by War.—Where a commissioner, appointed to sell a decedent's land, collected the money and deposited it in a solvent bank to his individual credit, and the bank was ruined by the war, and the money was lost, it was held that the commissioner was not chargeable with the loss, but that the loss must fall on the estate of the decedent. *Thompson v. Brooke*, 76 Va. 160. See also, *Douglass v. Stephenson*, 75 Va. 747.

Deposit with Receiver of Court.—Where an administrator, having funds

in his hands, arising from the sale of property, made by the decedent as commissioner of the court, deposits such funds in confederate money with the general receiver of the court, in a suit to which he was not a party and which did not involve a settlement of his accounts, he does not thereby relieve himself from liability for such funds. *Fultz v. Brightwell*, 77 Va. 742.

Liability for Loss.—An administrator who had acted in good faith and was guilty of no negligence was held not responsible for money which became worthless in his hands by the insolvency of the bank. *Powell v. Stratton*, 11 Gratt. 792.

4. Collection of Assets.

a. Duty and Authority to Collect.

(1) In General.

An intestate in his lifetime assigned bonds to an agent for collection, but died before they were collected. His administrator permitted the agent to collect the bonds and appropriate the proceeds to his own use. Held, that this was a devastavit by the administrator for which he was responsible out of his own estate to the distributees of the intestate, and that after the death of such administrator, the distributees might maintain a suit in equity against his personal representative and the agent to recover the amount for which the agent should be primarily subjected. *Miller v. Jeffress*, 4 Gratt. 472.

The administrator of a creditor of the United States government, duly appointed where he was domiciled at his death, has full authority to receive payment and give full discharge of the debt due his intestate, in any place where the government may choose to pay it. *Davis v. Chapman*, 83 Va. 67, 1 S. E. 472, 5 Am. St. 251.

Where the same person is representative of both debtor and creditor estates, he may out of funds in his hands belonging to the former estate pay a debt due him as representative of the

latter estate. *Green v. Thompson*, 84 Va. 376, 5 S. E. 507; *Caskie v. Harrison*, 76 Va. 85.

Foreclosure Proceedings.—See generally, the title MORTGAGES AND DEEDS OF TRUST.

An executor or administrator may foreclose a mortgage by peaceable entry and possession or otherwise, just as his decedent might have done, wherever this becomes needful for realizing upon the secured debt or claim. *Wilson v. Barclay*, 22 Gratt. 534.

(2) Right of One of Several Executors to Collect.

By the terms of a will a perpetual rent was secured on real estate, which the lessee was authorized to redeem by paying an amount which, at six per cent., would produce an interest equal to the rent. Held, that one of the three executors might receive the payment although it might require all to execute the release. *Mills v. Mills*, 28 Gratt. 442.

(3) Effect of Payments to Heirs or Distributees Instead of Executor.

See the titles HEIR, HEIRS AND THE LIKE; LEGATEES AND DISTRIBUTEES.

(4) Validity and Effect of Receipt.

R., an administrator, signs and delivers to B. a receipt for a certain sum of money, reciting that it is in full payment of all sums due his intestate, as per statement thereto attached; this statement shows the whole amount due the intestate's estate, subject to a credit of \$324, paid to intestate's widow by B., after intestate's death; this credit, after deducting a small sum for error, with the amount stated in the body of the receipt, makes up the whole amount due intestate's estate. Held, that this receipt, in connection with the other evidence in the cause, not being impeached for mistake, error or fraud, is evidence of a settlement of accounts between the parties, and is a ratification and acceptance of the payments

claimed as credits in said receipt. *Ruby v. Railroad Co.*, 8 W. Va. 269.

b. Right and Obligation to Sue.

(1) In General.

It is the duty of the executor to collect together the personal estate, of which he is a trustee for the payment of debts and legacies; and, therefore, he is entitled to maintain all actions which relate to the personalty, because he alone is entitled to the possession of the personal assets for such purposes. *Eppes v. Demoville*, 2 Call 22. See also, *Matheny v. Ferguson*, 55 W. Va. 656, 47 S. E. 886; *Tabb v. Cabell*, 17 Gratt. 160; *Richardson v. Donehoo*, 16 W. Va. 685; *Wilson v. Straight*, 46 W. Va. 651, 33 S. E. 758; *Poling v. Huffman*, 39 W. Va. 320, 19 S. E. 421, 423. See also, post, "Actions by Executors or Administrators," IV, O, 1.

(2) Suit by Beneficiary.

But it is held, that while claims due an estate should ordinarily be prosecuted by the personal representative thereof, yet it may be done by the beneficiaries thereof in a special case, as where it appears that the personal representatives can not or will not act. *Matheny v. Ferguson*, 55 W. Va. 656, 47 S. E. 886.

(3) Relief in Equity in Adjusting Claims.

There being a deed of trust upon land in favor of decedent's estate, and various payments claimed by the debtor, and disputed by the administrator, not known by him to be valid, or supported by decisive evidence, equity has jurisdiction of a suit in the name of either the administrator, or the trustee, or jointly, to settle the amount due on the debt. *Pendleton v. Bower*, 49 W. Va. 146, 38 S. E. 487.

(4) Rights and Powers of Representatives of Deceased Representative.

In jurisdictions where the common-law rule has not been adhered to it seems that the representative of the deceased executor or administrator can not collect or sue upon assets of the first

estate, nor proceed with its general administration, beyond clearing up such personal liability as may have been incurred by his own decedent, and realizing upon what should enter properly into a final account and settlement on his part so as to clear his own decedent's estate from further liability for the trust. *Turnbull v. Claibornes*, 3 Leigh 392.

(5) Claim Doubtful.

An administrator is not bound to sue upon a controverted, doubtful claim where he demands indemnity for costs and expense of the suit from those requesting suit, and it is not given. *Harris v. Orr*, 46 W. Va. 261, 33 S. E. 257.

(6) Inability of Debtor to Discharge.

An administrator is not bound to sue for a debt due the estate, when it is apparent that the debtor is unable to pay it. *Lovett v. Thomas*, 81 Va. 245; *Mitchell v. Trotter*, 7 Gratt. 136. See also, *Nelson v. Page*, 7 Gratt. 160.

c. Taking Payment in Something Else than Money.

(1) Live Stock.

An administrator and his sureties are properly chargeable with debts due the intestate which were paid in something else than money, where it appears that the debts were mostly, if not entirely, paid in live stock, which was either butchered at home, or shipped and converted into money; for, even if not converted into money, the surrendering and extinguishing the notes amounts to waste or conversion on the part of the administrator. *Harman v. McMullin*, 85 Va. 187, 7 S. E. 349.

(2) Other Debts Due Debtor.

Where an executor exchanges a debt due his testator for some other debt due the debtor, he is regarded as having converted the assets, and should be charged with such debt so exchanged whether it is a good debt or not. *Anderson v. Piercy*, 20 W. Va. 282.

(8) Taking Payment in Depreciated Currency.

A personal representative is not warranted in receiving a debt due to the decedent's estate in greatly depreciated currency, such as was the confederate currency toward the close of the Civil War, unless there is something in the condition of the debt, or in the state of the demands of creditors or legatees of the estate, or otherwise, which makes it to the interest of the estate that the debt should be so received. *Moss v. Moorman*, 24 Gratt. 97; *Hannah v. Boyd*, 25 Gratt. 692; *Williams v. Skinner*, 25 Gratt. 507; *Peters v. Neville*, 26 Gratt. 549; *Myers v. Nelson*, 26 Gratt. 729; *Tosh v. Robertson*, 27 Gratt. 270; *Mills v. Mills*, 28 Gratt. 500; *Crawford v. Shover*, 29 Gratt. 69; *Patteson v. Bondurant*, 30 Gratt. 94; *Siron v. Ruleman*, 32 Gratt. 215; *Purdie v. Jones*, 32 Gratt. 827; *Taylor v. Lancaster*, 33 Gratt. 1.

The cases in which the supreme court has held it a breach of duty in a fiduciary to receive confederate currency in discharge of ante-war obligations have all been cases in which the depreciation had become so great as of itself, when not attended by circumstances of justification, to be evidence either of bad faith or lack of common prudence. But the same cases show that even when the currency was greatly depreciated, the fiduciary might be well justified in receiving it, on account of the necessities of the estate he represented, the condition of the debt, or by other special circumstances making the collection proper. *Douglass v. Stephenson*, 75 Va. 747.

An executor was held to be justified in receiving confederate money, though greatly depreciated, for a debt payable in sound currency, where the necessities of the estate required it, where it could be used in payment of the debts of the testator, where the parties entitled to distribution consented to receive it, or where the security for the

debt had become doubtful and it was to the benefit of the estate to receive even a depreciated currency. *Williams v. Skinner*, 25 Gratt. 507.

An executor received confederate treasury notes in satisfaction of a bond for the amount of a legacy ordered to be loaned, and so loaned by him, before the Civil War, without any coercion on the part of the debtor, and invested the same in confederate bonds at the instance of counsel. He sought to be relieved on the ground that he had acted under advice, and as a prudent man would have done. Held, that he was not entitled to relief, because it did not appear that he was compelled to receive the fund by the coercion of the debtor. *Copeland v. McCue*, 5 W. Va. 264.

Where one of two coexecutors receives payment of a debt due the estate in depreciated currency, he alone is chargeable therefor. *Myrick v. Adams*, 4 Munf. 366.

Measure of Accountability.—The measure of accountability of an executor or administrator who receives confederate money in payment of debts is the actual value of such money at the time of receipt, not the face value thereof. *Staples v. Staples*, 24 Gratt. 225; *Wayland v. Crank*, 79 Va. 602; *Siron v. Ruleman*, 32 Gratt. 215.

Where a personal representative received confederate money, during the war, and used it in his own business, he was charged with the money so received, in the settlement of his account of administration after the war as of its scaled value in gold at the date of its receipt. *Moses v. Hurt*, 25 Gratt. 795.

d. Liability for Failure to Collect Assets.

(1) Presumption as to Collection.

Where debts are stated in the executor's inventory as good, they will, after a reasonable time, be prima facie presumed to have been collected; and it devolves upon the executor to show

that they have not been collected, and not upon the legatees to show that the executor has been guilty of misconduct or negligence in regard to such debts. *Anderson v. Piercy*, 20 W. Va. 282.

(2) Liability Distinguished from Trustees.

See generally, the title TRUSTS AND TRUSTEES.

The liability of trustees for collection of choses in action would seem different from that of personal representatives, as laid down in *Crouch v. Davis*, 23 Gratt. 62. *Wimbish v. Blanks*, 76 Va. 365.

(3) Dependent on Actual Collection or Loss by Negligence.

An administrator ought not to be charged with debts due to an estate, unless he has actually collected such debts, or they have been lost by his negligence or improper conduct. *Evans v. Shroyer*, 22 W. Va. 581.

Thus, the executors of a consignee are not liable for outstanding debts, unless they are guilty of gross negligence. *McConnico v. Curzen*, 2 Call 358, 1 Am. Dec. 540.

Prima facie, he is chargeable with all the assets undoubtedly, and must account for them, but if he accounts by showing a loss, which he could not have prevented by the exercise of due diligence and vigilance, he thereby discharges himself as to the assets lost. *Evans Shroyer*, 22 W. Va. 581; *Ritz v. Bennett*, 6 W. Va. 417; *Cavendish v. Fleming*, 3 Munf. 198.

In 1863 the estate of a testator was placed in the hands of the sheriff as administrator with the will annexed. Among the assets was a bond executed November 2, 1857. In 1863 the administrator with the will annexed placed the bond in the hands of an attorney for collection. The obligor had in his possession a considerable estate real and personal, but he was largely indebted, and the attorney, as well as other counsel who had claims against him, apprehended that if he

was sued he would convey his estate to secure preferred creditors, and therefore did not bring suit upon the bond until 1866. Several suits were brought against the debtor in 1866, and he sold and conveyed his land in payment of debts mentioned in the deed, and soon after went into bankruptcy paying nothing. Held, that the administrator with the will annexed had been guilty of no negligence, and that his estate was not responsible for the debt. *Tanner v. Bennett*, 33 Gratt. 251.

But where the failure of an executor or administrator to make collections results from neglect on his part in the performance of his duties, he is personally chargeable with the amount so lost. *Sterling v. Wilkinson*, 83 Va. 791, 3 S. E. 533; *Chapman v. Shepherd*, 24 Gratt. 377.

When Required Diligence Exercised.

—Where the testator had relied upon a deed of trust on land to secure a certain debt, and the executor had acquired additional security on slaves, and it did not appear that by any degree of diligence he could have effected more to secure the payment of the whole debt, it was held, that the executor was not liable for the debt. *Nelson v. Page*, 7 Gratt. 160.

(4) Where Debt Might Have Been Collected.

The mere fact that a debt might have been collected is not sufficient to charge the personal representative with its loss, but he is chargeable if the loss resulted from his delay. *Anderson v. Piercy*, 20 W. Va. 282.

But an executor qualified in 1856 and received as a part of his estate bonds executed to his testator without security, the obligors being then solvent. The executor failed to collect the money due on the bonds, and on his death in 1862, they were turned over to the administrator de bonis non of the testator, the obligors being still solvent. The administrator de bonis non sued on the bonds, but owing to

the state of things in the county during the war judgment could not be recovered on them, and by the results of the war the obligors became insolvent. Held, that as the executor might have collected these debts, his estate and his sureties were responsible for their loss. *Lacy v. Stamper*, 27 Gratt. 42.

And where there are several successive administrations upon the same estate, and debts due to the estate might have been collected by each of the personal representatives of said estate, by the use of due and reasonable diligence, but was collected by none of them, and was lost by the negligence of each and all of them; while all of them are liable for said debts, their relative liability is in the inverse order of their qualifications as such personal representatives. *Lacy v. Stamper*, 27 Gratt. 42.

The dismissal of a suit in chancery brought by a legatee of a decedent against his personal representative and debtor of the estate, for the purpose of holding the debtor to account, while a separate suit is pending against the personal representative for the settlement of his account, should be without prejudice to the right of the legatee to have the personal representative charged in the other suit with any sum which it was his duty to collect, but which he had failed to collect of the debtor. *Beaty v. Downing*, 96 Va. 451, 31 S. E. 612.

(5) Allowing Debt to Go Unsettled until Insolvency.

A testator directed all his property real and personal, except his slaves, to be sold, and the proceeds of the sales, together with what money might be due to him to be put and kept at interest for the benefit of his wife and children, until his children should arrive at the age of twenty-one years or be married. He had in his lifetime taken the bond of two men who were partners for a partnership debt, and it was unpaid at his death. They were reputed to be wealthy men, and the

executor permitted the debt to remain uncollected until one of them died, and the firm as well as its members proved to be insolvent. Held, that the executor was bound to account for the debt. *Southall v. Taylor*, 14 Gratt. 269.

(6) Balance Due on Insurance Policy.

If a third party holding a policy of insurance on the life of a decedent collects and retains more on account of it than he is entitled to under the law, it is the duty of the administrator to require him to account for the excess, and if, through his failure to do so, any loss has resulted to the estate of the decedent, the administrator should be charged with such loss in his administration account. *Beaty v. Downing*, 96 Va. 451, 31 S. E. 612.

(7) Permitting Collector to appropriate Proceeds.

A, in his lifetime, assigned bonds to B to be collected for A, but before they were collected A died. The administrator of A having permitted B to collect the bonds and appropriate the proceeds to his own use, this was a devastavit by the administrator, for which he was responsible out of his own estate to the distributees of A. And the administrator of A being dead, the distributees of A may have a decree against the representative of the administrator, without bringing an administrator de bonis non of A before the court. *Miller v. Jeffress*, 4 Gratt. 472. See also, *Burwell v. Burwell*, 78 Va. 574, 582; *Harvey v. Steptoe*, 17 Gratt. 289.

(8) Unavailability Caused by War.

An administrator who has been guilty of no negligence can not be held liable for debts due the estate of his decedent, which have become unavailable by the results of war. *Estill v. McClintic*, 11 W. Va. 399.

(9) Extent of Liability.

Where a debt has been lost to the estate by the negligence of the executor in not taking steps to collect it when it could have been collected, he

should be charged with such debt as of the time when it should have been collected. *Anderson v. Piercy*, 20 W. Va. 282.

Two of the obligors upon a bond became insolvent, and the third died without having proceeded against the fourth obligor to enforce the collection of one-half of the bond. His administrator also neglected to enforce the payment of the one-half to which the fourth obligor was liable, and suffered said obligor to become insolvent, after having made some payments on the bond. Held, that the administrator was liable for what he could have made out of the fourth obligor, which was one-half of the bond; but he was entitled to be credited as upon this one-half with all collections already made. *Sterling v. Wilkinson*, 83 Va. 791, 3 S. E. 333.

An executor is not chargeable with debts due the estate of his testator at the time when they become due, but only at the time when he actually received them, unless they were lost by his negligence or improper conduct. *Cavendish v. Fleming*, 3 Munf. 198.

It seems that a settlement of partnership affairs made with the surviving partners by the personal representative of a deceased partner is binding on the latter's estate, its creditors and beneficiaries, except in cases of fraud or mistake, and for only the share thus received is the representative presumably liable. *Shackelford v. Shackelford*, 32 Gratt. 481.

Prior to 21st August, 1865, A assigned for an unknown consideration to B a bond of C's for \$451, dated 7th August, 1862. On suit, the bond was scaled to \$78.83, which was collected. In 1870, A conveyed to D land on condition that he pay certain debts of A's including "claim due B's estate, to the amount of \$500, should so much be due thereto." Testimony showed that the claim originated out of the assignment. On bill by B's administrator to enforce this charge on D's land, it was held,

that the claim due B's estate amounted to \$78.83, which, having been paid, the bill should be dismissed. *Barley v. Layman*, 79 Va. 518.

5. Discovery of Assets.

See generally, the title DISCOVERY, vol. 4, p. 656.

a. By Personal Representative.

A bill of discovery is the proper remedy to be pursued by the administrator of an estate against a defendant who has in his possession choses in action and other personal estate of the decedent, the amounts, dates and character of which are unknown to the complainant, and which the defendant refuses to disclose; and in such suit the distributees of the decedent are neither necessary nor proper parties. There is no adequate remedy at law. *Smith v. Smith*, 92 Va. 696, 24 S. E. 280.

A bill in equity will lie by an administrator of a principal against the general agent of his intestate for a discovery and an account of the transaction of the latter with the principal. *Simmons v. Simmons*, 33 Gratt. 451.

A bill by a creditor or creditors to discover assets and enforce a debt or claim against the estate, real and personal, in the hands of the heirs or devisees, is not demurrable because filed within six months of the date of the appointment of the personal representative of such estate. *Poling v. Huffman*, 39 W. Va. 320, 19 S. E. 421.

Where a person leases land from an executor, and purchases judgments against the testator, although he can not set them off against the rent, unless the executor acknowledges a sufficiency of assets to pay all the debts of the estate, yet the tenant may maintain a bill in such case for the discovery of assets by the executor. *White v. Bannister*, 1 Wash. 166.

After a judgment against an executor and a return of "no effects" on an execution against the goods and chattels of his testator, a suit in equity may be brought for a discovery of the assets;

to which suit the sureties of the executor, and all other persons against whom a decree can be rendered, ought to be made defendants. *Clarke v. Webb*, 2 Hen. & M. 8.

b. By Creditor.

A creditor may file a bill of discovery against the personal or real representative of the estate of a decedent to discover the assets liable to the payment of his debt. *Poling v. Huffman*, 39 W. Va. 320, 324, 19 S. E. 421, 423, citing *White v. Bannister*, 1 Wash. 166; *Duval v. Trent*, 6 Munf. 29; *Clarke v. Webb*, 2 Hen. & M. 8. See also, *Gordon v. Justices of Frederick*, 1 Munf. 20.

6. Loss of Assets.

a. General Principles Governing Liability.

See ante, "Degree of Skill and Diligence Required," IV, A, 2.

Prima facie an administrator is liable for the whole amount of the estate of his decedent and must account for the same, but, as to any assets of the estate he may so account by showing that the same are worthless or have been lost, without any fault or negligence on his part, or failure on his part to use due diligence to prevent the loss, and his oath is prima facie proof of such worthlessness or loss. *Van Winkle v. Blackford*, 54 W. Va. 622, 46 S. E. 589.

Courts of equity will not hold fiduciaries liable for losses incurred in managing a trust where they acted in good faith, in the exercise of reasonable discretion, and as they would probably have done in their own matters. *Lovett v. Thomas*, 81 Va. 245; *Watkins v. Stewart*, 78 Va. 111. See also, *Cavendish v. Fleming*, 3 Munf. 198.

It was held, that administrators who qualified in Greenbrier county in 1863, under the confederate government, ought not to be charged with the value of a negro slave, because of the difficulty of making sale of such slave, or

from getting anything but confederate money in payment; and because if they had retained the slave until there was another currency in the country, such slave would have died in their hands; especially as it did not appear that they intermeddled with, or realized anything from the slave. *Williams v. Buster*, 5 W. Va. 342.

b. Mere Errors of Judgment.

It is well settled that if an executor honestly exercises the discretion conferred on him by the will, he can not be held liable for any loss which may have been occasioned by a mere error of judgment. *Jones v. Jones*, 86 Va. 845, 11 S. E. 426; *Wayland v. Crank*, 79 Va. 602; *Cooper v. Cooper*, 77 Va. 198; *Lingle v. Cook*, 32 Gratt. 262; *Mills v. Mills*, 28 Gratt. 442; *Staples v. Staples*, 24 Gratt. 225.

A decedent appointed his brother as executor of his will, with power to sell any part or all of the real and personal estate, as he should deem best for the decedent's children and to reinvest the same. The estate consisted of half of a tract of land, which had not been paid for, personal property thereon, and a number of slaves. The other half of the land, the buildings, and many of the slaves, belonging to the widow's father. There were many debts against the estate. The farm was kept up as a home for the widow and children until 1862, when, upon the death of the widow, the property was sold, and the proceeds applied to the payment of the debts of the estate, as far as the creditors would take confederate money. The balance was sent within the confederate lines, and a part of it was invested in a confederate bond, and the balance was deposited in the bank. The executor was shortly afterwards captured by the federal army and held a prisoner until the close of the war. Held, that the executor having acted in good faith, could not, under the discretion given him, the condition of the estate, and the surrounding circum-

stances, be held liable for any loss occasioned by mere errors of judgment. *Jones v. Jones*, 86 Va. 845, 11 S. E. 426.

By will probated July, 1873, a testator made assets to pay all his debts, of his whole estate, valued at \$46,000, except two hundred and twenty-five shares of bank stock, valued at \$20,000, and specifically bequeathed to his wife and children. He authorized his executor to sell at his discretion, his whole estate, except the bank stock, and after paying his debts, the residue to go also to his wife and children. Financial panic in 1873, depressed property values, and no sales were made until after suit instituted in June, 1876, to settle the estate, by the reports of the accounts therein taken, revealed that the debts had swollen to \$25,000, and the assets dwindled to \$8,000, and the bank stock became worthless. The widow never renounced the will, nor claimed dower until December, 1877, when she filed her petition in the suit, averring she had lawfully been deprived of her jointure, and desired her dower in the lands of her husband, which had been sold under decree in the suit. She also claimed homestead exemption in his estate. She filed exceptions to the said reports wherein they failed to make the executor account for the bank stock, and to hold him liable for his failure to convert into money so much of the estate of the testator as was necessary to pay the debts, before its depreciation in value. The lower court overruled the exceptions and denied the prayer for dower, but allowed the homestead. On appeal by the widow, it was held, that by a long series of decisions, it was well settled in Virginia that if an executor honestly exercise the discretion conferred on him by the will, he can not be held liable for any loss which may have been occasioned by a mere error of judgment. *Cooper v. Cooper*, 77 Va. 198.

c. Acts and Omissions.

Where an administrator has acted

in good faith, without an eye to self-interest and with what men of sense and experience would deem reasonable discretion in their own affairs, he is not liable for losses resulting to the estate from his acts or omissions especially during the period of doubts and difficulties like that of the war between the states. *LeGrand v. Fitch*, 79 Va. 635; *Cooper v. Cooper*, 77 Va. 198; *Wayland v. Crank*, 79 Va. 602. See also, *Elliott v. Carter*, 9 Gratt. 541; *Davis v. Harman*, 21 Gratt. 194; *Parsley v. Martin*, 77 Va. 376.

Failure to Take Forthcoming Bond.

—In the case of *Ferguson v. Epes*, 77 Va. 499, an executor was held liable for failure to take from a life tenant a forthcoming bond conditioned to return the fund intrusted to him in the event of his dying before marriage and without heirs of his body.

d. Loss Incurred by Entrusting Collection to Agent.

See *Cavendish v. Fleming*, 3 Munf. 198.

e. Loss Resulting from Negligence.

An administrator of an estate who indorses a draft payable to him as administrator and places it so indorsed in the hands of a person whom he does not know for collection, and who fails to account to him therefor, will be chargeable with the loss as for a devastavit occasioned by his want of due care. *Davis v. Chapman*, 83 Va. 67, 1 S. E. 472, 5 Am. St. Rep. 251.

An administrator placed a due bill in the hands of an attorney for collection. The attorney negligently suffered it to run out of date, and also made an alteration in it of which the administrator had knowledge, but the administrator did not attempt to collect it of the attorney. Held, that, although the administrator was not negligent in the selection of the attorney, he is liable, in the absence of proof that the attorney was insolvent. *Mills v. Talley*, 83 Va. 361, 5 S. E. 368.

Two of the obligors upon a bond

became insolvent, and the third died without having proceeded against the fourth obligor to enforce the collection of one-half of the bond. His administrator also neglected to enforce the payment of the one-half to which the fourth obligor was liable, and suffered the obligor to become insolvent, after having made some payments on the bond. Held, that the administrator was liable for what he could have made out of the fourth obligor, which was one-half of the bond; but he was entitled to be credited as upon this one-half with all collections already made. *Sterling v. Wilkinson*, 83 Va. 791, 3 S. E. 533.

The executors of a consignee are not liable for outstanding debts unless they are guilty of gross negligence. The appointment by executors of agents of known ability to collect such debts is prima facie evidence of due diligence, and throws the burden on the assignor to prove negligence. *McConnico v. Curzen*, 2 Call 358, 1 Am. Dec. 540.

f. Where Property Confiscated.

Money received by an executor during the war belonging to a citizen of Indiana was confiscated by the confederate government. Held, that the confederate government, in the exercise of its belligerent rights, had authority to confiscate the property of alien enemies, and the executor was not responsible for the money confiscated. *Newton v. Bushong*, 22 Gratt. 628.

An administrator ought not to be charged with the shares of foreign legatees confiscated by the confederate government and paid by the administrator to the confederate states sequestrator "at the point of the bayonet," notwithstanding the decision in *Williams v. Bruffy*, 96 U. S. 176, that the sequestration laws of the confederate states were void and did not forfeit money due to citizens of the United States residing outside the confederate states. *Miller v. Cook*, 77 Va. 306.

g. Failure of Banks.

See ante, "Deposit of Funds," IV, E, 3; also, the title BANKS AND BANKING, vol. 2, p. 254.

h. Depreciation of Funds.

An executor or administrator acting strictly within the line of his duty and exercising reasonable care and diligence will not be held responsible for the loss or depreciation of the trust fund, or the insolvency or misconduct of any person who may have possessed it; but if that line of duty be not strictly pursued, and any part of the fund be invested upon securities not authorized, or be put within the control of persons who ought not to be intrusted with it, when there is no necessity for so doing, and a loss be thereby eventually sustained, such trustee will be liable to make it good, however unexpected the result; however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive. *Key v. Hughes*, 32 W. Va. 184, 9 S. E. 77.

Shortly before the financial panic of 1873, an administrator believing that matters would become better, delayed the settlement of an estate. On account of the delay and by reason of the depreciation in values, the estate suffered great loss. Held, that the administrator was not liable for the loss, it appearing that he had acted in good faith. *Cooper v. Cooper*, 77 Va. 198.

Among the assets which came into the hands of an administrator in 1875, were railroad bonds for \$6,000, worth at the time, \$4,200, which were paying a good rate of interest. Two out of the four legatees, one having been absent for seven years and supposed to be dead, requested that these bonds should not be sold, as it was thought they would appreciate. The administrator held them until 1877, when, by the railroad's sudden collapse, they became worthless. Held, that the administrator was not liable for the loss;

it was also held, that he was not liable for the loss of \$4,000 secured by the pledge of \$12,000 of similar bonds, the payment of which had been frequently demanded and promised. *Watkins v. Stewart*, 78 Va. 111.

Where an executor deposited money in the loan office in February, 1778, drew it out in April, 1778, and deposited it again on the same day, it was held that he should be allowed the nominal amount of the debts, notwithstanding the great depreciation between the first and second deposits. *Cary v. Macon*, 4 Call 605.

A testator whose personal estate amounted to less than \$60,000, of which \$40,000 was represented by equal amounts of the interest-bearing bonds of two railroad companies, and the balance for the most part, by other bonds and notes, directed, by his will, that two funds of \$5,000 each be invested "in some safe public bonds or securities, bearing at least six per centum annual interest" or deposited "with some trust company at the time reported solvent," and the interest thereon paid to his two sisters during their natural lives, and, after their deaths, the principal sums to be put in the residuum of his personal estate. He died in 1872, and the administrator with the will annexed, by way of compliance, set apart \$5,000 of each of the two classes of railroad bonds, believing them to be good, and, in the panic of the year 1873, the bonds representing one of the funds greatly depreciated and were afterwards sold for forty-eight cents on the dollar. Held, that, under the circumstances stated in the opinion filed, the administrator was not chargeable with the loss, nor, on account thereof, with compound interest in his settlement. *Van Winkle v. Blackford*, 54 W. Va. 621, 46 S. E. 589.

i. Emancipation of Slaves.

See generally, the title SLAVES.

Where other personal assets besides

slaves existed largely in excess of the debts, the administrator was not at liberty, under Va. Code, 1849, ch. 130, § 17, to sell the slaves, and hence was not liable for their loss by emancipation. *Green v. Thompson*, 84 Va. 376, 5 S. E. 507.

Where a slave was left by the will to residuary legatees, and, there being no debts or legacies necessitating its sale, the executor hired the slaves out for several years, during which time the slave was lost, as a consequence of the war, the executor should not be held responsible for the loss, as he had no right to sell the slave, the payment of debts or legacies not requiring such sale. *Anderson v. Piercy*, 20 W. Va. 282.

An administrator qualified in 1862. The estate consisted of slaves valued at \$7,150, other personalty valued at \$1,344, the home tract where the widow and child lived valued at \$2,500, and another tract unpaid for. The debts against the estate amounted to \$5,000, and the creditors were unwilling to accept confederate money in payment thereof. The widow deemed it best that none of the slaves should be sold, but that she should retain all the property and by economical management pay the debts in a reasonable time. The administrator assented to this arrangement, and the widow soon paid over to him \$3,000, but he could only pay with it debts to the amount of \$1,600. The plan failed; the slaves were emancipated; the currency became valueless; and the land had to be sold to pay the debts. Held, that the administrator could not be charged with a devastavit for failing to sell the slaves to pay the debts. *LeGrand v. Fitch*, 79 Va. 635.

A testator left his estate to his widow subject to his debts, and appointed her as executrix. The estate consisted partly of slaves, which she kept. She married again, and her second husband qualified as administrator

c. t. a., but did not sell the slaves to pay the debts. The slaves were freed by the war, and after her death her devisees attempted to hold him liable for their value. Held, that he was not liable therefor, since the devisors were estopped by her conduct from asserting that he violated his duty as administrator in failing to sell the slaves. *Baker v. Baker*, 87 Va. 180, 12 S. E. 346.

7. Waste of Assets.

The use of the assets by the personal representative for his own private purposes, or for the payment of his own debts, is necessarily a misapplication of trust funds and a breach of trust. The duty of every fiduciary is to keep the trust fund separate and distinct from his own property or money, and to apply it in a due course of administration, or to invest it securely for the benefit of the parties entitled thereto. *Asberry v. Asberry*, 33 Gratt. 461. See also, *Leake v. Leake*, 75 Va. 792.

An administrator voluntarily paying away the assets of the estate to distributees when there are outstanding debts, though he is ignorant of them, is guilty of maladministration, and is liable as for a devastavit. *Cookus v. Peyton*, 1 Gratt. 431. See post, "Effect of Distribution," IV, K, 7.

The payment of inferior debts is not waste, if sufficient assets are retained to pay those of superior degree. *Braxton v. Winslow*, 4 Call 308.

Where a widow, who is the administratrix of her husband, cuts timber from the land and builds a new house on it, she is chargeable with the value of the timber cut. *Casto v. Kintzel*, 27 W. Va. 750. See generally, the title DOWER, vol. 4, p. 782.

Liability of Sureties.—See generally, the title SURETYSHIP.

Where an executor is not responsible for a fund as executor, but as trustee, his securities as executors, therefore, are not responsible for his waste of it. *Boyd v. Boyd*, 3 Gratt. 114.

Joint Devastavit.—Where in a suit charging two administrators with a joint devastavit of their intestate's estate, they jointly excepted to the master's report wherein they were charged with the devastavit, and the court sustained the exception, one of the administrators can not afterwards be heard to charge his coadministrator with the same devastavit whereby a debt due by the estate to the allegor was lost. The decree sustaining the exception is the law of the case, binding upon the parties and all claiming under them. *Kent v. Kent*, 82 Va. 205.

8. Mingling Assets with Private Funds.

Where an executor deposits funds of the estate in bank in his own name and a loss occurs, he is personally responsible for it. *Vaiden v. Stubblefield*, 28 Gratt. 153.

9. Continuing Decedent's Business.

Executors are to be charged with the personal property owned by the testator at the time of his death, which came or ought to have come into their hands; and they will not be permitted to carry on the business in which the testator was engaged at the time of his death, and charge the estate with any loss occasioned thereby, or to mix up the accounts of such business with their executorial accounts. *Hooper v. Hooper*, 29 W. Va. 276, 1 S. E. 280.

A brickmaker having a number of brick on hand, went abroad leaving his wife as his agent to carry on the business. While abroad he died, and she qualified as his executrix, completed the manufacture of bricks commenced in his lifetime, and, without returning any inventory of his estate, sold the bricks he left on hand and those she made, without discrimination. Held, that this was not a confusion of the testator's goods with the goods of the executrix; for the bricks begun by her before and completed after her husband's death, as well as those he left already made, were all properly assets of his estate; and all the expenses she incurred in the brick making busi-

ness, whether incurred during his lifetime or after his death, were proper charges against his estate. *Newton v. Poole*, 12 Leigh 112.

A testator directed his partnership to be continued, if his partner would consent to it, and gave his partner full power over his interest in the partnership for carrying it on; and also authorized his executors to sell all his estate to enable his partner to carry on the business to greater advantage, or to pay the debts which might be due and owing from the partnership at any time during its continuance. Held, that the effect of this provision was not to give the executors a mere discretion to sell the real estate or not at their pleasure during the continuance of the partnership, but to create a trust in favor of creditors of the partnership. *Davis v. Christian*, 15 Gratt. 11.

10. Dealing with Estate for Individual Benefit.

a. Rule Stated.

It is a well-settled principle of equity jurisprudence that a party holding a fiduciary relation to trust property can not, either directly or indirectly, become the purchaser of such property, or transfer it to his own use or for his benefit and if he does, the sale or transfer is voidable, and will be set aside at the mere pleasure of the beneficiaries, although such fiduciary may have paid a full price and gained no advantage. *Newcomb v. Brooks*, 16 W. Va. 32. In *Reilly v. Oglebay*, 25 W. Va. 36, 43, the supreme court, following *Newcomb v. Brooks*, 16 W. Va. 32, says: "This rule is not confined to trustees and fiduciaries in the technical sense of those terms, but it extends to every person coming within the reason of the rule. It embraces trustees, guardians, executors, administrators, agents, cashiers of banks, factors, auctioneers, sheriffs, commissioners in bankruptcy, and their solicitors, assignees of bankrupts, attorneys at law, directors of corporations,

and parties bearing many other relations to each other which may not well be classified." See also, *Sweeney v. Grape Sugar Refining Co.*, 30 W. Va. 443, 4 S. E. 431.

Where a fiduciary buys property with the trust assets, or an interest in the trust estate, such as a mortgage or the like, with his own funds, and the title is taken in his own name, he can not hold the same for his own, but must hold it upon a resulting trust for the beneficiary. *Morgan v. Fisher*, 82 Va. 417.

b. Constitutes a Misapplication of Trust Funds.

The use of the assets by the personal representative for his own private purposes, or for the payment of his own debts, is necessarily a misapplication of trust funds, and a breach of trust. The duty of every fiduciary is to keep the trust fund separate and distinct from his own property or money and to apply it in the due course of administration, or to invest it securely for the benefit of the parties entitled thereto. *Asberry v. Asberry*, 33 Gratt. 461. See also, *Leake v. Leake*, 75 Va. 792.

c. Sale or Pledge as Constituting a Fraud.

Where an executor, not being in advance to the estate, sells or pledges the assets for his own use, he commits a fraud. *Dodson v. Simpson*, 2 Rand. 294.

d. Hire of Slaves at Reduced Price.

An administratrix who sets up the slaves of the estate to be hired publicly, and hires them herself at very reduced prices, and then hires them out to other persons at an advanced price, will be held to account for the advanced price, or if that can not be ascertained, for reasonable hires. *Cross v. Cross*, 4 Gratt. 257.

e. Where Executor in Advance to Estate.

An executor can not apply the assets of his testator to his own individual

purposes, unless he is in advance to the estate to the same amount, and a purchaser knowing of the trust purchases at his peril. This rule applies as well to a purchaser, who advances his money at the time of the purchase as to one who takes the assets as his security for a preceding debt. *Graff v. Castleman*, 5 Rand. 195, 16 Am. Dec. 741.

f. Claim of Gift from Testator.

Where an executor claims that a sum of money advanced to him by his testator in his lifetime was a gift and not a loan, this claim will not be allowed upon the executor's own oath and slight circumstances. *Ruth v. Owens*, 2 Rand. 507.

g. Gift from Cestui Que Trust.

The rule that a fiduciary shall not be allowed to receive gifts from one whose interests are intrusted to his care, unless it appears that no undue influence was used to induce the gift, and that it was made with a full knowledge of the nature and extent of the act, applies to transactions between an administrator and the widow of the decedent. *Statham v. Ferguson*, 25 Gratt. 28.

h. Exceptions—Protecting Ultimate Personal Liability.

With a view to protect himself in the event he should be held liable for bank stock which perished on his hands, an executor made a compromise with the creditors, who (in advance of the legatees) would be entitled to the bank stock, whereby the creditors assigned to him for value their interests therein, but the stock having become valueless there remained nothing out of which he could derive any advantage. Held, that such agreement did not, under the circumstances, come within the rule which forbids a fiduciary from availing himself of his fiduciary character to make personal profits or advantage. *Cooper v. Cooper*, 77 Va. 198.

i. Extent of Liability.

In a given case an executrix holding and employing the estate of a testator in her business, was held not to be bound for profits, but only for rent. *Hill v. Huston*, 15 Gratt. 350.

11. Control of Real Estate.

a. Title and Right to Possession.

In the absence of any provision by statute or by will, the real estate of a decedent in no wise and for no purpose goes into the possession or control of the executor or administrator, but the legal title thereto descends directly to the legal heirs, subject, of course, to the just debts of the intestate, in so far at least as the personalty falls short of paying the same. *Laidley v. Kline*, 8 W. Va. 218; *Eppes v. Demoville*, 2 Call 22.

An administrator with the will annexed, being in possession of lands directed to be sold, may maintain a caveat to prevent any other person from obtaining a patent for the same as waste and unappropriated lands. *Archer v. Saddler*, 2 Hen. & M. 371.

In a suit to settle a decedent's estate, it was error to adjudge the administrator entitled to recover rents accruing after the intestate's death for a farm occupied by one of the parties, such rents belonging to the heirs, who asserted no claim thereto. *Lightner v. Speck*, 2 Va. Dec. 557.

b. Enforcement of Deed of Trust.

See generally, the title MORTGAGES AND DEEDS OF TRUST.

A father guarantied the payment of a bond given by his son, which was further secured by a deed of trust on the son's land. The son failed to pay the bond, and the father made several payments thereon and died. His executrix paid the balance due on the bond, took an assignment of it, and filed a bill to subject the land covered by the deed of trust to the payment of the full face of the bond. Held, in view of the evidence, that she could enforce the deed of trust only to the extent

of the payment made by her as executrix; the amounts paid by the testator to be regarded as gifts to the son made to disincumber the latter's land. *Scott v. Scott*, 83 Va. 251, 2 S. E. 431.

c. Power to Sell.

See post, "Realty," IV, F, 2.

12. Management of Estate during Will Contest.

F. SALES, MORTGAGES OR PLEDGES.

1. Personalty.

a. Title.

The legal title to a decedent's assets in the personal representative's hands for administration, whencesoever arisen, is in the personal representative. *Brockenbrough v. Turner*, 78 Va. 438; *Richardson v. Donehoo*, 16 W. Va. 685; *Laidley v. Kline*, 8 W. Va. 218. See ante, "Personalty," III, B.

b. Authority to Sell.

An executor or administrator may make a valid sale of the decedent's effect, whether they are necessary for the payment of debts or not, if there is no fraud or collusion in the purchaser. *Knight v. Yarborough*, 4 Rand. 566. See also, *Hunter v. Lawrence*, 11 Gratt. 111, 62 Am. Dec. 640.

c. In Satisfaction of Individual Debts.

An executor who sells or pledges the assets of his testator's estate for his own use, when he is not in advance to the estate, commits a fraud; and the purchaser or mortgagee with notice of such improper conduct, at the time of the purchase, will be decreed to make restitution. *Dodson v. Simpson*, 2 Rand. 294.

An executor or administrator in advance to an estate may apply the assets of the decedent to his individual purposes. *Graff v. Castleman*, 5 Rand. 195.

Transfer to Individual Creditor.—

Where a creditor of a solvent executor received from him, in payment of an individual debt, bonds which had been given for the price of lands of the

estate of which the executor had become a part owner, and the bonds so received amounted to less than the executor's share of the estate, it was held, that there was no collusion in any devestavit by the executor. *Brockenbrough v. Turner*, 78 Va. 438.

Assignment to Individual Creditor.—

Where there was an assignment by an administrator to his individual creditor of choses in action belonging to the estate of his intestate, in consideration of which the creditor assigned to the sureties of the administrator a bond of the administrator for the same amount amply secured on real and personal estate, the party so receiving the assets of the estate is not merely collaterally liable on the failure of the administrator to account for the assets of the estate, but is directly and principally liable to those entitled to the estate from the time the assets were received by him. *Morris v. Duke*, 2 Pat. & H. 462.

d. Sale of Chattel Specifically Bequeathed.

Where an executor sells a chattel specifically bequeathed to a person who knows there are no debts, the purchaser takes the property subject to the bequest. *Garnett v. Macon*, 6 Call 308.

e. Sale of Perishable Property.

In determining which of the goods and chattels of a testator or intestate shall be sold "as liable to perish, consume, or be the worse for using, or keeping," some latitude of discretion must be allowed to the executor or administrator; and his conduct should be sanctioned by a court of equity, where it appears to be fair and probably proceeds from a good intention. *McCall v. Peachy*, 1 Call 55.

As to sale of perishable property, see also, Va. Code, 1887, § 2651; W. Va. Code, 1899, ch. 85, § 16, p. 732.

f. Sale of Choses in Action Generally.

When Approved.—Under ordinary circumstances it is the duty of the ad-

ministrator to collect, not to sell, the debts due the estate. But where a sale is made by him in the honest belief that the interest of the estate required it, it should be approved. *Trevelyan v. Lofft*, 83 Va. 141, 1 S. E. 901.

To Raise Funds to Discharge Debts.

—For the purpose of raising funds to pay a debt due by the estate, an administrator sold certain bonds of a foreign corporation without property in the state, and which were not collectible without considerable expense and delay. It appeared from the evidence that the administrator acted in good faith. Held, that the administrator was not chargeable with more than he received, notwithstanding a subsequent advance in the value of the bonds. *Trevelyan v. Lofft*, 83 Va. 141, 1 S. E. 901.

Sale within Scope of Power, but Dishonestly Made.—Where a sale by an administrator of bonds belonging to an estate is apparently within the scope of his powers, a bona fide purchaser of them obtains a perfect title as against the testator's estate, although the administrator acted dishonestly in making the sale. *Lingle v. Cook*, 32 Gratt. 262.

Sale of Bond at Discount.—Where an administrator takes a bond to himself for a debt due to his intestate's estate, payable at a distant day, and sells it at a large discount, to an assignee, with notice that the consideration of the bond was a debt due the intestate's estate, but who believes that the administrator has acquired the full property in the bond, the burden of proving the fairness of the administrator's conduct is upon such assignee, and if the administrator has not made such advances as to justify him in appropriating the bond to himself, the assignee can not, in equity, avail himself of the transfer. *Fisher v. Bassett*, 9 Leigh 119, 33 Am. Dec. 227.

A sale of bonds of the estate by an

executor, at a discount of eighteen per cent., when the circumstances of the estate does not require it, is a devastavit. *Pinckard v. Woods*, 8 Gratt. 140.

A purchase from an executor at a large discount of bonds belonging to the testator's estate may amount to a constructive fraud sufficient to implicate the purchaser as a participant in a devastavit committed by the executor and render him liable for the amount of the bonds. *Jones v. Clark*, 25 Gratt. 642.

Where an executor sells bonds at a heavy discount or pays his own debts with them, the burden rests on the purchaser to show either that the estate needed the sale or that the bonds had become the executor's individual property by reason of his advances to the estate or legatees, or had accounted for them. *Brockenbrough v. Turner*, 78 Va. 438.

g. Time, Manner and Terms of Sale.

(1) Time of Sale Discretionary.

Where an executor or administrator is given discretion as to the time of sale, and he acts in good faith, he is not chargeable with the loss resulting from selling when he did, whether his judgment that the sale could then be made without sacrifice was reasonable or not. *Staples v. Staples*, 24 Gratt. 225.

(2) Character of Sale.

Private Sale.—Where an executor or administrator sells property at private sale when he should have sold it at public auction, he is chargeable with the amount that would have been realized if the sale had been made at public auction. *Hudson v. Hudson*, 5 Munf. 180.

h. Validity.

(1) In General.

It is the duty of a personal representative, under ordinary circumstances, not to sell, but to collect, the debts due the estate. When a sale, however, is made by him in the honest belief that the interest of the estate re-

quired it, it should be approved. *Trevelyan v. Lofft*, 83 Va. 141, 1 S. E. 901.

(2) Before Executor Qualifies.

A sale of a slave belonging to the estate of a testator, by a person named as one of the executors, but who, at the time of such sale, had not qualified, and afterwards died, without having qualified, by giving bond and security, is void against the executor who did qualify, notwithstanding such sale was made for valuable consideration, and at a time when there was no qualified executor. *Monroe v. James*, 4 Munf. 194.

(3) Effect of Executor's Bad Faith.

Even if the executor acts in bad faith, yet if the purchasers at the sale have no knowledge of the fact, but act in good faith in making and completing their purchases, they acquire a good title to the land purchased by them. *Staples v. Staples*, 24 Gratt. 225.

Although a personal representative acts unfairly and dishonestly in making a sale, which, if fairly and honestly made, would be within the scope of his power and duty, a bona fide purchaser for value from him obtains a perfect title against the testator's estate. *Lingle v. Cook*, 32 Gratt. 262.

A bona fide purchaser for value and without notice of a portion of the assets of the estate, either directly or indirectly from the executor, will acquire a good title thereto, even though the executor commits a devastavit by making the sale for the purpose of converting the proceeds to his own use and by actually so converting them. *Jones v. Clark*, 25 Gratt. 642; *Brockenbrough v. Turner*, 78 Va. 438.

(4) Sale of Property Specifically Bequeathed.

Where an executor sells property specifically bequeathed at public auction, the sale can not be avoided by the legatee, although it was not necessary to pay the debts, unless the purchaser knew that the sale was not nec-

essary, the remedy of the legatee being against the executor. *Sale v. Roy*, 2 Hen. & M. 69.

Where an executor sells a chattel specifically bequeathed to a person who knows there are no debts, the purchaser takes the property subject to the bequest. *Garnett v. Macon*, 6 Call 308.

(5) When Unnecessary for the Payment of Debts.

An executor may make a valid sale of his testator's effects, although it is not necessary that they should be sold for the payment of debts, if there is no fraud or collusion in the purchase. *Knight v. Yarborough*, 4 Rand. 566.

(6) Where Purchase Money Borrowed from Administrator.

A, by deed of trust in his lifetime, mortgages slaves for debt, and the slaves are sold by the trustee, after his death; B purchases some of these slaves at the trustee's sale, at a full price, and borrows part of the purchase money of A's administrator, who charges himself with the same in his administration account, B knowing at the time of the loan, that the money borrowed of the administrator, was the money of A's estate; and then B settles the slaves so by him purchased at the trustee's sale upon A's widow, who is B's daughter. Held, this is a fair transaction; and a creditor of A recovering judgment against his administrator, has no right to levy an execution on these slaves. *Whitton v. Terry*, 6 Leigh 189.

(7) Collusion between Purchaser and Executor.

Where an executor commits a fraud by improperly selling or pledging the assets of the estate, and the purchaser or mortgagee is a participator in the fraud, the sale or mortgage should be set aside as fraudulent. *Dodson v. Simpson*, 2 Rand. 294.

Evidence of Fraud or Collusion.—To convict a purchaser of a fraudulent participation in a breach of trust by

an executor having authority to sell, the evidence of notice of the fraudulent intent on the part of the executor ought to be very strong. The purchaser has a right to presume, in the absence of all direct or plain proof to the contrary, that the executor is exercising his power fairly and faithfully in conformity to his duty. *Davis v. Christian*, 15 Gratt. 11.

An administrator took a bond to himself individually for a debt due his intestate's estate, payable at a distant day, and then sold the bond at a discount of twenty-five per cent. to an assignee, who knew that the consideration of the bond was a debt due to the intestate's estate, but was informed, and so informed as to justify him in believing, that the administrator had acquired the full property in the bond in his own right. Held, that this was such a dealing with the assets of the intestate's estate, and such a concurrence of the assignee with the administrator in his appropriation of the assets to his own use, as to throw the burden of proof of the fairness of the administrator's conduct on the assignee; and if the administrator had not purchased the claim from the next of kin, or had not made such advances as to justify him in appropriating it to himself, the assignee could not in equity avail himself of the transfer. *Fisher v. Bassett*, 9 Leigh 119, 33 Am. Dec. 227.

(8) Purchase by Executor or Administrator.

(a) In General.

A purchase by a fiduciary, while actually holding a fiduciary relation, of the trust property, either of himself or of the party to whom he holds such fiduciary relation, is voidable at the option of the party to whom he stands in such a relation, although the fiduciary may have given an adequate price for the property and gained no advantage whatever. *Newcomb v.*

Brooks, 16 W. Va. 32. See also, *Tiernan v. Minghini*, 28 W. Va. 314.

While an executor may not lawfully, directly or indirectly, purchase at his own sale, he may lawfully purchase for his own benefit property, though it may have been previously purchased by his vendor of himself as such executor; provided, of course the transaction be real and bona fide. *Staples v. Staples*, 24 Gratt. 225. And this is true a fortiori, when the transaction was not only real and bona fide, but was sanctioned by the court with all the facts before it. *Hurt v. Jones*, 75 Va. 341; *Wayland v. Crank*, 79 Va. 602.

Agent of Administratrix.—A purchase by the agent of an administratrix from his principal, where he is shown to have practically conducted and had control of the administration, does not bind the beneficiaries, and they may have such sale set aside on repayment of the purchase money with interest, and the purchaser compelled to account for the rents and profits. *Buckles v. Lafferty*, 2 Rob. 292, 40 Am. Dec. 752.

(b) Sale and Purchase When There Are No Debts.

If an executor sells the slaves of his testator when there are no debts to render such sale necessary and buys them himself, the sale may be set aside at the instance of any person interested. *Anderson v. Fox*, 2 Hen. & M. 245.

An executor sold a slave belonging to his testator's estate, the sale not being necessary for the payment of debts, and repurchased the slave and thereafter held him as his own. Held, that the slave was the property of the estate, and the executor should account for his annual hires with interest thereon, although the slave was not in fact hired out by the executor, but was kept in his own employment. *Rosser v. Depriest*, 5 Gratt. 6, 50 Am. Dec. 94.

(c) When Sale at Sacrifice.

An administrator who sells the property of the estate at a very great sacrifice, and purchases it himself, will be held to account for it at the appraised value. *Cross v. Cross*, 4 Gratt. 257.

(d) When Strangers Are Deterred from Bidding.

A purchase by an executor or administrator of any part of the estate of his testator or intestate when other persons were deterred from bidding in consequence of doubts concerning the title suggested by himself, whereby he obtained the property for less than its value, ought to be annulled by a court of equity. *Hudson v. Hudson*, 5 Munf. 180.

(e) Sale Made Agreeably to Will.

It has been held, that a purchase of land by an executor, which had been sold by him agreeably to the will of the testator, is valid if it appears that his conduct in the sale was fair and correct. *McKey v. Young*, 4 Hen. & M. 430.

(f) Ratification—Effect.

It is a ratification of a purchase by a personal representative at his own sale of property of the decedent where the parties interested acquiesce in the purchase for a long time after they are capable of objecting and are fully apprised of the facts of the case. *Todd v. Moore*, 1 Leigh 457.

l. Application of Proceeds.

Where an administrator sold slaves of the estate to raise funds for the payment of debts, and it turned out that the sale was not necessary for that purpose, it was held, that, as the widow was entitled to only a life interest in one-third of the slaves, she should be allowed one-third of the proceeds of the sale thereof for her life, and should be required to give bond with surety that the principal, at her death, should be paid to the persons entitled in remainder. *Godwin v. Godwin*, 4 Leigh 410.

j. Rights and Liabilities of Purchasers.**(1) In General.**

As to the rights and liabilities of purchasers generally, see the titles JUDICIAL SALES; NOTICE; VENDOR AND PURCHASER.

(2) Where Privy to Devastavit.

Where the purchaser of a portion of the assets of an estate from the executor is privy to the intended devastavit of the executor, at the time of the purchase, or fraudulently contributes to such devastavit in any way, such purchaser will be liable for the loss sustained by creditors, legatees or others by reason of such devastavit. *Jones v. Clark*, 25 Gratt. 642.

One who has received a benefit arising from a devastavit committed by an executrix, knowing the facts, is primarily liable, and may be united as a defendant with the executrix and held to account in a suit by a legatee. *Tenant v. Dunlop*, 97 Va. 234, 33 S. E. 620.

(3) Knowledge That There Are No Debts.

If an executor sells a chattel specifically devised to a person who knows there are no debts, the purchaser takes the property subject to the bequest. *Garnett v. Macon*, 6 Call 308.

(4) Notice That Sale in Satisfaction of Individual Debt.

An executor who sells or pledges the assets of his testator's estate for his own use, when he is not in advance to the estate, commits a fraud; and the purchaser or mortgagee with notice of such improper conduct, at the time of the purchase, will be decreed to make restitution. *Dodson v. Simpson*, 2 Rand. 294.

(5) Duty to See to Application of Purchase Money.

A purchaser from an executor of personal property of the testator for valuable consideration need not inquire whether the condition of the testator's estate required a sale of the property, and is not bound to see to the application of the purchase money

but may fairly presume that the sale is rightly made, and that the purchase money will be properly applied; and such purchaser can only be made liable on the ground of a fraudulent participation with the executor in the commission of a devastavit of the testator's estate. *Jones v. Clark*, 25 Gratt. 642; *Brockenbrough v. Turner*, 78 Va. 438; *Davis v. Christian*, 15 Gratt. 11.

Although the executor or administrator makes the sale in bad faith and for the purpose of converting the proceeds to his own use, the purchaser is not bound to see to the application of the purchase money, where he acts in good faith and without notice of the intended fraud. *Dodson v. Simpson*, 2 Rand. 294.

An executor can not apply the assets of his testator to his own individual purposes, unless he is in advance to the estate to the same amount; and a purchaser, knowing of the trust, purchases at his peril. This rule applies as well to a purchaser who advances his money at the time of the purchase, as to one who takes the assets as a security for a preceding debt. *Graff v. Castleman*, 5 Rand. 195.

k. Liability of Executor.

(1) Liability for Price Begins Immediately upon Sale.

At common law an executor or administrator becomes liable for the price of the goods immediately on the sale, whether he sells for cash or on credit. *Southall v. Taylor*, 14 Gratt. 269.

(2) Sale of Perishable Property.

A sale by an executor of his testator's perishable property not exempt from sale, in January, 1865, for the only currency then in circulation was held to be not only allowable but in accordance with the mandate of the statute. Va. Code, 1873, ch. 126, § 16. *Wayland v. Crank*, 79 Va. 602.

(3) Sale on Credit.

The sale by an administrator of his intestate's effects, though upon a credit,

must be treated at law as a conversion thereof. *Clarke v. Wells*, 6 Gratt. 473.

(4) Improper Surety.

A partner in trade of the buyer is not such a person as the executor or administrator can properly take as surety on a note given for the price of the property sold. *Southall v. Taylor*, 14 Gratt. 269.

(5) Sale for Less than Value.

An executor or administrator is chargeable as for a devastavit where he sells bonds belonging to the estate for less than their value. *Pinckard v. Woods*, 8 Gratt. 140.

The conversion into money by a trustee, of well-secured bonds belonging to a trust fund, by a sale thereof, at a large sacrifice, to a purchaser with full notice of the trust, constitutes such an improper dealing with and devastavit of the trust subject as will render both trustee and purchaser prima facie responsible therefor. And it will be for them to show that the necessities of the trust required the sacrifice. *Cocke v. Minor*, 25 Gratt. 246.

A testator by his will gave certain personal property to his son, out of which he directed him to pay his debts, and gave him the remainder. The son conveyed his whole estate real and personal to a trustee in trust to pay specific debts, some of which were his own, and others were the debts of the testator. The son died in 1828, and by his will authorized his executors to sell his whole estate for the payment of debts. The executors refused to qualify, and the trustee was appointed administrator with the will annexed. Afterwards the trustee, as trustee, sold the whole estate, and after having sold enough to pay the debts provided for in the deed, allowed an agent of the son's widow to purchase eight slaves at a price far below what they would have brought if there had been fair competition. Held, that i. v. the

trustee's duty to have been present at the sale of the slaves to superintend and control it, and, if the sale was not properly conducted, he was bound to make good the loss, and that the widow was bound by the act of her agent. *Harvey v. Steptoe*, 17 Gratt. 289.

- **Sale of Personalty.**—An execution having been levied upon slaves of an estate, they were sold with the assent of the executors, at X instead of the courthouse; and they sold for considerably less than their estimated value. The sale was fairly made. Held, that the executors were not responsible for the difference between the price at which the slaves sold, and the estimated value of them at the time. *Boyd v. Boyd*, 3 Gratt. 114.

(6) Bond Received in Payment.

Where an administrator sells the personal estate of his intestate and takes bonds therefor, this is a conversion of the assets of the estate, and he becomes liable as administrator to account for the amount of the sales, and the bonds become his individual property, but a court of equity will relieve him from this responsibility where it is shown that he has acted with prudence, diligence and caution, and that it is not due to any fault on his part that the bonds prove unavailing. *Estill v. McClintic*, 11 W. Va. 399.

Although, where an executor sells the personal estate of his testator and takes bonds with security therefor, it is generally a conversion of the assets so sold, and he becomes liable to account for the amount of sales, and may be charged therewith in the settlement of his accounts, and the bonds become his individual property, yet a court of equity may, where it is shown that the executor has acted in good faith and has exercised due diligence in collecting the bonds and has failed to do so for causes beyond his control, and a long time has elapsed, and it is doubtful whether the bond can be made available, if at all, within a reasonable time, relieve the executor in

the settlement of his executorial account from responsibility as to such debts, by crediting him with the amount of such debts and treating them as unadministered assets, under the control and direction of the court. *Hoke v. Hoke*, 12 W. Va. 427.

Without Security.—A testator died in 1859, and by his will directed that all his estate be sold as soon as convenient; and the executor had all the personal property appraised and sold. Four slaves, appraised at \$3,700, were sold for \$4,955, to one of the legatees living in Missouri, being purchased for such legatee at his request by the executor. The purchaser executed his bond for the price, but without security, and the executor retained possession of the slaves until they were freed by the results of the war. Held, that the executor and his surety should account for the slaves at the price for which they were sold. *Boaz v. Hammer*, 27 Gratt. 382.

(7) Extent of Liability Where Sale for Cash.

Where an executor or administrator sells the slaves of his testator or intestate at a private sale for cash, he ought to be charged therefor such sum as they would have sold for upon a reasonable credit, if the situation of the estate would admit of such credit, and, if not, such sum as they would have sold for at public auction for cash. *Hudson v. Hudson*, 5 Munf. 180.

(8) Cash Payment to Agent of Executor.

An administrator sold property belonging to the estate of his intestate through an agent, partly for cash and partly on credit. The vendees made a cash payment to the agent. Held, that the agent received the money to the use of the executor, and not to the use of the vendees. *Heffernan v. Grymes*, 2 Leigh 512.

1. Mortgage or Pledge by Executor or Administrator.

Where an executor or administrator

mortgages or pledges the assets of the estate for his individual purposes, the mortgagee or pledgee, having actual or constructive notice of the breach of trust, has no better title as against the estate than the executor or administrator had. *Graff v. Castleman*, 5 Rand. 195, 16 Am. Dec. 741.

2. Realty.

a. Authority to Sell at Common Law.

An executor or administrator is without authority to make a sale of the deceased owner's real estate, unless authorized by statute or by the will of the decedent. *Litterall v. Jackson*, 80 Va. 604.

b. Power Conferred by Will.

(1) Statute Governing Construction of Will.

Where a testator, who empowered his executors to sell and convey certain real estate, died before the first of January, 1787, it was held, that the construction of the will, as to the power of the executors to convey, was to be governed by the statute of 21st Hen. VIII, ch. 4, and not by the act of 1785, ch. 61; notwithstanding the conveyance was executed after the 1st of January, 1787. *Geddy v. Butler*, 3 Munf. 345.

A testator, being about to leave the county, made his will, and devised that in case of his death, or if he should not be heard of for ten years, his land should be sold for the best price that could be got, as was directed by letter of attorney to X of same date with the will, and proceeds divided among his four sisters. Held, that the administrator with the will annexed had power to sell the land, under the statute 1 Rev. Va. Code, ch. 104, § 52. *Broadus v. Rosson*, 3 Leigh 12.

"His will was drawn in the light of our statute (W. Va. Code, p. 686, ch. 86, § 1), which reads as follows: 'Real estate devised to be sold shall, if no person other than the executors be appointed for the purpose, be sold and conveyed * * * by the executors

who qualify, or the survivor of them;' and when, in the last clause of his will, he provided that if his said brother Michael could not pay said legacies, or if said sums were not realized from his available cash at the date of his death, then the said sums of \$300 and \$200 should not be due and payable unto the said Martin and Michael, respectively, until the said sum of \$4,000 could be realized from a sale of said described property, he contemplated a sale of said realty as provided for in his will, under the statute, by his executor, and did not intend that, if the sale was made for the satisfaction of a decree or judgment against his estate by a person whose actions were beyond the control of his executor for a sum less than \$4,000 said specific legacies to Martin and Michael should not be due and payable. In speaking of the sum of \$4,000 being realized, he meant realized by a sale made under the directions and provisions of his will; and where it was sold by a commissioner under a decree of the court to satisfy a debt against his estate, as it was, and the sale confirmed, it became impossible that said land could be sold as the testator contemplated, or that the sum of \$4,000, or any other sum, could be realized as directed by the will." *Broderick v. Broderick*, 35 W. Va. 620, 14 S. E. 157.

(2) Sale Discretionary.

A testator, by his will, directed his estate to be kept together and managed by his executors for the common good of his wife and children; but authorized them to sell any part, except "Seguine," the homestead, if they deemed it best. One third of "Seguine" belonged to his three children, by his first wife, which they claimed, and it was allowed them, after testator's death. Dower was assigned his widow out of "Seguine." The residue of "Seguine" was cultivated by the three children. Afterwards "Seguine"

was sold under decree of court, and purchased by the three, who, later, filed their petition for one-third of the rents and profits from testator's death to the date of their purchase, to be applied as a credit on their purchase. A master having been directed to take an account, took much evidence, and, after great delay, filed a report adverse to their claims. Exceptions were filed to it, and their counsel was heard at large. But the court confirmed the report, dismissed the petition, and ordered a resale of the land, unless, in sixty days, they paid the balance due the widow and her two children. On appeal, held, that there was no cause to reverse the decree complained of. *Gregory v. Gates*, 81 Va. 262.

A testator by his will directed that his farm should be kept for five years and cultivated for the support of his family, and longer if his executor thought it would promote the interests of the family; and the executor was vested with power to sell at the proper time, say after five years. As each child arrived at the age of twenty-one years, he should receive his share of the estate. The widow lived on the farm and cultivated it for five years, when the oldest child was in a few months of being twenty-one years of age; and then the executor offered the land for sale. Held, that, the executor acting in good faith, and being of the opinion that the interest of the family required the sale, which opinion was not disproved by evidence, it would be an improper exercise of power in a chancellor to interfere and substitute his own discretion for that of the executor. *Dixon v. McCue*, 14 Gratt. 540.

(3) Power Coupled with Interest.

See generally, the titles POWERS; WILLS.

In a case where the will directed that, "Whenever my executors think best, they shall sell my land in Buckingham county, together with all the

personal estate thereto belonging, except," etc., it was held, that the will vested in the executors an interest and a trust, and it was their duty to take possession of the land and to account for the rents and profits until sold. *Mosby v. Mosby*, 9 Gratt. 584. Upon this question of the construction of will, as to when the power given the executors, is not a mere naked one, but one that is coupled with an interest, see *Mills v. Mills*, 28 Gratt. 442; *Machir v. Funk*, 90 Va. 284, 18 S. E. 197; *Elys v. Wynne*, 22 Gratt. 224, 232; *Milhollen v. Rice*, 13 W. Va. 534; *Irwin v. Zane*, 15 W. Va. 646; *Dunn v. Renick*, 33 W. Va. 476, 10 S. E. 810, 812.

Where the will of a testator vests the power coupled with an interest in certain land of the testators, investing them with a fee simple in the land in trust to sell and dispose of the net proceeds in money for certain defined purposes, the executors have the right to enter upon the land and take the rents and profits, and a delay of the sale does not divest the right of the executors to recover it in ejectment. But it is competent for the devisees entitled to the net proceeds of sale, or any of them, to file a bill in equity, at any time, to compel a sale and the execution of the trust according to the intent of the testator. *Bell v. Humphrey*, 8 W. Va. 5.

(4) Sale by One of Two Executors Directed to Sell.

A will directed a sale of land by two executors. Before sale the executors brought a suit in equity to construe the will and administer the assets, making all persons interested parties, and in it decrees were made directing a sale of the land by both or either of the executors. A sale was made and confirmed, and a bill of review was filed for reversal of the decree of confirmation. Held, that if there were error in the first decree, in giving power to either executor to sell, that decree being appealable and final, and relief

against it by bill of review or appeal being barred by limitation, reversal of the decree of confirmation would not affect it. It could not be reached by bill of review, and a sale by one executor under it would be valid, and beyond reach by such bill of review. *Dunn v. Renick*, 33 W. Va. 476, 10 S. E. 810, 812.

Under the statute of 21 Hen. VIII, ch. 4, a conveyance by part of the executors named in a will, by which the executors therein mentioned are empowered to convey, is justified where the others refuse to qualify. And such refusal may be found on proof of declarations in pais, or presumed, from circumstances without any renunciation of record. But a special verdict, in ejectment, finding that the executors who failed to join in the deed, "never did take upon themselves the burthen of executing the will, and never did relinquish their right so to do," when it appears that they were living at the time of the date of the deed, is so defective, that a venire facias de novo should be awarded. *Geddy v. Butler*, 3 Munf. 345.

(5) Renunciation of Provision by Widow as Affecting Power.

Where the will provided for the sale of all the testator's real estate and gave the widow the interest on one-third of the proceeds, and the widow renounced the provisions of the will and claimed dower, it was held, that the executor had no right to sell, because the power was given in the expectation that the widow would accept and abide by the provisions made for her in the will, and with the purpose and intent that the land should be sold free from incumbrance and the proceeds of the sale disposed of as directed by the will. *Snider v. Snider*, 3 W. Va. 200.

(6) Sale of Mortgaged Premises—Assent of Mortgagee.

Although a tract of land be decreed to be sold to satisfy a mortgage, the

executors of the mortgagor, being authorized by his will to sell all his real and personal estate, may sell it for a full and fair price, with the assent of the mortgagee or his attorney. *Nelson v. Carrington*, 4 Munf. 332.

Foreclosure of Mortgage on Land.—

Where lands devised to be sold, have been sold by one of several executors, all the executors ought to be parties to a suit to foreclose a mortgage previously existing upon those lands. So, also, all the purchasers, in order to be subjected to a rateable contribution to satisfy the mortgage. *Mayo v. Tomkies*, 6 Munf. 520.

(7) Power to Convey Land Sold in Testator's Lifetime.

Where a testator empowers his executor to make a conveyance of land, which he sold but did not convey in his lifetime; until the power is executed, the lands descend to the heir, and if he be found to be one of the executors conveying, though he conveys as executor and not as heir, yet his conveyance would operate as an estoppel against him, should he claim as heir. *Shaw v. Clements*, 1 Call 429.

(8) Direction to Sell as Charging Whole Estate with Debts.

A testator, in the first clause of his will, appointed his executor and provided that no security should be required of him, except such as should be necessary for his just debts; and then added, "the residue of my estate I confide in him to dispose of as I shall hereafter direct;" and then directed him to sell all his real estate, except a very small part. Held, the real estate was charged with debts. *Dunn v. Amey*, 1 Leigh 465.

(9) Sale of After-Acquired Property—Power Qualified.

If in a given case the testator directs the executor of his will to sell the real estate owned by him at the time he made the will, describing it as "My said home farm," and the disposition of his estate is such that the

purposes disclosed by the will can not be effectuated without a sale of all the real estate of the testator, a power of sale as to such after-acquired property is implied, and should be exercised by the executor. *Dearing v. Selvey*, 50 W. Va. 4, 40 S. E. 478.

(10) Sale While Title in Controversy.

In *Bell v. Humphrey*, 8 W. Va. 5, it was held, that in a given case it would have been improper for executors to have sold land in controversy while the title thereto was controverted in an ejectment suit commenced by the testator during his life.

(11) Manner and Terms of Sale.

Time of Making Sale.—Where the will directs a sale to be made at a future time, or on the happening of a contingency, a sale by the executor before the prescribed time is void. *Jackson v. Ligon*, 3 Leigh 161; *Raper v. Sanders*, 21 Gratt. 60.

A testator, after making provision for his wife by his will, devised that after his wife's death or marriage his land should be sold and the proceeds equally divided among his children. The widow renounced the will, and dower was assigned her. Held, that the executor had no power to sell during the widow's life and widowhood. *Jackson v. Ligon*, 3 Leigh 161.

A testator dying in January, 1861, desired his debts to be paid as soon as convenient and directed his land in Virginia and all property on it except negroes to be sold on such terms as his executor might deem advisable. The executor delayed the sale until November, 1862. Held, that the will vested in him a wide discretion as to time as well as terms of sale, and, acting in good faith, he would not be liable even had loss resulted from the delay. *Wimbish v. Rawlins*, 76 Va. 48.

Terms of Payment.—A testator died in 1861. His land was appraised at \$35 per acre in good money. In October, 1862, his executors sold the land for \$55 per acre, one-fourth cash and the

balance in installments. The terms of the sale did not indicate in what kind of money the purchase price was to be paid; but it was admitted that the cash payment was made in confederate currency, and a number of witnesses testified that the sale was made with reference to confederate currency both as to the cash payment and as to the installments. One of the executors testified that, during the sale, in answer to an inquiry, he had stated that he would accept confederate currency for the cash payment, and would not require the deferred payments to be made in gold or silver, but would take its equivalent or a legal tender for it. He testified, moreover, that, a short time before the maturity of the bond for the first deferred payment, he had promised to accept payment of the bond and had supposed that it was to be paid in confederate currency. At the time of the sale, confederate currency was almost universally used in the locality. Held, that the contract should be regarded as having been made with reference to confederate currency, and therefore the purchase money should be scaled as of the date of the sale. *Moore v. Harnsberger*, 26 Gratt. 667.

When Sale by Executor a Sale by the Acre.—See generally, the title MORE OR LESS.

If an agreement of sale, by an executor under the will of his testator, be equivocal, the court should be inclined to consider it a sale by the acre, and not by the tract; it being a dangerous principle, that executors, or other fiduciary characters, should take upon themselves, by means of bargains of hazard, to jeopardize the interests confided to their care. *Nelson v. Carrington*, 4 Munf. 332.

(12) Validity of Sale.

(a) Sale by One of Several Executors.

Where, before the Revolution, a testator directed that his executors should sell his land, a sale by one was void, unless it appeared that the other was

dead or refused to qualify. *Johnston v. Thompson*, 5 Call 248.

Where, in a will made before the Revolution, a general power to executors to sell land was given, a sale by one without the consent of the others was void. *Deneale v. Morgan*, 5 Call 407.

Where a testator directs a sale of land by his executors, and there are three executors, all of whom qualify, a conveyance executed by only two of them is not valid in law, and can not be aided in equity; nor will the payment of the purchase money in such case create a lien on the land. *McRae v. Farrow*, 4 Hen. & M. 444.

A power to four executors to make a conveyance, was executed by three only, but the declaration stated that all of them joined in the deed, and the defendant, without craving oyer, pleaded covenants performed. Held, that after verdict by which this point was not submitted, it could not be objected that all the executors did not execute the deed. *Watson v. Alexander*, 1 Wash. 340.

A conveyance by some of the executors named in a will is justified, where the others refuse to qualify. *Geddy v. Butler*, 3 Munf. 345.

As far as circumstances will permit, a court of equity will supply any defect of execution of a power given by a will to executors or trustees to sell lands for the payment of debts or legacies. A conveyance, therefore, by one executor or trustee only, instead of three, but in all other respects conforming to the intention of the testator in creating the trust will be supported in favor of a purchaser for a valuable consideration, and this is true although the will provided that if one or more of the executors or trustees should die before the object of the trust was accomplished others should be appointed by the survivors jointly with them to finish the execution of the trust. *Roberts v. Stanton*, 2 Munf. 129.

A will directed a sale of land by two executors. One only was present at the public auction, but the other consented that his coexecutor make it, and ratified and approved it. Held, that the sale was not invalid on account of these facts. *Dunn v. Renick*, 40 W. Va. 349, 22 S. E. 66.

Where two or three executors named in a will qualified and conveyed the real estate of the testator to purchasers who paid the purchase price in full and a third executor afterwards qualified and ratified the sale by sharing the commissions, it was held that the title of the purchaser was valid, at least in equity. *Mills v. Mills*, 28 Gratt. 442.

If the written agreement of sale be signed by the purchaser, and one of the two acting executors, the other may, by acts in pais, though not in writing (such as delivering possession of the land and the like), manifest his assent to the sale, and make it his own act. *Nelson v. Carrington*, 4 Munf. 332.

(b) Purchase by Executor or Administrator.

The prevailing rule seems to be that a fiduciary can not purchase at his own sale, however fair the transaction may be. *McKey v. Young*, 4 Hen. & M. 430. See *Moore v. Hilton*, 12 Leigh 1; *Bailey v. Robinson*, 1 Gratt. 4; *Buckles v. Lafferty*, 2 Rob. 292; *Newcomb v. Brooks*, 16 W. Va. 32; *Lewis v. Broun*, 36 W. Va. 1, 17, 14 S. E. 444.

But the purchase of land by an executor which had been sold by him agreeably to the will of his testator, was held to be valid, where it appeared that his conduct in the sale was fair and correct. *McKey v. Young*, 4 Hen. & M. 430.

An executor may not lawfully, directly or indirectly, purchase at his own sale, but he may lawfully purchase for his own benefit property, though it may have been previously purchased by his vendor or himself as such executor; provided, of course, the

transaction be real and bona fide. And this is true a fortiori when the transaction is not only real and bona fide but is sanctioned by the court with all the facts before it. *Wayland v. Crank*, 79 Va. 602; *Hurt v. Jones*, 75 Va. 341; *Staples v. Staples*, 24 Gratt. 225.

The will directed real property to be sold by an executor, and the proceeds to be applied with the proceeds of the personality to the payment of debts and legacies, and the balance to go to the residuary legatees. The executors renounced their right to qualify as such, and then one of them qualified as administrator with the will annexed. He sold the property under the will, becoming himself the purchaser of a portion of it. Held, that the sale, being a fair one and a fair price being given for the property, should be confirmed. *Toler v. Toler*, 2 Pat. & H. 71.

An administratrix emancipated her slaves by her will and directed that a certain tract of land should be sold for the payment of her debts, and that certain money due her should be applied when collected, to the same object. The land was sold for ready money by her administrator with the will annexed, after advertising the time and place (without specifying the terms of sale), for ten days only, and purchased by himself before judgment was obtained against her estate. The slaves were afterwards sold under an execution. On a bill brought by certain of her slaves claiming the benefit of her will, and suggesting fraud in the management of her estate, it was decreed that the lands be resold, and that an account be taken, and, if there be not funds sufficient to pay the debts for which they were sold, that they be sold for a term of years to satisfy it. *Patty v. Colin*, 1 Hen. & M. 519.

A testator bequeathed legacies to be paid out of the proceeds of certain lands, which he directed to be sold. The administratrix with the will annexed was old and confided the administration for the most part to an agent,

who caused the land to be sold, and became himself the purchaser, at a price insufficient to satisfy the legacies. Held, that the sale was voidable as to the legatees, and that the extent of their interest was a sum sufficient to satisfy their legacies, which the agent might remove by payment, and that, if he did not, the land should be sold at a proper upset price, to be ascertained by debiting the purchaser with the profits of the land or with a fair annual rent therefor and crediting him with his payments and interest on the same and with all the substantial and permanent improvements. *Buckles v. Lafferty*, 2 Rob. 292, 40 Am. Dec. 752.

An executor of a will, who was also appointed guardian for his infant children by the will, kept no separate accounts, intermingled his own money with that held by him as executor and as guardian, purchased land, paying for it partly with his own money and partly with money in his hands as executor, and had it conveyed to his children. Held, that the land was chargeable with the amount of money in his hands as executor which was expended in its purchase, although the children to whom it was conveyed had no knowledge of the fraud. *Hedrick v. Tuckwiller*, 20 W. Va. 489.

Where a purchase of land by an executor at his own sale has been set aside, the executor will not be required to take the land at what it was worth at the time of sale upon the conjectural estimate of witnesses, but it will be sold for more if possible, and if not, his purchase will be confirmed. *Bailey v. Robinsons*, 1 Gratt. 4, 42 Am. Dec. 540.

(13) Warranty by Executor.

See generally, the titles COVENANTS, vol. 2, p. 741; WARRANTY.

Where an executor sells land of his testator by virtue of a power given by the will, he is not bound to convey with general warranty, without an agreement to that effect, but only with spe-

cial warranty against himself and all persons claiming under him, notwithstanding a written agreement after the sale that he would make a good and indefeasible title to the purchaser, for such an agreement is to be understood with reference to the terms of the sale. *Grantland v. Wight*, 5 Munf. 295.

Rule of Caveat Emptor.—It is the duty of a purchaser to inquire into the sufficiency of the testator's title and the authority of the executor to sell under the will, and if the purchaser takes no covenants to cover defects of title, he is absolutely without relief, unless the executor has been guilty of such fraud as will vitiate the contract. *Syme v. Johnston*, 3 Call 558; *Brock v. Philips*, 2 Wash. 68.

Where the executor states at the sale that he sells only as his testator, held, it is the duty of the purchaser to inquire into the state of the property. *Syme v. Johnston*, 3 Call 558.

In respect to the duty to inquire as to the executor's power, the following distinction has been made between a sale of personalty and a sale of real estate under a power in the will: "The executor by law has a right to the possession of slaves and of personal estate, and a right to sell them. But he has no right to sell lands, unless under a special authority. A purchaser, therefore, of land, from an executor, is bound to look for and to understand the extent of that power, and consequently the principle caveat emptor, strictly applies in such a case." *Brock v. Philips*, 2 Wash. 68.

(14) Title Rights and Liabilities of Purchaser.

As a general rule, a sale under a power contained in a will gives the executor authority to convey a good title to a bona fide purchaser, and such title can not be defeated by the fact that the executor was acting in violation of his trust, where the purchaser had no knowledge of such violation. *Smith v. Henning*, 10 W. Va. 596.

Where the power of an executor to convey is limited to sales for the payment of debts, a conveyance of the lands for other purposes is constructively fraudulent as to the devisees, and they will not thereby be divested of title to the lands, if the purchaser had notice of the extent of the executor's authority, and that the conveyance was not authorized by the will; but if he purchased in good faith and without notice, the title will be vested in the purchaser and divested out of the devisee. *Smith v. Henning*, 10 W. Va. 596.

Where the purchasers at a sale in good faith pay the amount of the purchase money, and receive a conveyance of the property from the executors, who also act in good faith, they acquire a good title to the property. *Staples v. Staples*, 24 Gratt. 225.

One who purchases lands from an executor who is also a legatee of the estate, at a discount of from eighteen to twenty per cent., knowing that the condition of the estate does not require the sale, is guilty of a fraud, although he may know that such lands do not amount to more than the executor's interest in the estate; and, upon the failure of the executor to pay the other legatees their portion of the estate, such purchaser will be compelled to repay the money to them. *Pinckard v. Woods*, 8 Gratt. 140.

A testator died in November, 1861, and by his will directed certain land to be sold. It was valued in December by commissioners at \$8 per acre; and the administrator with the will annexed sold it within sixty days at a private sale, the greater part at \$10 and the rest at \$8, and the purchaser paid the purchase money, some of it before it was due, and took the receipts of the administrator for the payments; but the land was not conveyed to him. The parties acted in good faith in the transaction. Held, that the sale was valid, and that the

purchaser was entitled to a conveyance of the land without having any conditions imposed upon him. *Moss v. Moorman*, 24 Gratt. 97.

If an executor, uninformed as to the quantity, sells and conveys a tract of land under the will of his testator as containing one hundred and forty acres, more or less, and it is afterwards discovered that the tract contains two hundred and fifty-five acres, the excess is so great that a court of equity will presume that the executor would not have entered into the contract had the truth been known; and, unless it clearly appears from the evidence and circumstances that such excess was had in contemplation, the court, on application of those interested, will rescind the contract, or require the purchaser, at his election, to pay a just compensation for the excess. *Pratt v. Bowman*, 37 W. Va. 715, 17 S. E. 210.

An administrator with the will annexed purchased, at his own sale made under the will, an equity of redemption in certain lands of his testator; he afterwards paid off the lien on the land, but took no deed of release from the trustee. He held it during his lifetime and it descended to his son, who sold it to another with special warranty. Held, that if the estate of the administrator, after his decease, was not sufficient to pay those entitled thereto the purchase money with interest, the land in the hands of the holder would be liable to them for it, since he bought only such title as the administrator had, and in his hands it would have been liable to be resold for the payment of the purchase money. *Toler v. Toler*, 2 Pat. & H. 71.

Duty to See to Application of Purchase Money.—Where a discretionary power to sell is given to executors, a purchaser from them, if he acted in good faith, will not be affected by the manner in which they exercised their discretion. And if the power is to sell for the payment of debts generally, the purchaser is not bound to see to

the application of the purchase money. *Davis v. Christian*, 15 Gratt. 11.

Where a sale is made under a power to sell and reinvest upon the same trusts, it has been held that the purchaser is not bound to see to the application of the purchase money. And it is unreasonable that he should be so bound, if the form of the bequest implies confidence in the trustee as to the application of the purchase money. *Hughes v. Tabb*, 78 Va. 313.

15. Rights, Duties and Liabilities of Executor.

An executor offered land for sale at a public auction, and it was cried out to a solvent and responsible person, who, before anything was done in execution of the contract, permitted another person to take his purchase, and the second purchaser gave his bonds with security for the purchase money, both he and his surety being then in good credit, and considered able to pay the amount. Before all the purchase money became due, and when only one bond had been paid, both the second purchaser and his surety became insolvent, and the executor filed a bill to subject the land then in the hands of a third purchaser to the payment of the balance of the purchase money. After a long delay, the land was so subjected and sold, but after applying the proceeds of the sale there remained a large balance of the purchase money due from the second purchaser. Held, that the pecuniary circumstances of the second purchaser having been such at the time of the sale, that if the land had been cried out to him, the executor would have been justified in executing the contract, and there having been no bad faith on the part of the executor, he was not liable for the balance of the purchase money. *Elliott v. Carter*, 9 Gratt. 341.

A testator provided in his will that his executor might take the testator's farm at \$15 per acre, and if he refused to do so, his brother was given the same privilege; and in the event of his

refusal the executor was required to sell. The executor and his brother both refused to take the farm, and the executor sold it at auction to another brother for \$13.50 per acre, and then wrote to the parties interested, offering to cancel the sale if any of them objected, at the same time expressing the opinion that the land would bring less at a second sale. Some of the parties objected to the sale, and the land was resold, and the same brother again became the purchaser at \$10.30 per acre. Held, that the executor was not liable for the difference. *Wayland v. Crank*, 79 Va. 602.

Liability as Guardian.—An administrator with the will annexed was guardian of testator's four sisters; he sold land under a power given by the testator's will, and took bonds for the proceeds payable to himself as guardian. Held, that he was chargeable in his character of guardian, and his sureties for the guardianship were responsible. *Broadus v. Rosson*, 3 Leigh 12.

Where Acting as Trustees.—A testator by his will bequeathed his slaves to his widow and children, and directed, that if the remainder of his personal estate was not sufficient to pay his debts, his executors should sell enough of his real estate to discharge them. The personal assets were administered by one of the executors, X, who advanced largely to the estate, and there were other debts outstanding. The executors then joined in the sale and conveyance of real estate, the proceeds of which sales the other executors permitted to go into the hands of X, who was a man of fair character and apparently ample fortune. X appropriated the proceeds of the sales to himself, and the creditors of the estate recovered judgment against the executors, and levied upon and sold the slaves. X died and his estate proved insolvent. Held, that in the sale of the real estate the executors acted as trustees, and as such were liable only for their respective receipts; unless

guilty of fraud or gross neglect amounting to fraud the other executors were not responsible for the proceeds of the land received by X. *Boyd v. Boyd*, 3 Gratt. 114.

Purchase by Executor of Property Sold for Debts Due Estate.—The defendant was employed by the personal representatives of an intestate to go to Mississippi for the purpose of collecting certain debts due the intestate. Upon his arrival in that state, he ascertained that it would be necessary to qualify as administrator of the decedent's estate in order to collect the debts; and, upon a sale of the lands for the payment of the debts, he became the purchaser. Held, that the defendant was not bound to keep the land and account for the price, but the land should be treated as assets of the estate. *Powell v. Stratton*, 11 Gratt. 792.

Exoneration of Incumbered Property.—It is the duty of an executor or administrator to apply the assets of the estate not necessary for the payment of debts to the exoneration of the real estate of his testator or intestate which may be under mortgage. *Dandridge v. Minge*, 4 Rand. 397.

c. Sale under Order of Court.

(1) Jurisdiction.

See generally, the title JURISDICTION.

(a) Suit at Instance of Executor.

Though, under the statute, an executor who is given no power as to the realty under the will, is not authorized to maintain a suit against the heirs to have the realty sold for the payment of debts, yet, if the court has jurisdiction of the subject matter, its decree, though erroneous, is binding until reversed; and hence a bill of review would lie to vacate it. *Pierce v. Graham*, 85 Va. 227, 7 S. E. 189.

A court of equity has the authority to sell the incumbered real estate of a decedent, upon a bill filed by the administrator for the purpose of paying

decendent's debts, free from the incumbrances, and satisfy such incumbrances out of the proceeds of sale. *Shahan v. Shahan*, 48 W. Va. 477, 37 S. E. 552.

(b) Suit against Nonresident.

A bill was filed praying the sale of decedent's land to pay debts, and for distribution; the widow joining, and agreeing to commute her life right for its fee-simple value. Service upon one nonresident heir was had by publication, as to whom decree was taken as confessed, and sale confirmed to the purchaser of the whole estate. Held, that the purchaser acquired a valid title, except as to the nonresident heir, with whom he was a tenant in common. *Menefee v. Marge*, 1 Va. Dec. 644.

(c) Debts Not Proved.

The sale of a decedent's land for the payment of his debts will not be set aside in a suit brought for that purpose, on the ground that the debts were not properly proved, and did not in fact exist, and that, on the evidence in the cause, no sale should have been ordered, as errors of the court in its determination of the questions before it can not be so reviewed, it having had jurisdiction of the subject matter and parties. *Lawson v. Moorman*, 85 Va. 880, 9 S. E. 150.

(d) Requisites to Exercise of Power to Sell.

(a) Claims for Which Sale May Be Ordered.

See post, "What Constitutes Debts of the Estate," IV, H, 5.

(b) Opportunity of Paying Debts to Be Given Heirs.

It is error to decree the sale of the lands of a decedent for the payment of his debts without giving to his heirs a reasonable time within which they may pay such debts, and thus avoid a sale of their lands. *Hart v. Hart*, 31 W. Va. 688, 8 S. E. 562.

The cases in which the heirs and devisees, should have a day to pay the amount decreed against a testator's es-

tate before a decree of sale is made of the real estate, are cases where the property is covered by a lien, such as a mortgage or deed of trust, or other security for a debt. Where there is no lien of any kind, but it is a suit to subject the real estate of the decedent to pay a fiduciary debt, the personal estate being exhausted, it is not necessary to give the heirs and devisees a day to pay in the decree. *McDearman v. Robertson*, 1 Va. Dec. 354; *Long v. Weller*, 29 Gratt. 347. See also, *Crawford v. Weller*, 23 Gratt. 835.

(c) Insufficiency of Personalty.

See post, "Personalty Primary Fund," IV, H, 2, a.

The personal estate of a decedent is the natural and primary fund for the payment of his debts and legacies, and, as a general rule, must be first exhausted before the real estate can be made liable; and the personal estate will not be exonerated in charging the real estate, even when there is a specific lien for a debt on the real estate, unless there be express words or a plain intent to make such exoneration. *New v. Bass*, 92 Va. 383, 23 S. E. 747; *Simmons v. Lyles*, 27 Gratt. 922; *Buchanan v. Clark*, 10 Gratt. 154; *Elliott v. Carter*, 9 Gratt. 541.

In equity, whether the lands are charged by the will or the bond of the ancestor, creditors must exhaust the personal estate before they can resort to the land; and in such case a decree against the executor is not conclusive, but only prima facie evidence against the heir or devisee. *Garnett v. Macon*, 6 Call 308.

In enforcing a vendor's lien against the estate of the vendee after his death, the court ought to require the personal estate in the hands of the administrator to be first ascertained, and should ascertain how much of it is applicable to the payment of the purchase money due, and should require the personalty to be so applied, before it decrees a sale of the land to pay the

lien. *Sommerville v. Sommerville*, 26 W. Va. 479; *Bierne v. Brown*, 10 W. Va. 748.

Insufficiency of Rents and Profits.—

Upon a bill by creditors of a decedent against his administrators and heirs to marshal the assets, the court ought not to order the lands descended to the heirs to be sold, where the rents and profits will satisfy the debts within a reasonable time. *Tennent v. Pattons*, 6 Leigh 196.

It seems, that, where the annual rent of land descended, is more than sufficient to pay the interest accruing on a bond debt of the ancestor, a court of equity will not decree a sale of such land, in possession of his heirs, to satisfy the debt; the land being not subject to any specific lien, or incumbrance, in favor of the creditor. See also, *Wilder v. Chambliss*, 6 Munf. 432; *Mason v. Peter*, 1 Munf. 437.

In a bill by a creditor against the devisees, or heirs at law of a decedent, the court should first make a decree for renting the land, and, if the rents should prove insufficient to satisfy the debts, a report should be made to the court for further proceedings to be had, before a decree can be made ordering a sale. *Daingerfield v. Smith*, 83 Va. 81, 1 S. E. 599.

(d) Settlement of Accounts.

It is error to decree a sale of the lands of an intestate for the payment of his debts or judgment liens until the administration accounts of all his personal representatives have been settled, and the amounts and priorities of all claims against his estate have been ascertained and decreed for, and until it has been ascertained what amount, if any, of his personal estate remains in the hands of his personal representatives applicable to his debts. *Hart v. Hart*, 31 W. Va. 688, 8 S. E. 562; *Laidley v. Kline*, 8 W. Va. 218; *Martin v. Rellehan*, 3 W. Va. 480; *Simmons v. Lyles*, 27 Gratt. 922; *Beckham v. Duncan*, 1 Va. Dec. 694; *Buchanan v.*

Clark, 10 Gratt. 164; *Cralle v. Meem*, 8 Gratt. 496. See also, *White v. White*, 16 Gratt. 264.

Generally, the court should not decree the sale of the realty of an intestate to pay debts or judgment liens before the accounts of the administrator have been settled and the unadministered assets ascertained. *Laidley v. Kline*, 8 W. Va. 218.

When the real estate of a testator is necessary for the payment of his debts, it is not improper to direct an account of the rents and profits from his death, for the purpose of ascertaining what rents and profits had accrued from that period, and by whom they had been received; in order to enable the court to decide by its future decree, what persons, if any, were accountable therefor. *M'Candlish v. Edloe*, 3 Gratt. 330.

Where there is a deficiency of personal assets and a creditor of the decedent files a bill for the purpose of subjecting land devised by the decedent for the payment of his debts, it is error for the court to decree a sale for that purpose before ordering an account, and settling the priorities of the liens thereon, though the parties agree that a certain statement filed in the cause is to be taken as a true exhibit of the indebtedness of the estate to the plaintiff. *Daingerfield v. Smith*, 83 Va. 81, 1 S. E. 599.

In an action to subject land to the payment of testator's debts, and for an accounting, the cause was referred to a commissioner, from whose report it appeared that the personal assets were sufficient to pay all of the debts, and that a portion of them was secured by trust deeds on the land. The report was recommitted for amendment, and on motion of the lien creditors (parties by consent) the court decreed that they might have their trust deeds executed by sales according to their provisions. Held, that it was premature to direct a sale of the real estate be-

fore adjudicating the claims of the creditors, and their priorities, under Va. Code, § 2652, and ascertaining the amount chargeable on the realty. *New v. Bass*, 92 Va. 383, 23 S. E. 747.

(3) Property or Interests Subject to Sale.

(a) Interest of Heir.

See generally, the title **HEIR, HEIRS AND THE LIKE**.

The interest of an heir to real estate, not conveyed by a judicial sale, by reason of defective notice, is still liable to the claims of general creditors of the decedent, but can not be sold therefor, until the liability has been adjudicated, the amount judicially determined, and an option given the heir to pay without sale. *Menefee v. Marge*, 1 Va. Dec. 644.

Assumption of Debt by Purchaser.

—Where the purchaser at a judicial sale of land, of which one heir, a non-resident, had no notice, agreed to pay a lien thereon, it being agreed that a sufficient amount of the purchase price should be retained for that purpose, it was held, that even if the nonresident heir had been a proper party in the original proceeding, the decision of the court that her share of the estate was liable to the purchaser's estate for any part of the debt so provided against, and that the same be sold therefor, was error. *Menefee v. Marge*, 1 Va. Dec. 644.

Estimation of Value.—Where the whole of the lands of an estate were sold at a uniform price per acre, and no reason appeared why one part of the land might not be worth as much as any other, held, that each individual interest of the heirs should be estimated on the one basis. *Menefee v. Marge*, 1 Va. Dec. 644.

b. Incumbered Property.

A court of equity has the authority to sell the incumbered real estate of a decedent, upon a bill filed by the administrator for the purpose of paying decedent's debts, free from the incum-

brances, and satisfy such incumbrances out of the proceeds of sale. *Shahan v. Shahan*, 48 W. Va. 477, 37 S. E. 552.

c. Amount to Be Sold.

Where a decree authorized a public sale of so much of the decedent's land as was necessary to pay debts amounting to \$8,000, and \$35,000 worth of land was sold, it was held that the sale should be set aside, especially as it appeared that the purchaser, who was the executor, had full knowledge of the decree. *Pierce v. Graham*, 85 Va. 227, 7 S. E. 189.

(4) Procedure.

(a) Application.

aa. Time for Application.

The West Virginia Code, ch. 86, § 7, authorizing the personal representative of a decedent to maintain a suit in equity to sell the decedent's land for the payment of debts, and providing that, if such suit is not brought within six months after the personal representative qualifies, any creditor of the decedent may bring the suit, does not limit the right of the personal representative to sue to six months from the time of his qualification, unless after six months a creditor brings such suit. *Reinhardt v. Reinhardt*, 21 W. Va. 76.

It is error to decree the sale of a decedent's land to satisfy claims of his judgment creditors before the assignment of dower claimed by his widow. *Simmons v. Lyles*, 27 Gratt. 922.

bb. Notice of Application.

Where defective notice was had upon an heir in an action for distribution and for sale of realty, who did not join or in any manner assert, either to the original or any subsequent proceeding of the court in the sale of the decedent's realty, such proceedings as to such heir are nullities. *Menefee v. Marge*, 1 Va. Dec. 644.

(b) Parties.

See generally, the title **PARTIES**.

aa. Who May Apply for Order to Sell.

In Virginia.—In Virginia an execu-

tor or administrator can not maintain a proceeding to sell land for the payment of a decedent's debts in the absence of any power given him by the decedent's will. The creditors must bring a creditor's bill to have the real estate sold. This decision is under Va. Code, 1887, §§ 2665, 2666, which provide that "all real estate of any person who may hereafter die, as to which he may die intestate, or which, though he die testate shall not by his will be charged with the devised subject to the payment of his debts, or which may remain after satisfying the debts with which it may be so charged or subject to which it may be so devised, shall be assessed for the payment of the decedent's debts and all lawful demands against his estate, in the order in which the personal estate of a decedent is directed to be applied," and that "such assets, so far as they may be in the hands of the personal representative of the decedent may be administered by the court in the office where there is or may be filed, under the one hundred and twenty-first chapter, a report of the accounts of such personal representative, and of the debts and demands against the decedent's estate, or they may, in any case, be administered by a court of equity." *Pierce v. Graham*, 85 Va. 227, 7 S. E. 189. See also, *Beckham v. Duncan*, 1 Va. Dec. 694; *Daingerfield v. Smith*, 83 Va. 81, 1 S. E. 599; *Litterall v. Jackson*, 80 Va. 604; *Brewis v. Lawson*, 76 Va. 36; *McCandlish v. Keen*, 13 Gratt. 615; *Tennant v. Patton*, 6 Leigh 196.

In West Virginia.—Under the West Virginia statute either the personal representative or a creditor may bring suit to sell a decedent's real estate, the statute providing that if the personal representative does not sue within six months after his qualification, then the creditor may sue; and it is held that this statute precludes the representative from suing after the expiration of the six months. *W. Va. Code 1899*, ch.

86, § 7, p. 735; *Reinhardt v. Reinhardt*, 21 W. Va. 76.

A widow can not bring what is substantially a creditors' bill to have all the lands of her husband sold, and out of the proceeds of such sale to have the value of her dower paid, and the residue paid to the creditors of her husband, and the surplus, if any, divided among the heirs. *Hull v. Hull*, 26 W. Va. 1. See generally, the titles CREDITORS' SUITS, vol. 2, p. 780; DOWER, vol. 4, p. 782.

bb. Parties Defendant.

(aa) In General.

In a bill by an executor for the sale of the testator's lands to pay debts, the widow, heirs, devisees and all known creditors are necessary parties. *Underwood v. Underwood*, 22 W. Va. 303.

(bb) Devisees.

Where the bill to subject a decedent's lands to the payment of his debts alleges that there are devisees and proceeds against them as "unknown devisees," under W. Va. Code, ch. 124, § 11, although the domicile of the decedent was well known and the name of the devisees easily ascertained from the will, the court should require such devisees to be made parties by name before selling the realty in which they have an interest. *Kilbreth v. Root*, 33 W. Va. 600, 11 S. E. 21.

When Too Remote to Be a Necessary Party.—Where an interest devised is contingent on both of testator's children dying without issue, and on a failure of the executrix to sell property as she is authorized by the will, such interest is too remote to make the devisee a necessary party to a suit to subject the property to the payment of the testator's debts. *New v. Bass*, 92 Va. 383, 23 S. E. 747.

Nonjoinder.—A testator directed that after the payment of his debts his whole estate should be divided equally among his children. After the personal property had been exhausted, a

creditor filed a bill against the executor alone to subject the land of the testator to the payment of his debt; and a decree was made appointing commissioners to sell and convey the land for this purpose. They acted as directed and their report was confirmed. Held, that the devisees were not bound by the decree, and that such sale did not operate to pass the legal title. *Hudgin v. Hudgin*, 6 Gratt. 320, 52 Am. Dec. 124.

(cc) Widower.

The circuit court decreed the sale of an intestate's land to satisfy creditors, after an order of reference to ascertain the claims against the estate and confirmation of the commissioner's report of such claims, but before the widow and administratrix of the intestate had been served with a summons to the suit or appearance by her to the cause. Held, that it was not error for the court to send the cause back to rules for the purpose of making the necessary parties. *Hull v. Hamilton*, 8 W. Va. 43.

(dd) Guardian Ad Litem of Infant Heirs.

See generally, the titles GUARDIAN AND WARD; INFANTS.

It is error to decree the sale of lands of infant heirs for the debts of their ancestors, no guardian ad litem having been appointed, nor answer filed for them. *Hart v. Hart*, 31 W. Va. 688, 8 S. E. 562.

(ee) Vendor When Lien Not Discharged.

When it does not appear that the vendor's lien on land purchased by a decedent has been discharged, the vendor is a necessary party to a decree for the sale of the land for the payment of the decedent's debts. *Hart v. Hart*, 31 W. Va. 688, 8 S. E. 562.

(ff) Trustee.

See generally, the title TRUSTS AND TRUSTEES.

The trustee in a trust deed on land is a necessary party to a decree for the

sale of the land for the payment of the deceased grantor's debts. *Hart v. Hart*, 31 W. Va. 688, 8 S. E. 562.

(c) The Decree or Order of Sale.

aa. General Consideration.

In a suit in equity by a creditor to subject the land of a decedent to the payment of a debt, the rights and interest of infant children are under the protection of the court, and, where a decree in the cause is entered by consent of the adult parties, and by the guardian ad litem of the infants, which is prejudicial to their rights, such consent decree is not binding on the infants. *Daingerfield v. Smith*, 83 Va. 81, 1 S. E. 599.

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The trustee of a trust deed of land is a necessary party to a decree for the sale of the land for the payment of the deceased grantor's debts. *Hart v. Hart*, 31 W. Va. 688, 8 S. E. 562.

Where an interest devised is contingent on both of testator's children dying without issue, and on a failure of the executrix to sell the property as she is authorized by the will, such interest is too remote to make the devisee a necessary party to a suit to subject the property to the payment of the testator's debts. *New v. Bass*, 92 Va. 383, 23 S. E. 747.

A decree in a suit for the sale of a decedent's lands for the payment of his debts, which ascertains and declares the amount and priorities of all debts and liabilities and ascertains the amount of his personal estate remain-

ing in the hands of his personal representative applicable to the payment of the debts, but fails to make any application of the assets in the hands of his personal representative or fails to decree to his several creditors by name the sums ascertained to be due to them respectively, and to fix the order of priority in which they are severally entitled to be paid, is erroneous, and will for that cause alone be reversed. *Hart v. Hart*, 31 W. Va. 688, 8 S. E. 562.

The circuit court decreed the sale of an intestate's land to satisfy creditors, after an order of reference to ascertain the claims against the estate and confirmation of the commissioner's report of such claims, but before the widow and administratrix of the intestate had been served with a summons to the suit of appearance by her to the cause. Held, that it was not error for the court to send the cause back to rules for the purpose of making necessary parties. *Hull v. Hamilton*, 8 W. Va. 43.

bb. Collateral Attack.

Where it may be fairly assumed from the record that the sale of a decedent's land was ordered by the county court for the payment of debts, the proceedings can not be attacked collaterally on the ground that one of the reasons influencing the county court to order the sale was that the interests of infants would be promoted; the county court not having, at the time, jurisdiction of proceedings for the sale of infants' real estate. *Woodhouse v. Fillbates*, 77 Va. 317.

Though, under Va. Code, 1887, § 2665, an executor, who is given no power as to the realty under the will, is not authorized to maintain a suit against the heirs to have the realty sold for the payment of debts, yet, if the court has jurisdiction of the parties and subject-matter, its decree, though erroneous, is binding until reversed. *Peirce v. Graham*, 85 Va. 227, 7 S. E. 189.

The sale of a decedent's land for the payment of his debts will not be set aside in a suit brought for that purpose, on the ground that the debts were not properly proved, and did not in fact exist, and that on the evidence in the cause, no sale should have been ordered, as errors of the court in its determination of the questions before it can not be so reviewed, it having had jurisdiction of the subject matter and parties. *Lawson v. Moorman*, 85 Va. 880, 9 S. E. 150.

(d) Special Sale Bond.

The county court was authorized by an act of assembly to grant leave to an administrator to sell and convey the decedent's real estate on such terms as the court might deem expedient, having first required of the administrator a new bond with security conditioned to perform the decree of the court and to account for the proceeds of the sale. The statute further provided that if the administrator should refuse or neglect to give the bond for two months after the passage of the statute, or if the court should deem it proper to appoint some other person to make the sale, it should have authority to do so. After the two months had expired, the court then made a decree authorizing the administrator to sell. It was held that this was a substantial compliance with the statute and that the bond was valid. *Corbell v. Zeluff*, 12 Gratt. 226.

(e) Manner and Terms of Sale.

A sale of land at auction by commissioners under a decree in chancery ought not to be set aside on the ground that the day when the sale took place was cloudy, and occasionally rain, it not appearing with certainty that any person who would have bid for the land was thereby prevented from attending, but a considerable number being present, five of whom were bidders; nor because the commissioners, wishing to quicken the bidding, caused limitations of time for further bidding

to be proclaimed, which were afterwards repeatedly done away with, and the sale again opened, the only effect whereof must have been to quicken and excite the bidders; nor because the witnesses generally thought the land was cried out rather precipitately, and without due notice, but one of them stated that it was proclaimed more than once by the crier that the property was about to be struck off, that the commissioners made proclamation also to the same effect by directing the crier not to dwell, and that about three minutes elapsed after the last bid before the land was struck off. *Fairfax v. Muse*, 4 Munf. 124.

Where a decree for the sale of lands is made against adult and infant defendants, and the adult defendants instruct the marshal to make the sale in a manner different from the decree, and the marshal conforms with the instruction and not with the decree, the sale is irregular. *Tennent v. Patton*, 6 Leigh 196.

Public or Private Sale.—Where a decree authorized a public sale of a decedent's land for the payment of debts, and a private sale was made, at which the property was sold at a sacrifice, it was held that the sale should be set aside, especially as it appeared that the executor, who was in fact the purchaser, had full knowledge of all the circumstances involved. *Peirce v. Graham*, 85 Va. 227, 7 S. E. 189.

Terms of Payment.—In 1863, at the sale of a decedent's lands under a decree of court, the crier read a written agreement by four of the heirs, representing six shares out of twelve, to take confederate money for their shares, and expressed an opinion that the other heirs would do likewise; but the receiver of the court, after accepting the first payment in such money, declined to accept more. Held, that the sale referred to confederate treasury notes as the standard of value. *Poague v. Greenlee*, 22 Gratt. 724.

Set-off of Claims against Estate.

—The lands of a deceased debtor were sold under a decree in a creditor's suit, and the sale was confirmed, and the commissioner directed to collect the bonds and disburse the money. The purchaser at the sale, who executed his bonds, was a creditor, and the commissioner had been ordered to pay him a debt greater than the amount of the purchase money. Held, that the commissioner may offset pro tanto the indebtedness for purchase money on the debt due the purchaser from the estate. *Ellett v. Reid*, 25 W. Va. 550.

As a general rule, a distributee purchasing at an administrator's sale can not enjoin the collection of his bonds for the purchase money until his distributive share is ascertained and set off against the bond. *Hickerson v. Helm*, 2 Rob. 628.

(f) Report and Confirmation of Sale.

Where the sale of a decedent's land for more than enough to pay all his debts has been absolutely confirmed, it should not be set aside on the petition of a creditor who does not allege or show that he was prejudiced thereby, simply because such creditor had no notice of the confirmation of the sale. *Patterson v. Eakin*, 87 Va. 49, 12 S. E. 144.

A testator, owning a storehouse, whereon was a vendor's lien, and a farm, devised the farm to his wife and children. In a suit to enforce the lien, the storehouse and lot were sold for enough to pay the lien. By an account in the suit, it was ascertained that the only other debt was an unsecured one, which, with the lien, had been assigned to the purchaser. Later, in a suit by the devisees to sell the farm and, after paying the debts, to distribute the proceeds, the sale of the farm was decreed, and the causes consolidated. The sale was made and confirmed in vacation, without notice to the creditor. Held, that the creditor, as purchaser, became party to the first

suit, and by the consolidation also to the last suit, and, as such party, was, under Va. Code, 1887, § 3426, entitled to notice of the confirmation of the sale made in vacation, but that the confirmation should not be set aside unless he was prejudiced by the want of notice. *Patterson v. Eakin*, 87 Va. 49, 12 S. E. 144.

Objection to Confirmation—Inadequacy of Price.—The confirmation of the executor's sale of a decedent's land for the payment of legacies may be refused, if the price is grossly inadequate, although the sale was otherwise fairly conducted. *Terry v. Coles*, 80 Va. 695.

(g) Validity of Sale.

aa. Failure to Make Proper Parties.

See post, "Parties," IV, F, 2, c, (4), (b).

A testator directed that after the payment of his debts his whole estate should be divided equally among his children. After the personal property had been exhausted, a creditor filed a bill against the executor alone to subject the land of the testator to the payment of his debt; and a decree was made appointing commissioners to sell and convey the land for this purpose. They acted as directed and their report was confirmed. Held, that the devisees were not bound by the decree, and that such sale did not operate to pass the legal title. *Hudgins v. Hudgins*, 6 Gratt. 320, 52 Am. Dec. 124.

bb. Sale under Erroneous Decree.

Where a testator's lands were sold for the payment of debts under an erroneous decree rendered on a bill filed by a creditor against the executor alone, it was held that the creditor, not having entered into any covenants and not being guilty of fraud, was not liable to the purchaser, executor or devisees. *Hudgin v. Hudgin*, 6 Gratt. 320, 52 Am. Dec. 124.

(h) Setting Aside and Vacating Sales.

In order to rescind a judicial sale

some special ground must be laid—something which goes to the very substance of the contract, such as fraud, accident, mistake or misconduct on the part of the purchaser or other person connected with the sale which has worked injustice to the party complaining. *Patterson v. Eakin*, 87 Va. 49, 12 S. E. 144.

The existence and proof of claims are adjudicated by the order of sale and confirmation thereof, and can not be questioned in a suit brought for the purpose of setting the sale aside. *Lawson v. Moorman*, 85 Va. 880, 9 S. E. 150.

A decree for the sale of real estate in the hands of the heirs, some of whom are infants, though prematurely made, will not be set aside on the application of the purchasers, if the sale was beneficial to the infants. *Cralle v. Meem*, 8 Gratt. 496.

Inadequacy of Price.—A judicial sale which has been confirmed by the court ordering it will not be set aside for mere inadequacy of price. *Patterson v. Eakin*, 87 Va. 49, 12 S. E. 144.

Where there is no evidence tending to impeach the fairness of the sale by an executor to pay debts, and property sells for one-half of its estimated value, there is no such presumption of fraud and collusion from the inadequacy of price as to justify setting of the sale aside. *Bradford v. McConihay*, 15 W. Va. 732.

Fraud.—Participation by the purchaser in the fraud of the executor or administrator making the sale, or notice of such fraud at the time of his purchase, is necessary to authorize setting aside the sale. *Staples v. Staples*, 24 Gratt. 225.

Purchase by Executor or Administrator.—See ante, "Title, Rights and Liabilities of Purchasers," IV, F, 2, c, (5).

(5) Title, Rights and Liabilities of Purchaser.

The fact that there is sufficient per-

sonality with which to pay general creditors does not make their claims any less liens on the decedent's realty; and where suit for administration was commenced, to which the purchaser of the realty belonging to the estate was a party, knowing there were other debts besides the one he assumed, he took the land subject to the lien of the other creditor, and was liable therefor to the extent of his purchase, but not for after-accrued rents and profits. *Menefee v. Marge*, 1 Va. Dec. 644.

M. dies in November, 1861, and by his will directs certain land to be sold. It is valued in December by commissioners at eight dollars per acre; and the administrator c. t. a. sells it within sixty days at private sale, the greater part at ten dollars, and the rest at eight, and the purchaser pays the purchase money, some of it before it is due, and takes the receipts of the administrator for the payments; but the land is not conveyed to him. The parties act in good faith in the transaction. The sale is valid, and the purchaser is entitled to a conveyance of the land, without any conditions to be imposed upon him. *Moss v. Moorman*, 24 Gratt. 97.

Failure to Serve Heir with Notice.—

A bill was filed praying for the sale of decedent's land to pay debts, and for distribution; the widow joining, and agreeing to commute her life right for its fee simple value. Service upon one nonresident heir was had by publication, as to whom decree was taken as confessed, and sale confirmed to the purchaser of the whole estate. Held, that the purchaser acquired a valid title, except as to the nonresident heir, with whom he was a tenant in common. *Menefee v. Marge*, 1 Va. Dec. 644.

Proceedings to Get Possession of Land.—A rule may be awarded against a person, not a party to the suit, in possession of land sold under a decree of the court to another person, to show cause why he should not sur-

render possession to the purchaser. *Paxton v. Rucker*, 15 W. Va. 547; *Trimble v. Patton*, 5 W. Va. 432.

Duty to See to Application of Purchase Money.—Where the charge upon land by will for the payment of debts is general, the purchaser from the executor or administrator with the will annexed is not bound to see to the application of the purchase money. In such case if the sale was necessary at the time it was made and was fairly made, and the purchase money paid, the failure of the executor or administrator to account for and pay over the proceeds to the creditors of the estate, will not impair the title of the vendee. *Meeks v. Thompson*, 8 Gratt. 134, 56 Am. Dec. 134.

Return of Purchase Money on Avoidance of Sale.—Where a decree for the sale of a decedent's lands for the payment of debts was erroneous and no title passed to the purchaser, and the consideration has been paid, the purchaser may recover the purchase money from the estate; but the rents and profits received while in possession of the land should be deducted from the amount to which he is entitled. *Hudgin v. Hudgin*, 6 Gratt. 320, 52 Am. Dec. 124.

Purchase by Executor or Administrator.—The law is well settled that the same person can not occupy the antagonistic positions of seller and purchaser of the same subject. And if a person selling land as a commissioner of the court, becomes himself the purchaser, or has any understanding at the time of the sale that he is to have any interest in the purchase of the land sold by him, the sale will be held voidable and set aside at the election of any party interested in the land. *Walker v. Ruffner*, 32 W. Va. 297, 9 S. E. 215; *Ayers v. Blair*, 26 W. Va. 588; *Winans v. Winans*, 22 W. Va. 678; *Newcomb v. Brooks*, 16 W. Va. 32; *Howery v. Helms*, 20 Gratt. 1; *Bailey v. Robinsons*, 1 Gratt. 4, 42 Am. Dec. 540.

Upon the failure of a purchaser to pay the purchase money, there was a decree appointing a commissioner to resell, and the commissioner by arrangement with the first purchaser himself purchased the land. This was reported to the court and was approved and confirmed. It was held that the fact that the commissioner was appointed to sell the land did not avoid his purchase from the first purchaser, and that the parties, having all they were entitled to claim, could not object, *Hurt v. Jones*, 75 Va. 341.

A purchaser of land by an executor at a sale made by himself as such is a violation of his duty as trustee and an invasion of the rights of his cestui que trust, who are entitled to relief in a court of equity. The general rule in such case is, that though the sale may have been irregularly and fraudulently conducted and the property sold for less than its value the proper mode of relief is not to subject the trustee to the payment of the actual value of the land at the time of the sale, upon the conjectural estimate of witnesses, but, at the election of the trustees, to direct a resale at a proper upset price. *Bailey v. Robinsons*, 1 Gratt. 4.

(6) Rights of Heirs—Allowance for Improvements.

Upon a bill by a single creditor against the administrator and heirs of a decedent for the sale of the decedent's real estate to pay debts, an account was ordered, and a portion of the land was sold. One of the heirs purchased the interest of the other heirs remaining unsold, and made valuable improvements thereon. It was afterwards found necessary to sell all the land to pay the debts. Held, that the heir was not entitled to an allowance for the improvements under Va. Code 1873, ch. 132. *Hurn v. Keller*, 79 Va. 415.

Where a decree ordered a public sale, but it was made privately, and also ordered enough land sold to pay

certain debts but more was sold than necessary, and where the executor, who brought the suit and by his own counsel managed it, was in fact the purchaser, though but a nominal bidder, it was held that he could have no protection in the purchase. *Peirce v. Graham*, 85 Va. 227, 7 S. E. 189. See *Quarles v. Lacy*, 4 Munf. 251.

A purchase by an executor or administrator of any part of the estate of his testator or intestate, when other persons were deterred from bidding in consequence of doubts concerning the title suggested by himself, whereby he obtained the property for less than its value, ought to be set aside. *Hudson v. Hudson*, 5 Munf. 180.

Sale to Clerk of Executor.—A sale of the testator's land by the executor—who, under the will, is entitled to two-thirds of it—to his clerk, who does not pay the consideration, but afterwards resells to the executor, is fraudulent. *Davies v. Hughes*, 86 Va. 909, 11 S. E. 488.

Frauds upon Rights of Owners.—The commissioner having become the purchaser under a judicial sale, it was held, that the nonresident coparceners could set the sale aside, even though it had been confirmed, by an informal bill on the grounds of fraud upon their rights. *Howery v. Helms*, 20 Gratt. 1.

(7) Conveyance.

An executor selling the land of his testator, by virtue of a power given by the will, is not bound to convey with general warranty, without an agreement to that effect, but only with special warranty against himself and all persons claiming under him. *Grantland v. Wight*, 5 Munf. 295.

It is not essential to the validity of an executor's deed to recite the authority of the executor on its face, especially where no injury could result to parties in interest by the want of recital. But it is the usual practice to recite the power of the executor in the deed, and it is better and safer to do so. *Smith v. Henning*, 10 W. Va. 596.

A conveyance of land by two out of three executors, all of whom qualified and were living, the testator having directed the sale and conveyance by his executors, in general terms, is not valid in law, and can not be aided in equity; nor would the payment of the purchase money, in such case, create any lien on the land. *M'Rae v. Farrow*, 4 Hen. & M. 444.

Where a party describing himself as an administrator, sells and conveys a tract of land to a purchaser, reserving a vendor's lien upon the face of the deed to secure a portion of the purchase money, it is not necessary to the validity of the deed that such administrator should recite his power and authority to sell the land on the face of the deed, but it is regarded as the better practice to do so. To a bill filed by an administrator to enforce a vendor's lien, in which he alleges the sale and conveyance of a tract of land to a purchaser, and that there is a balance of the purchase money for the land remaining unpaid, to secure the payment of which a vendor's lien is reserved by him on the face of the conveyance, which is with general warranty, which deed of conveyance and the bond evidencing the amount of purchase money remaining unpaid are exhibited and made part of the bill, a demurrer filed by the defendant will not be sustained, where the plaintiff does not show by his bill under what authority he sells, and in what right he became invested with the title to the land. *Bartlett v. Bartlett*, 34 W. Va. 33, 11 S. E. 732.

(8) Application of Proceeds to Payment of Debts.

An administrator who was a creditor of the decedent exhausted the personal estate in the payment of debts, leaving himself still a creditor. Upon a bill filed by the heirs of the decedent, the land was sold, part of it being purchased by the administrator, who executed his bond for the purchase

money. Held, that the administrator was entitled to a decree enjoining the payment of the purchase money to the heirs, and directing that it be applied to the satisfaction of his debt. *Williams v. Williams*, 11 Gratt. 95.

The purchaser at a judicial sale of land, of which one heir, a nonresident, had no notice, agreed to pay a lien thereon, it being agreed that a sufficient amount of the purchase price should be retained for that purpose. Held, that, even if the nonresident heir had been a proper party in the original proceeding, her share of the estate was not liable to the purchaser's estate for any part of the debt so provided against. *Menefee v. Marge*, 1 Va. Dec. 644.

As to duty of purchaser to see to application of proceeds to payment of debts, see ante, "Rights and Liabilities of Purchasers," IV, F, 1, j.

G. LEASE OF REAL PROPERTY.

Where a testator directs money arising from certain sources, among which are rents of his lands, to be placed out at interest, his executor is impliedly authorized to lease such lands, not already occupied by tenants, as are not necessary to be reserved for cultivation by the testator's own slaves. *McCall v. Peachy*, 3 Munf. 288.

Where a tenant leases land from an executor, he can not set off debts due to him by the testator against the rents unless the executor acknowledges that he has sufficient assets to pay all the debts of the estate. *White v. Banister*, 1 Wash. 166.

Where a bill gives to the executors a naked power to sell real estate, neither the title nor the right to the possession passes to the executors, and they are not chargeable for a failure to rent the same until the sale can be made. *Dunn v. Renick*, 33 W. Va. 476, 10 S. E. 810.

H. PAYMENT OF DEBTS.

1. In General.

The estate of a decedent remains

liable on his just obligations after his death. *Coleman v. Stone*, 85 Va. 386, 7 S. E. 241.

2. Property Liable for Payment of Debts.

See generally, the title MARSHALING ASSETS AND SECURITIES.

a. Personalty Primary Fund.

The personal estate of the decedent is the natural and primary fund for the payment of his debts, and must be first exhausted before the real estate can be subjected; nor will it be exonerated by a charge on the real estate, unless there be express words or a plain intent in the will to make such exoneration. *Foster v. Crenshaw*, 3 Munf. 514; *Elliott v. Carter*, 9 Gratt. 541; *Edmunds v. Scott*, 78 Va. 720; *Laidley v. Kline*, 8 W. Va. 218; *Elliott v. George*, 23 Gratt. 780; *Beckham v. Duncan*, 1 Va. Dec. 694.

The personalty being first liable to the payment of a decedent's debts, it is true that there should be no distribution either to the widow or to the other distributees until the debts are paid, and there can be no resort for their payment to the realty until the personalty has been exhausted. But when that has been exhausted either by devastavit or distribution, the realty in the hands, not of the widow, because she takes and holds her life estate in one-third thereof by a title which is paramount to the rights of creditors, but that of the heirs, must be subjected to the payment of the ancestor's debts. *Alexander v. Byrd*, 85 Va. 700, 8 S. E. 577.

Lien Given by Decedent in Lifetime.

—In the absence of a testamentary provision for the payment of debts, the personal property of a decedent is the primary fund for their payment, even though the debts be secured by a lien given by the decedent in his lifetime on his real estate. *Todd v. McFall*, 96 Va. 754, 32 S. E. 472.

Lands in Possession of Heirs.—In suits to subject to the payment of

debts, lands in the possession of heirs, the constant course, where there is no specific lien, is, first to take an account of the personal assets. *M'Loud v. Roberts*, 4 Hen. & M. 444.

Charge by Will—Effect.—In equity, whether the land be charged by the will or the bond, of the ancestor, creditors must exhaust the personal estate, before they can resort to the lands. *Garnett v. Macon*, 6 Call 308. And in such case a decree against the executor is not conclusive, but prima facie evidence only, against the heir or devisee. *Garnett v. Macon*, 6 Call 308.

Exoneration by Realty.—See post, "Exoneration of Personalty," IV, II, 2, b, (2).

The common-law rule that the personalty is the primary fund for payment of the decedent's personal debts, to the exoneration of the realty, has been extended so far as to allow the heir or devisee to call upon the executor or administrator to exonerate the realty from a debt constituting a lien thereon, unless the testator has expressed his intention to the contrary in plain and unequivocal terms. The rule relates, however, only to personal debts of the decedent; and if the decedent acquired land already subject to a mortgage, the representative can not be called upon to discharge it unless the decedent made the debt his own. *Dandridge v. Minge*, 4 Rand 397; *Pleasants v. Flood*, 89 Va. 96, 15 S. E. 504; *Haydon v. Goode*, 4 Hen. & M. 460.

b. Realty.

(1) In General.

At common law the lands of a decedent were liable only to debts of record and of specialty binding the heirs expressly, but by statute the distinction between such debts and simple contract debts has been done away with, and now the real as well as the personal estate of a decedent is liable for the liquidation of all his debts. *Frasier v. Littleton*, 100 Va. 9, 40 S.

E. 108, 7 Va. Law Reg. 620. For a full discussion of the liability of a decedent's property to the payment of his debts, see the title **MARSHALING ASSETS AND SECURITIES**.

Although, under the legislation of this state, as contained in the Code, real as well as personal estate is made subject to the payment of the just debts of the intestate, still the realty which descended to the heir should not be decreed to be sold for the payment of judgment liens until resort is first had to the personal estate, so far as practicable, and without producing unreasonable delay. *Laidley v. Kline*, 8 W. Va. 218.

Where land, incumbered by trust deeds and other liens, is granted by a husband to his wife, and the wife purchased the land at a judicial sale, giving her bonds for deferred payments, and died, on petition of the heirs to have the bonds paid out of her personal estate, to the exoneration of the land which descended to them, it was held that the land, and not the personalty, was primarily liable for the payment of the bonds. *Pleasants v. Flood*, 89 Va. 96, 15 S. E. 504.

Surplus Applied Rateably to Ancestor's Debts.—When a grantor in a deed of trust to secure debts, which conveys real and personal property, dies intestate, before sale of the trust subject, the quasi equity of redemption descends to the heirs, and the surplus of the real estate, after the trust is satisfied, is applicable rateably to the payment of debts of the grantor by specialty binding the heirs. *Harvey v. Steptoe*, 17 Gratt. 289, 291.

(2) Exoneration of Personalty.

See ante, "Personalty Primary Fund," IV, H, 2, a.

A simple contract creditor shall receive out of the real assets descended to the heirs at law as much as has been paid to bond creditors out of the personal assets. *Haydon v. Goode*, 4 Hen. & M. 460.

(3) Where Whole Estate Charged with Debts.

Charging the whole estate with particular debts, lets in every creditor on the whole estate. *Quare. Trent v. Trent*, Gilmer 174. See also, *Clarke v. Buck*, 1 Leigh 490; *Thompsons v. Meek*, 7 Leigh 419.

In *Downman v. Rust*, 6 Rand. 587, it was said: "Every question of the charge on land under a will, is a question of intention. In the case of debts, it is so natural to suppose that a man in that solemn act, intended to be just, that courts have taken very slight words in a will to imply a charge upon lands."

(4) Rents and Profits.

If the estate of the decedent is solvent, and even where it is insolvent, until they are sequestered by the court at the instance of creditors, the rents and profits of the realty are not liable for the debts of the decedent. *Washington v. Castleman*, 31 W. Va. 832, 8 S. E. 603.

In a suit to settle a decedent's estate, it was held error to adjudge the administrator entitled to recover rents accruing after the intestate's death for a farm occupied by one of the parties, such rents belonging to one of the heirs, who asserted no claim thereto. *Lightner v. Speck*, 2 Va. Dec. 557.

Where the real estate of a testator is necessary for the payment of his debts, a court of equity may direct an account of the rents and profits from his death, for the purpose of ascertaining the profits accrued from that period and by whom received, in order to enable the court to decide what persons, if any, are accountable therefor. *McCandlish v. Edloe*, 3 Gratt. 330.

(5) Freehold Given in Lieu of Dower.

See generally, the title **DOWER**, vol. 4, p. 782.

Where a life estate in lands, given to a widow in lieu of dower is of less value than her dower would have

been, it is not chargeable with any of the debts of her deceased husband. *Gaw v. Huffman*, 12 Gratt. 628.

c. Property Purchased with Proceeds of Note Executed by Executor in Excess of Powers.

Where an executor, as such, executes a note, in excess of his powers, and the proceeds are used in the purchase of property which is in his possession at the time of his death, such property may be subjected by the lender to the payment of his debt. *Whitten v. Bank of Fincastle*, 100 Va. 546, 42 S. E. 309.

d. Marshaling Assets.

See generally, the title **MARSHALING ASSETS AND SECURITIES**.

The order in which the estate of a testator will be applied to the payment of his debts is as follows: The first to be so applied is the personal estate at large not exempted by the terms of the will or by necessary implication. Next to it, real estate or an interest therein expressly set apart by the will for payment of debts. Next, real estate descended to the heir. After it, property, real and personal, expressly charged with payment of debts, and then, subject to such charge, specifically devised or bequeathed. If these prove inadequate, then general pecuniary legacies, and after them, specific legacies, both classes rateably; and, in the last resort, real estate devised by the will. *Frasier v. Littleton*, 100 Va. 9, 40 S. E. 108.

3. Presentation of Notice of Claim.

Under the W. Va. Code, 1899, ch. 86, § 9, if a creditor of an estate of a decedent fail to present his claim before a decree upon a report of debts allowing debts against the estate and subjecting lands to their payment, such decree bars him from claiming participation in the proceeds of such lands until such decreed debts are satisfied. *Trail v. Trail* (W. Va.), 49 S. E. 431.

4. Allowance of Claims.

a. General Consideration.

The estate of a deceased guarantor or surety remains liable on the obligation after his death and claims growing out of the same are allowable. *Coleman v. Stone*, 85 Va. 386, 7 S. E. 241.

b. Claim Improper.

Where a personal representative confesses judgment on condition that if the demand be improper it shall be corrected, the estate is entitled to credit on the judgment to the extent that the demand is improper. *Staples v. Staples*, 85 Va. 76, 7 S. E. 199.

c. Proof of Claim.

It is the duty of an administrator to protect the estate of his decedent by interposing every legal defense, and he can not by an agreement in pais, where infants are concerned and are made parties, either obtain commissions as administrator, to which he is not entitled by statute, or provide for the allowance of claims against said estate without proof of their correctness and validity. *Crotty v. Eagle*, 35 W. Va. 143, 13 S. E. 59.

Where decedent's estate had been referred to a commissioner for settlement, and a claim on which judgment had been obtained against such estate was presented to him, and there was no evidence that it had ever been paid, and the commissioner rejected the claim in his report, and the court sustained exception to the report it was held, no error. *Armentrout v. Shafer*, 89 Va. 566, 16 S. E. 726.

Where Note of Decedent Found among His Effects.—

Defendant's decedent gave four notes to the assignor of claimant's testator, two of which were subsequently delivered to claimant's testator, in pursuance of a general assignment of the payee. The remaining two notes were renewed by other like notes, without being taken up, and the new notes were thereupon discounted to plaintiffs. After the death of

the payee, the note in controversy, being one of the notes so renewed, was found by claimant among the effects of the deceased payee, and claimed as the property of his testator, by virtue of such assignment. Held, improperly allowed as a claim against the estate of defendant's decedent. *Nottingham v. Lynchburg Trust & Sav. Bank*, 2 Va. Dec. 571.

5. What Constitutes Debts of the Estate.

a. In General.

The indebtedness for which the estate of a decedent is liable is that which existed at the time of his death. An executor, as such, can not create a cause of action against his decedent's estate. *Whitten v. Bank of Fincastle*, 100 Va. 546, 42 S. E. 309.

b. Medical Bills.

In *Baker v. Baker*, 87 Va. 180, 12 S. E. 346, it was held, that under the circumstances disclosed by the record, the executor was entitled to credit for medical bills paid by him out of his testatrix's estate.

Services Rendered Children.—Where medical services rendered to a woman's children are recognized by her as constituting a liability against her, her executor may, after her death, pay such bills out of her estate. *Baker v. Baker*, 87 Va. 180, 12 S. E. 346.

c. Funeral Expenses.

It seems that an action will not lie against a personal representative as such for the funeral expenses of his testator or intestate. *Fitzhugh v. Fitzhugh*, 11 Gratt. 300, 62 Am. Dec. 653; *Daingerfield v. Smith*, 83 Va. 81, 1 S. E. 599; *Kinnaird v. Williams*, 8 Leigh 405.

Personal Liability.—It seems that a personal representative is not liable as such for the funeral expenses of his decedent. *Fitzhugh v. Fitzhugh*, 11 Gratt. 300.

d. Costs of Administration.

It seems that the costs of adminis-

tration are claims against the estate. *Nimmo v. Com.*, 4 Hen. & M. 57. See also, Va. Code (1887), § 2660; W. Va. Code (1899), ch. 85, § 25, p. 733.

e. Expenses of Litigation.

(1) General Consideration.

The lawful administrator has the right to charge a fund to be recovered with the necessary expenses of litigation incurred in recovering the fund. *Thompson v. Nowlin*, 51 W. Va. 346, 41 S. E. 178; *Turk v. Hevener*, 49 W. Va. 204, 38 S. E. 476; *Baker v. Baker*, 87 Va. 180, 12 S. E. 346; *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. 447; *Lynch v. Spicer*, 53 W. Va. 426, 44 S. E. 255.

(2) Attorney's Fees.

General Rule.—A lawful administrator is allowed his legal costs including reasonable counsel fees expended in defending or prosecuting litigable demands against the estate, whether in a circuit court or appellate court, if he acted in good faith in this connection. But such fees must not be exorbitant or unjust. *Turk v. Hevener*, 49 W. Va. 204, 38 S. E. 476; *Thompson v. Nowlin*, 51 W. Va. 346, 41 S. E. 178; *Baker v. Baker*, 87 W. Va. 180, 12 S. E. 346.

Reasonable fees of counsel may be paid by an executor or administrator out of the assets, as part of the expense of administration, and, if not paid by him, are a lawful charge on the assets. *Crim v. England*, 46 W. Va. 480, 33 S. E. 310.

If an attorney at law by virtue of his employment performs services for an administratrix in the prosecution of a claim due the estate, to be paid for out of the proceeds thereof, and another administrator is substituted in lieu of the first and afterwards receives such proceeds, such attorney is entitled to payment for such services therefrom unless he has been otherwise paid therefor. *Thompson v. Nowlin*, 51 W. Va. 346, 41 S. E. 178.

Where an executor who was obliged

to employ counsel to collect debts due the estate of his testator did not pay the counsel fees, an allowance may be made directly to the attorneys. *Hoke v. Hoke*, 12 W. Va. 427. See post, "Accounting," IV, L.

Contingent Fees.—An administrator has the right to charge the estate with contingent fees. *Thompson v. Nowlin*, 51 W. Va. 346, 41 S. E. 178; *Baker v. Baker*, 87 Va. 180, 12 S. E. 346.

Fees and Expenses in Taking Depositions.—But counsel fees and expenses incurred in taking depositions in support of a claim are not proper charges against the estate of a decedent. *Garland v. Garland*, 2 Va. Dec. 351.

Exorbitant Fees.—Courts disapprove the allowance by courts of exorbitant fees to attorneys out of dead men's estates. *Lynch v. Spicer*, 53 W. Va. 426, 44 S. E. 255.

"I think it is error to allow so large a sum to attorneys out of a small estate for services in a suit of no difficulty or size. The record is small, a short bill, a short decree—no depositions—only the construction of the will involved. This court and others have strongly condemned the allowance of heavy fees out of dead men's estates and funds. *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. 447; *Trustees v. Greenough*, 105 U. S. 537." *Lynch v. Spicer*, 53 W. Va. 426, 44 S. E. 255.

When Not Deemed Exorbitant.—Where an intestate was killed by the negligence of a third party, it was held, that the contract entered into by his administratrix agreeing with a lawyer that if he should prosecute and recover a settlement out of the party guilty of the negligence without a suit he should have fifteen per cent. of the amount realized, but if he had to bring suit he should have one-third of the amount collected, it seems is not an exorbitant or unjust fee. *Thompson v. Nowlin*, 51 W. Va. 346, 41 S. E. 178. See also, *Baker v. Baker*, 87 Va. 180, 12 S. E. 346.

f. Improvements on Estate of Decedent.

Where a decedent allowed his son to plant an orchard and put other costly improvements on a farm as though it belonged to the son, it was inequitable, on settling decedent's estate, to charge the son with full rental value of the farm, and allow him to set off merely the cost of the trees and the planting thereof, without regard to their value when in full bearing, and the care and attention bestowed on them for years. *Lightner v. Speck*, 2 Va. Dec. 557.

Upon a bill by a single creditor against the administrator and heirs of a decedent for the sale of the decedent's real estate to pay debts, an account was ordered, and a portion of the land was sold. One of the heirs purchased the interest of the other heirs remaining unsold, and made valuable improvements thereon. It was afterwards found necessary to sell all the land to pay the debts. Held, that the heir was not entitled to an allowance for the improvements under Va. Code, 1873, ch. 132. *Hurn v. Keller*, 79 Va. 415.

In a suit to settle a decedent's estate, one of the decedent's sons filed a cross bill setting up a claim to a farm under a parol agreement with the decedent, who had permitted him to take possession and make valuable improvements. The claim was not sustained, and cross complaint was charged with rent of the farm, and allowed a certain sum for improvements, the evidence as to the value thereof being unsatisfactory and conflicting. Held, that the court should have dismissed the cross complaint without attempting to adjust the accounts between cross complainant and deceased, thereby leaving them where they had, by their manner of dealing, placed themselves. *Lightner v. Speck*, 2 Va. Dec. 557.

g. Loans or Advances to Estate.

In some cases where money has been paid for a deceased person, an

action for such money will lie against the personal representative as such; as where money has been paid by a joint surety. *Fitzhugh v. Fitzhugh*, 11 Gratt. 300, 62 Am. Dec. 653.

Where a bill was brought against an administratrix to enforce an agreement to give the complainant certain of the real estate of her intestate, in consideration that he would effect a compromise of certain claims against the estate, it was held that he stood on the same footing as a vendee, and might properly be allowed as damages for the nonperformance of the agreement, in addition to his advances and interest, the commission of ten per cent. for extra trouble in collecting the debts which the law would have allowed her. *Shepherd v. Hammond*, 3 W. Va. 484.

It is error to overrule a demurrer to a petition in equity, by a commissioner to sell real estate, against unpreferred creditors, to recover back payments made by him to them voluntarily, in good faith, and with full knowledge of outstanding preferred claims, to pay which said money is sought to be recovered. *Findlay v. Trigg*, 83 Va. 539, 3 S. E. 142.

An administrator made a verbal promise to an agent employed to collect a debt from the estate, that if the agent would pay the amount to his principal, the administrator would repay him with interest. The agent accordingly paid the principal the debt, and the administrator afterwards refunded to the agent the sum paid with interest. Held, that the payment by the agent was a payment by the administrator for which he was entitled to credit at the date thereof, whatever might be the time the amount was repaid to the agent. *Morrow v. Peyton*, 8 Leigh 54.

h. Note Given by Executrix.

Where an estate is devised to testator's wife for life, and she acts as executrix under the will, a note given by such executrix to a bank creates no

cause of action against the estate. *Whitten v. Bank of Fincastle*, 100 Va. 546, 42 S. E. 309.

i. Promises by Executor or Administrator.

Although it is generally true, that an executor or administrator can not create a new cause of action against the estate, yet he may make a valid promise to pay a debt not barred by the statute of limitations, out of the assets of the estate, upon which a suit may be maintained. *Braxton v. Harrison*, 11 Gratt. 30; *Switzer v. Noffsinger*, 82 Va. 518, 524. See also, *Seig v. Acord*, 21 Gratt. 365; *Smith v. Pattie*, 81 Va. 654.

j. Services Rendered Decedent.

(1) Statement of General Rule.

Whenever compensation is claimed for services rendered near relatives, as a father, brother, or grandfather, and the like, the law will not imply a promise of payment, and no recovery can be had unless an express contract or its equivalent is shown. A moral obligation to pay is not sufficient, but an express promise must be proved, or facts from which such promise can be reasonably inferred must be established by evidence so clear, direct and explicit, as to leave no doubt as to the undertaking and intention of the parties. This is especially so when the party sought to be charged is dead. It must be shown that the deceased intended to and did assume a legal obligation to the plaintiff for such services of such a character that it could be legally enforced against him. Generally, the services of a child, grandchild, or other near relative, are presumed to have been rendered in obedience to the promptings, of affection, and not with a view to compensation. Such presumption, however, may be rebutted by positive and direct evidence to the contrary. *Jackson v. Jackson*, 96 Va. 165, 31 S. E. 78.

(2) Where Express Agreement Exists.

See post, "Agreements to Make Will," IV, H, 5, m, (6).

On 16th of April, 1870, A was taken suddenly and violently ill and at his request X and Y, who were engaged in business with him, left their work and nursed him, he saying to them: "Boys, leave your work and come and nurse me, and I will pay you well for it in my will;" which promise he often repeated to them during his illness, and after his recovery declared "That money can not pay the boys for nursing me." He made his will and bequeathed to them \$1,000 each. He subsequently became angry with them and revoked the bequest to them. After the death of A, X and Y brought separate actions against the executors of A for the amount promised them for their services in nursing A during his illness. Held, that since the contract as laid in the declaration was clearly proved, the only question is as to the amount of compensation, and as to the estimation of this the jury were not restricted to the prices usually paid nurses for their attendance upon the sick. *Kerr v. Kurtz*, 1 Va. Dec. 116.

(3) Services Rendered by Children.

See generally, the title PARENT AND CHILD.

As between parents and an adult child, whenever compensation is claimed in any case by either against the other for services rendered, it must be determined from the particular circumstances of that case, whether the claim should be allowed or not. There can be no fixed rule governing all cases alike. In the absence of direct proof or any express contract the question always is, can it be reasonably inferred, that pecuniary compensation was in the view of the parties at the time, when the services were rendered; and that depends upon all the circumstances of the case, the relation of the parties being one of the circumstances. *Stansbury v. Stansbury*, 20 W. Va. 23.

In 1851, H. and his wife E. entered into an agreement by which they

agreed to a separation, and they united in a deed by which certain real estate and \$900 in money was conveyed to S. for the express use, support and maintenance of the wife, and if she should die before the whole of the \$900 was paid to her, she might by will or gift dispose of the remainder of it as she should think proper. He covenanted that E. might live separate from him, and that he would not claim any property of hers. And E. renounced all claim on him for support, etc., and to his property. This deed was executed by the trustee S. In a short time after making this deed, H. removed to the west, and never returned. He died in 1875. E. lived until 1871, having been helpless for the last year of her life, and unable to do any but very light work for two or three years previous. During this period she was nursed and attended to by her daughter A., who lived with her and attended to her land as well as her own. E. died without disposing of the remainder of the \$900, amounting to \$500 or \$600, which was paid to H.'s administrator. In 1877, A. sued the administrator of H. for compensation for services rendered E. in her lifetime. Held, as between parent and an adult child, whenever compensation is claimed in any case by either against the other for services rendered, or the like, it must be determined from the particular circumstances of that case whether the claim should be allowed or not. There can be no fixed rule governing all cases alike. In the absence of direct proof of any express contract, the question always is, can it be reasonably inferred that pecuniary compensation was in the view of the parties at the time the services were rendered; and that depends upon all the circumstances of the case; the relation of the parties being one. *Harshberger v. Alger*, 31 Gratt. 52.

Son.—An estate was devised to a widow for life or during widowhood, and then to her children. All of the

children lived with the widow on the farm, and the eldest son managed the estate until her death, a period of fifteen years. While thus engaged, he persuaded the widow to buy, out of the funds of the estate, an adjoining tract of land and took the deed to himself. At the death of the widow, the son and another administered on her estate. Held, that though the son was entitled to a reasonable compensation for his service as manager, chargeable against the widow's estate, the statute of limitations barred all recovery for such compensation, except for the five years preceding the death of the widow. *Chancellor v. Ashby*, 2 Pat. & H. 26.

Where a son, who is also the administrator of his father's estate, sues such estate for wages claimed for services rendered before his father's death, he cannot recover unless he proves an express contract, or the facts and circumstances sustained by a preponderance of testimony clearly establish an expectation or intention on the part of his father to compensate him for such services. *Cann v. Cann*, 40 W. Va. 138, 20 S. E. 910.

Where an executor has a claim against the estate of a testator, depending on a quantum meruit only, for services rendered the decedent, his father, during his lifetime, he may exhibit a bill in equity against his coexecutors and legatees, to have such claim established and fixed at a certain sum. In such case, he ought to state the claim with reasonable certainty, by setting forth his own estimate of his services; but, should he fail to do so, his bill ought not to be dismissed, but leave to amend it should be granted on motion. *Baker v. Baker*, 3 Munf. 222.

Son-in-Law.—A charge made by a son-in-law, for nursing his father-in-law, in his last illness, where there was no contract, express or implied, ought not to be allowed. *Williams v. Stonestreet*, 3 Rand. 559.

(4) Unsolicited Services of Friend.

In the absence of an express contract, no promise will be implied by law to pay a lifelong friend and neighbor for unsolicited services as nurse rendered during the last illness. *Teawalt v. Ramey*, 103 Va. 42, 48 S. E. 505.

(5) Services Rendered by Cousin.

Calvin P. and Mollie P. owned adjoining farms, were both unmarried, were cousins, lived together at the house of M. P., eating at the same table and each furnishing supplies therefor, for a period of at least forty years, until the death of C. P., during which time they kept no accounts between them, never made a settlement, neither presented a bill to, nor made a claim against the other; a part of the stock on the farms, they owned in common, and a part separately, and individually; but the stock was fed indiscriminately from the products, and upon both farms; no contract or agreement was made or existed between them for the payment of any board by him, or that either should pay to, or receive from the other anything for services rendered. Held, that the relations existing between the parties, and the circumstances were such as to raise the presumption that all such services were gratuitous and neither expected to make any charge against the other or to pay anything to the other. *Hanly v. Potts*, 52 W. Va. 263, 43 S. E. 218.

(6) Mother—Boarding Children.

A mother's estate will be allowed from the father's estate for her services in boarding their children during her lifetime, although she made no charge therefor. *Cary v. Macon*, 4 Call 605.

(7) Grandfather—Maintaining Grandchildren.

A daughter held the bond of her father, and prior to her death she requested him to keep her children for the debt. This he did until his death, which occurred a number of years after the death of the daughter. The

bond was found among his private papers. It was held, that the father should be allowed a fair compensation for maintaining the children of his daughter. *Hughes v. Patterson*, 91 Va. 664, 22 S. E. 485.

k. Support Furnished Decedent's Family.

In assumpsit against an executor in his individual character for the price of goods sold and delivered to him for the use of his testator's widow and legatees, upon evidence being given of such sale and delivery of a promise by the defendant to pay for goods out of his testator's estate and of assets sufficient for that purpose, the plaintiff may recover although the promise was not in writing. *Collins v. Row*, 10 Leigh 114.

l. Taxes.

See generally, the title TAXATION.

"Taxes upon real estate due at the time of the death of the owner of the land constitute a claim against his estate, and are payable from his personal estate, instead of being merely a lien on the land. Taxes, however, accruing after the death of the owner do not constitute a debt against his estate, but are to be paid by the devisee, heir or purchaser of the land." 8 Am. & Eng. Ency. Law (2d Ed.) 1032. See also, *Breckinridge v. Breckinridge*, 98 Va. 561, 31 S. E. 892.

It is provided in Virginia by statute, Va. Code, 1849, § 67, p. 189; Va. Code, 1887, § 474, that the land of a decedent shall be charged to the estate until it can be properly charged to the heir or devisee, and that while so charged the taxes are payable out of the personal estate. Under this statute it was held that, where an administrator was a party to a suit for the partition of the intestate's land, and the land was not charged for taxation on the land book until after the decree confirming its partition, the administrator should be allowed credit for payment of the taxes which accrued before the decree con-

firmed the partition, but not for those which accrued after the decree. *Dillard v. Dillard*, 77 Va. 820.

A testator devised his estate, real and personal, to his wife for life, but requested her, at her discretion, to make suitable advancements to his children as they became of age or married. He directed that, at the death of his wife, so much of his estate as remained in her hands should be equally divided among his children, taking into consideration advancements made. She kept the property together and managed it for the benefit of herself and children for a number of years, and then the property was divided among the children, on the basis of a partition reported to the court some years before, but never acted on. While the whole was in the possession of the widow, taxes accrued on the property, which were paid by the executor. No objection was made at the time to the payment of the taxes. This suit was brought thirty years afterwards. Held, that under the facts of this case, it was not error to credit the executor by the taxes so paid, and that it will be presumed that what was done was the result of a family arrangement. *Breckinridge v. Breckinridge*, 98 Va. 561, 31 S. E. 892.

If the heirs permit real estate to be returned delinquent for the nonpayment of taxes, and the executors pay the taxes to prevent the loss of the land, they will be entitled, as against the residuary legatees, to credit for the taxes so paid, whether or not the executors, having a naked power to sell, were under a duty to pay such taxes. *Dunn v. Renick*, 33 W. Va. 476, 10 S. E. 810.

Where a written contract for land has been made, and the vendee dies, and the vendor of the land is compelled to pay taxes incurred after the death of the vendee to prevent the sheriff from selling it for delinquent taxes, the heirs and not the administrator of the vendee are bound to refund to the

vendor the taxes so paid. *Creigh v. Boggs*, 19 W. Va. 240.

The state has no lien, under Va. Code, 1873, ch. 126, § 25, on a decedent's estate for taxes collected by him as a tax collector of the state and not accounted for, but only for taxes assessed upon him during his lifetime. *Spillman v. Payne*, 84 Va. 435, 4 S. E. 749.

m. Claims Based on Contracts of Decedent.

(1) In General.

See also, the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2.

"The death of a party to a contract does not extinguish the contract if it is capable of being fulfilled by his representatives, but as a general rule all contractual obligations continue as claims against the estate of the deceased obligor, and this is the rule irrespective of whether that contract be implied or express, or for the payment of money, or the performance of some act not personal." 8 Am. & Eng. Ency. Law (2d Ed.) 1007; *Ferguson v. Wills*, 88 Va. 136, 13 S. E. 392.

Thus, where one contracted with a person since deceased to build a church, the fact that the administrator, shortly after the work was commenced, gave notice not to proceed therewith, and that the estate would not be responsible therefor, was no bar to a recovery for work afterwards done, when the church was completed according to the contract. And the fact that, before proceeding, the contractor secured the guaranty of the church trustees that he should be paid the contract price, and as much in excess of it as the work should cost, and that he then sublet the work to another, did not bar a recovery against the estate on the original contract. *Ferguson v. Wills*, 88 Va. 136, 13 S. E. 392.

(2) Personal Contracts.

Promises of Marriage.—An action for breach of promise of marriage will

not lie against the personal representative of the promisor, either at common law or under the statute, where no special damages are alleged and proved. In such case, the maxim, *actio personalis moritur cum persona* applies. *Grubb v. Sult*, 32 Gratt. 203, 34 Am. Rep. 765; *Flint v. Gilpin*, 29 W. Va. 740, 3 S. E. 33. See also, *Burton v. Mill*, 78 Va. 468, 483.

(3) Joint Contracts.

(a) Common-Law Rule—Prior to 1786.

Upon the death of one or more joint promisors, his estate was, at common law, discharged from liability on the contract and the action survived against the survivor or survivors alone. 8 Am. & Eng. Ency. Law (2d Ed.) 1010; *Atwell v. Milton*, 4 Hen. & M. 253; *Richardson v. Johnson*, 2 Call 527; *Harrison v. Field*, 2 Wash. 136.

Where a joint bond was given before the act of 1786, and after that act went into operation, one of the obligors died, leaving the other, the obligation survived, and the executors of the deceased were exonerated. *Elliott v. Lyell*, 3 Call 268.

The surviving obligor in a joint note, made before the act of 1786, was alone liable in an action at law, nor could the note be set up in equity against the representatives of the deceased obligor, except on the ground of a moral obligation antecedently existing on his part to pay the money. *Chandler v. Hill*, 2 Hen. & M. 124.

(b) Rule in Equity.

Partnership Relations.—See the title PARTNERSHIP.

Although the surviving partner of a mercantile house was alone liable at law to the creditors of the house, yet if the surviving partner proved insolvent, the estate of the deceased partner was liable in equity for the debts of the partnership. *Sale v. Dishman*, 3 Leigh 548. See Va. Code, 1887, § 2885. In this case a quære was raised as to what kind of laches of

the creditor, or dealings between him and the surviving partner, in respect to the debt claimed of the partnership, would suffice to exonerate the estate of the deceased partner from the debt. It seems that the mere delay of the creditor to assert and prosecute his demand against the surviving partner, will not suffice to exonerate the estate of the deceased partner. And there is no analogy between the duty of a creditor in such case to assert and prosecute his claim against the surviving partner, and the due diligence which the assignee of a bond is bound to exert against the obligor, in order to entitle him to recourse against the assignor.

A creditor of a firm obtained a judgment against the surviving partner, who died, and whose administrators exhausted the personal assets in paying other claims. The creditor then filed a bill in equity against the administrators and heirs of the surviving partner, and the representatives of the deceased partner. The bill sought a decree for the sale of lands of which the surviving partner died possessed, some of which belonged to himself and some to the firm; and when the funds from this source should be exhausted, then it sought to charge the representatives of the deceased partner. Held, that equity had jurisdiction of the case and that the representatives of the deceased partner were properly made defendants. *Jackson v. King*, 8 Leigh 689.

It seems that a bill in equity properly lies to subject the estate of a secret partner in trade to the payment of a debt contracted by the ostensible members of the firm. *Cocke v. Upshaw*, 6 Munf. 464.

One of two partners executed bonds in the name of the firm for firm debts. The other partner died solvent. Subsequently the surviving partner, died insolvent, the bonds remaining unpaid. The surety in the bonds was perfectly solvent. The creditor filed a bill against the surety and the representa-

tives of the deceased partners to subject the estate of the solvent partner to the payment of the debts, or to have payment of them from the parties, according to their respective liabilities. Held, that equity was without jurisdiction to entertain such bill, as the creditor had an adequate remedy at law by action on the bonds against the surety. *Linney v. Dare*, 2 Leigh 588.

One of the partners died, and those who survived him and the executors of the decedent conveyed all the effects of the firm in trust to pay the firm debts. The creditor who lent the money then filed a bill in equity against the surviving partners, the executors of the decedent, and the trustee. It was held that, although at law there would be no remedy on the sealed obligation, except against the partner who executed it, yet equity had jurisdiction to correct the mistake, and hold all the partners as much bound as if there were no seal, and that, regarding the debt as a simple contract debt of the firm, the estate of the deceased partner could not be charged, until the insolvency of the surviving partners and the deficiency of the trust subject were first established. *Galt v. Calland*, 7 Leigh 594.

(c) Statutory Liability.

In Virginia and West Virginia it is provided by statute that, "the representative of one bound, with another, either jointly or as a partner, by judgment, bond, note, or otherwise, for the payment of a debt, or the performance or forbearance of an act, or for any other thing, and dying in the lifetime of the latter, may be charged in the same manner, as such representative might have been charged, if those bound jointly or as partners, had been bound severally as well as jointly, otherwise than as partners." Va. Code, 1887, § 2855; W. Va. Code, 1899, ch. 99, § 13, p. 767.

Under this statute, which appeared verbatim in the Va. Code of 1849, ch.

144, § 13, it was held, that where a decedent is largely indebted individually and also as partner, his real estate is equally liable for his partnership debts as for his individual debts. *Ashby v. Porter*, 26 Gratt. 455.

1, Revised Code, ch. 98, § 3.—The former statute concerning joint rights and obligations, 1 Rev. Code, ch. 98, § 3, p. 1859, did not contain the words "or as a partner," appearing in the present statute, Va. Code, 1887, § 2855. While the former statute was in force, a sum of money was lent to a firm, and the firm was charged with it on the partnership books, but the partner with whom the transaction occurred executed by mistake a penal obligation, in the name of the firm, under seal, instead of giving merely a promissory note. One of the partners died, and those who survived him and the executors of the decedent conveyed all the effects of the firm in trust to pay the firm debts. The creditor who lent the money then filed a bill in equity against the surviving partners, the executors of the decedent, and the trustee. It was held that, although at law there would be no remedy on the sealed obligation, except against the partner who executed it, yet equity had jurisdiction to correct the mistake, and hold all the partners as much bound as if there were no seal, and that, regarding the debt as a simple contract debt of the firm, the estate of the deceased partner could not be charged, until the insolvency of the surviving partner and the deficiency of the trust subject were first established. *Galt v. Calland*, 7 Leigh 594.

The statute, 1 Rev. Code, ch. 98, § 3, p. 359, Va. Code, 1887, § 2855, in relation to joint rights and obligations, though it gives an action against the personal representative of a deceased joint obligor, does not affect the principle that the defeat of the remedy against one joint obligor upon a ground not personal to himself, defeats it as to

all the obligors. *Brown v. Johnson*, 13 Gratt. 644.

Partnership Estate.—The proposition that the separate estate of a deceased partner is liable *pari passu* for both his individual and social debts is applied in *Robinson v. Allen*, 85 Va. 721, 8 S. E. 835; *Pettyjohn v. Woodruff*, 86 Va. 478, 10 S. E. 715.

Applicability to Joint Judgments.—Where a joint judgment is obtained against two defendants, and one dies, an action of debt on the judgment lies against the representative of the deceased defendant, the law respecting partitions, joint rights and obligations, 1 Rev. Code 359, being applicable to joint judgments. *Roane v. Drummond*, 6 Rand. 182. In the present statute, Va. Code, 1887, § 2855, joint judgments are expressly mentioned.

Competency of Surviving Obligor as Witness.—And in an action on a joint bond against the personal representative of a deceased obligor, a surviving obligor is an incompetent witness for the defendant. *Brown v. Johnson*, 13 Gratt. 644.

(4) Contracts of Suretyship.

See generally, the title SURETYSHIP.

Exhaustion of Estate of Principal as Condition to Enforcement.—An administrator of a surety having in his hands, as such administrator, bank stock certificates, when the principal debtor becomes insolvent, may, and should, apply, on the debt for which the decedent is bound as surety, the value of the stock and any dividends thereon remaining in his hands. *Van Winkle v. Blackford*, 54 W. Va. 621, 46 S. E. 589.

Before the estate of the surety can be subjected to the payment of the indebtedness, the property of the principal should be first exhausted. But where the bill alleges that the principal has no estate, and the allegation is not denied, but is proven, it is not error to decree at once against the es-

tate of the surety. *Jones v. Degge*, 84 Va. 685, 5 S. E. 799. See also, *Penn v. Ingles*, 82 Va. 65; *Horton v. Bond*, 28 Gratt. 815.

Verbal Agreement to Assume Liability.—Two sons, with their respective fathers as indorsers, executed a note to a bank for \$1,500, to obtain money to start the sons in a partnership business, with the understanding and agreement between themselves, as an inducement thereto, that each son and respective father was to be responsible for one-half of such note, and not responsible for the other half, except to the bank. Before the note matured, the business, under the management of one of the sons, proved a failure. The other son then took charge of it and wound it up, realizing only \$200 out of the social assets. This amount he applied on the note, leaving a balance of \$1,300, which he paid out of private funds. The other son being hopelessly insolvent, the father of the latter acknowledged his liability therefor, and agreed to refund one-half of such balance. Dying without doing so, the paying son presented the same against his estate. Held, that it was properly audited against such estate, and that such agreement could be established by parol evidence, and was not subject to the statute of frauds. *Faulkner v. Thomas*, 48 W. Va. 148, 35 S. E. 913.

Omission to Prove Claim as Affecting Right.—The plaintiff, as creditor of the decedent, proved a debt against the estate, but forebore to prove a debt for which the decedent was surety, not wishing to press the principal. Twenty-five years after the latter debt was due, the principal having died insolvent, the plaintiff petitioned to be made a party to the original creditors' bill against the decedent, explaining why the debt had not been pressed, and stating that sufficient assets of the estate to pay the debt remained in the hands of the court. The debt was not barred by limitation, the war period and stay law

being deducted. Held, that, in the absence of any contract sufficient to discharge the surety, and no notice to proceed against the principal having been given, the petitioner was entitled to the relief sought. *Coleman v. Stone*, 85 Va. 386, 7 S. E. 241.

Where Obligation Discharged by Death of Surety.—Where a bond is made joint, without fraud or mistake, equity will not charge the executor of the surety, who was discharged at law by his death, in the lifetime of the principal. *Harrison v. Field*, 2 Wash. 136. See Va. Code, 1887, § 2855.

Debt Paid by Cosurety—Amount for Which He May Prove.—The liabilities of the estate of a decedent, and the rights of his creditors, are fixed by his death. If at that time a creditor has the right to prove against his estate a debt for which the decedent and another are bound as sureties, and subsequently the cosurety pays the debt, he is substituted to the right of the creditor, and may prove the whole debt against the estate of the decedent, and receive dividends thereon until one-half of the debt is paid, although the estate of the decedent will not pay his debts in full. *Pace v. Pace*, 95 Va. 792, 30 S. E. 361.

(5) Covenants and Warranties.

See generally, the titles COVENANTS, vol. 3, p. 741; WARRANTY.

(a) Relating to Personalty.

An action of covenant by the vendee of a slave, upon a covenant of warranty, binding the vendor and his heirs, will lie against the executors, although they are not named in the covenant of warranty. *Lee v. Cooke*, 1 Wash. 306.

(b) Affecting Realty.

An action of covenant, upon a covenant for the quiet enjoyment of real estate and that the premises are clear of all incumbrances will lie against the executors, although they are not expressly bound. *Harrison v. Sampson*, 2 Wash. 155.

In a deed of bargain and sale of

lands, the words "the said T. doth hereby covenant, for himself and his heirs, to and with the said B. that he the said T. will warrant and forever defend to the said B. his heirs and assigns, the title to the said parcels of land against all persons whatever," import a personal covenant of warranty, for breach of which, by eviction under judgment in ejectment, an action will lie against administrator of the bargainor. *Tabb v. Binford*, 4 Leigh 132, 26 Am. Dec. 317.

(c) To Do Collateral Thing.

An executor who prefers a claim against the state of his testator for breach of a covenant to do a collateral thing has the burden of proof to establish the due execution of the covenant, the breach by the testator, and the amount he is entitled to recover by reason of such breach. *Scott v. Porter*, 99 Va. 553, 39 S. E. 220.

(6) Agreements to Make Will.

(a) Validity of Agreement.

One may contract to make a provision for another by will. *Swann v. Houseman*, 90 Va. 816, 20 S. E. 830.

A person may by an oral contract bind himself to dispose of his estate by will in a particular way, and such contract will be specifically enforced in equity, provided the requirements of the statute of frauds are complied with. *Hale v. Hale*, 90 Va. 728, 19 S. E. 739. See also, Va. Code, 1887, § 2840. See the title SPECIFIC PERFORMANCE.

A promise to leave a support at the death of the promisor in consideration of services during the balance of her life to be performed by the promisee is not within the statute, Va. Code, 1887, § 2840, cl. 7, prohibiting an action upon a promise not to be performed within a year, unless in writing. *Thomas v. Armstrong*, 86 Va. 323, 10 S. E. 6.

An executor filed his bill to have his testator's will construed, and submitted a writing executed by the lat-

ter, to wit: "\$1,000. This article is to signify that if Elliott Smith survive me, I bequeath him one thousand dollars of my property, free from any lien or incumbrance. To the above bequest I herewith set my hand and seal this first day of June, 1888. (Signed) Henry E. Smith. [Seal.]" Afterwards the testator made a will, dated December 2, 1889, disposing of his entire estate, and containing no reference to said writing or to Elliott Smith, which was duly probated. Held, said writing was not a contract, but was a will, and was revoked by the subsequent testament. *Swann v. Housman*, 90 Va. 816, 20 S. E. 830.

(b) Enforcement.

aa. Agreement as Constituting Enforceable Right.

"It is * * * well settled, both in England and in this country, that while no action lies for services rendered in expectation of a legacy merely, without any contract, express or implied, yet that where there is a promise, founded upon valuable consideration, that provision will be made for the promisee by the promisor in his will, and the latter dies without making such provision, an action does lie, though the proof * * * must be clear and convincing." *Rice v. Hartman*, 84 Va. 251, 4 S. E. 621.

bb. Who May Enforce.

It was understood and agreed between a husband and wife, who had no children, that the survivor should have all his property for life and at his or her death it should be equally divided between his and her heirs and next of kin. The husband made his will by which he gave all his property real and personal to his wife absolutely. He died during her lifetime, and she died the following day without having made a will. Held, that equity would not enforce the agreement at the suit of the heirs of the husband against the heirs and next of kin of the wife. *Sprinkle v. Hayworth*, 26 Gratt. 384.

cc. Mode of Enforcement.

Specific Performance.—Strictly speaking, an agreement to dispose of property by will can not be specifically enforced, not in the lifetime of the party, because all testamentary papers are from their nature revocable; nor after his death, because it is no longer possible for him to make a will, yet courts of equity can do what is equivalent to a specific performance of such agreement by compelling those upon whom the legal title has descended to convey or deliver the property in accordance with its terms, upon the ground that it is charged with a trust in the hands of the heir at law, devisee, personal representatives, or purchaser, with notice of the agreement. *Burdine v. Burdine*, 98 Va. 515, 36 S. E. 992.

A court of equity will compel the conveyance of the legal title of land claimed under a parol gift, supported by a meritorious consideration, and by reason of which the donee has been induced to alter his condition and make expenditures of money for valuable improvements on the land. *Burkholder v. Ludlam*, 30 Gratt. 255, 32 Am. Rep. 668; *Stokes v. Oliver*, 76 Va. 72; *Halsey v. Peters*, 79 Va. 60. See also, *Fishburne v. Ferguson*, 85 Va. 321, 7 S. E. 361. But such parol gift must be definite in its terms and clearly proved. *Griggsby v. Osborn*, 82 Va. 371.

Where a father agreed to devise land to his son in consideration that the son live with him upon the land and take care of him, and instead, the son, after taking care of him for some time, left the land and entered the army, where he was killed, it was held, that specific performance would not be decreed. *Cox v. Cox*, 26 Gratt. 305.

A court of equity will enforce a verbal promise made by a father to a son, in consideration of love and affection, to give him land, and make him a deed therefor, if the son, induced by such promise has taken possession of the land and expended on it labor and money in improvements. But if, when

such gift was made, the father required the son, in a given time, to put specified improvements on the land, such requirements would be regarded as a condition precedent to the right of the son to demand a deed; and the son, before he could acquire such deed, would have to prove that he put on the land, in the time specified, the specified improvements. *Frame v. Frame*, 32 W. Va. 463, 9 S. E. 901.

Part Performance as Affecting.—An oral agreement between two sisters to make mutual wills can not be specifically enforced, after the death of one of them, on the ground of part performance, where there has been no further performance than the making and preserving of the wills, and the will of the decedent has been revoked by her marriage after its execution. *Hale v. Hale*, 90 Va. 728, 19 S. E. 739.

dd. Evidence.

Sufficiency.—The evidence of a contract to make a provision for another by will, must be clear and convincing. *Swann v. Housman*, 90 Va. 816, 20 S. E. 830; *Kerr v. Kurtz*, 1 Va. Dec. 116.

To warrant a court in decreeing specific performance of an agreement to devise land, the contract must be certain and must be clearly and satisfactorily proved. *Sprinkle v. Hayworth*, 26 Gratt. 384; *Cox v. Cox*, 26 Gratt. 305.

A court of equity will require the most convincing proof to sustain a claim that deceased agreed to make a will in favor of claimant. *Miller v. Miller*, 2 Va. Dec. 97; *Rice v. Hartman*, 84 Va. 251, 4 S. E. 621; *Swann v. Housman*, 90 Va. 816, 20 S. E. 830.

Although an agreement to devise and bequeath land and personal property, in consideration of personal services to be rendered, is signed only by the intended testator, yet, if such services have been fully rendered, the agreement is binding on the party who has signed it, and will be enforced against him. *Burdine v. Burdine*, 98 Va. 515, 36 S. E. 992.

cc. Witnesses.

Widow of Testator.—The widow of the testator is not a competent witness to prove such contract and to establish the debt against the estate of her husband. *Swann v. Housman*, 90 Va. 816, 20 S. E. 830.

(c) Discharge or Performance.

A contract by which the decedent promised to "assist" the complainant "now," and, after his death, to leave him and his family a sufficient amount to justify them in returning from a distant state to live with him, is fulfilled by the decedent's supporting them for eight years, and leaving them at his death a small property; and evidence of these promises and facts is not sufficient to entitle the complainant to a further recovery from the estate of the decedent. *Rice v. Hartman*, 84 Va. 251, 4 S. E. 621.

(7) Failure of Consideration.

See generally, the title **CONTRACTS**, vol. 3, p. 307.

A husband and wife, in consideration of \$1,000, sold all their interest in any property of which the wife's father might die possessed. Upon the death of the wife's father, the purchaser entered into possession of the wife's share; but, upon the husband's death, the wife filed a bill for the partition of her father's estate, claiming the property of the purchaser on the ground that the deed was a nullity as to her, and obtained a decree in her favor. Held, that the purchaser might bring *assumpsit* against the husband's estate to recover the \$1,000, the consideration for its payment had failed. *Garber v. Armentrout*, 32 Gratt. 235.

6. Order of Payment.**a. Conflict of Laws.**

A decedent, domiciled at Norfolk, Va., there contracted a debt by bond to a certain party. He was also indebted to the Union Bank of Georgetown, D. C., on simple contract. He died intestate in Bedford, Pa., leaving personal estate in the city of Wash-

ington, D. C., of which administration was there granted. By the law of Virginia, bond debts were given priority over simple contract debts; but by the law of Maryland, which was in force in the district, no priority was given to bond debts. It was held that the effects of the intestate were to be distributed among his creditors according to the law of Maryland, and not according to the law of Virginia. *Smith v. Union Bank*, 5 Pet. (U. S.) 518.

b. Under Virginia Statute.**(1) Funeral Expenses.**

In Virginia and West Virginia, the funeral expenses and the costs of administration are placed in the same class. These debts are given preference over all other classes of obligations. Va. Code, 1887, § 2660; W. Va. Code, 1899, ch. 85, § 25, p. 733.

(2) Costs of Administration.

The statute places the costs of administration and funeral expenses in the same class as to order of payment of debts of decedents, and these debts are given preference over all other classes of obligations. Va. Code (1887), § 2660, as amended by acts, 1895-96, p. 289.

Executors and administrators ought to be allowed in their accounts all reasonable charges and disbursements for the benefit of the estate they represent and a reasonable recompense for their personal trouble, in preference to the claim of any creditor of the estate. *Nimmo v. Com.*, 4 Hen. & M. 57, 4 Am. Dec. 488.

(3) Claims of Physicians and Accounts of Druggists.

Next in order of priority the statute places claims of physicians not exceeding fifty dollars, for services rendered during the last illness of the decedent, and accounts of druggist not exceeding the same amount for articles furnished during the same period. Va. Code (1887), § 2660, as amended by acts, 1895-96, p. 289.

(4) Expenses of Last Illness.

In Virginia by statute, the expenses of the last illness rank next after the funeral expenses, and costs of administration. Va. Code, 1887, § 2660, as amended by acts, 1895-96, p. 289.

(5) Debts Due Federal and State Governments.

Next in order of payment are debts due the United States and state of Virginia. Va. Code (1887), § 2660, as amended by acts, 1895-96, p. 289.

What Constitutes Such a Public Debt.—To constitute a debt a public debt, it should, properly, be a debt due the government in its sovereign capacity. *Nimmo v. Com.*, 4 Hen. & M. 57. See also, *Leake v. Ferguson*, 2 Gratt. 419.

In *King v. Ashley*, 5 Leigh 408, it was left a query, whether the United States have any priority over an individual creditor for satisfaction out of the lands of a deceased debtor. And if not, whether the United States, having got the first decree in the federal court, or the individual creditor who brought suit first in the state court, shall have preference, or whether the real assets should be rateably distributed.

The lien of the commonwealth, as purchaser at a sale for delinquent taxes accruing on realty after the death of the owner is superior to the rights of creditors of the owner whose claims arose prior to his death, and were reduced to judgment after that event, and before the taxes were assessed. *Com. v. Ashlin*, 95 Va. 145, 28 S. E. 177.

(6) Taxes and Levies.

See generally, the title TAXATION.

After debts due the government, state or federal, the statute gives priority to taxes and levies assessed upon the decedent previous to his death. Va. Code (1887), § 2660, as amended by acts, 1895-96, p. 289.

The preference in favor of the state is only given to taxes assessed against the decedent in his lifetime. The state

has no priority, under statute, against a decedent's estate for taxes collected by the decedent, as a collector of taxes, and not accounted for. *Spillman v. Payne*, 84 Va. 435, 4 S. E. 749.

(7) Fiduciary Debts.

Next in order of priority are debts due as trustee for persons under disabilities, as receiver or commissioner under decree of a court of this state, as personal representative, guardian, or committee, where the qualification was in this state, in which class of debts shall be included a debt for money received by husband acting as such fiduciary in right of his wife. Va. Code, 1887, § 2660, as amended by acts, 1895-96, p. 289.

The statute preferring fiduciary debts is only prospective in its operation, and does not affect the distribution of the estate of a decedent who died before the passage of the act. *Price v. Harrison*, 31 Gratt. 114.

Thus a trustee under a will for the benefit of infant children died in 1865, indebted to the trust, and his executor paid the other trustee in the will a portion of the debt. Upon settlement of the estate of the deceased trustee in 1877, it appeared that he was largely indebted for more than his assets. It was held that, under the statute (Va. Code, 1860, ch. 131, § 25), in force at the time of the trustee's death, his debt as trustee was not embraced in the third class of creditors provided for in that act; but must be placed in the fourth class, with the general creditors; and that his executor was not entitled to a credit in his administration account for the amount of the trust debt he had paid. In this case it was also held that the act of July, 1870, Va. Code, 1873, ch. 126, § 25, which amended the former law by inserting in the third class "debts of trustee for persons under disabilities," was only prospective in its operation, and did not authorize the placing of the decedent's debt as trustee in the third class, though the

estate was not distributed until this last act went into operation. *Price v. Harrison*, 31 Gratt. 114.

Moneys collected by deputies of a deceased insolvent sheriff on the tax bills due to the state placed in their hands, and which they acknowledged and paid over, as the state's money, to the personal administrator of such deceased sheriff, to be paid through him into the treasury of the state, were properly paid over, by the administrator to the state, to the exclusion of the other creditors of the decedent, in accordance with the doctrine of "ear-marking." *Spillman v. Payne*, 84 Va. 435, 4 S. E. 749.

A statute giving preference to debts due by a decedent as executor applies not only to debts of decedents who were appointed executors by the state giving such preference, but also to debts due by a foreign executor. *Tunstall v. Pollard*, 11 Leigh 1.

An English executor collected the assets of his testator's estate in England, and brought them with him to Virginia, where he died, having never qualified in Virginia. Held, that the debt due his testator's estate was entitled, in the administration of his own estate, to priority over all his other debts. *Tunstall v. Pollard*, 11 Leigh 1.

Where the husband of an executrix administered the estate as executor in his wife's right, wasted the assets, and died, leaving the executrix still surviving him, it was held, that the waste committed by the husband during the coverture did not constitute a debt due from him to the testator's estate, which was entitled to preference in the administration of his own estate over his own proper debts, under the statute, 1 Rev. Va. Code, ch. 104, § 60. *Henrico Justices v. Turner*, 6 Leigh 116. See, however, Va. Code, 1887, § 2660.

The statute, Va. Code, 1860, ch. 131, § 25, preferring debts due as "personal representative, guardian, or committee," did not include a debt due as trustee of infant cestuis que trustent. *Price*

v. Harrison, 31 Gratt. 114. See, however, Va. Code, 1887, § 2660.

A guardian had a settlement with his ward upon the ward's coming of age, and, being found indebted on his account as guardian in the sum of \$3,000, he executed to the ward four bonds, each for \$750, payable in one, two, three and four years, with interest. The guardian paid the interest during his life, and a part of the principal, and was up to the war able to pay the whole. Held, that the giving and taking of these bonds was not a novation of the debt, but the debt due from the guardian to the ward continued to be a fiduciary debt and entitled to rank as such in the administration of the guardian's estate. *Smith v. Blackwell*, 31 Gratt. 291. See also, *Hamlin v. Atkinson*, 6 Rand. 574; *Yerby v. Lynch*, 3 Gratt. 460.

The statute of 1705, ch. 33 § 13, giving preference to debts due from deceased executors to their testator's estate, in the administration of the estates of such executors, was not repealed by the statute of 1748, ch. 4, § 13, notwithstanding the general repealing clause therein contained, or by the statute of 1785, ch. 61, § 50, or by the revised statute of 1792; the statutes subsequent to that of 1705 containing nothing inconsistent with it and being only cumulative. *Tunstall v. Pollard*, 11 Leigh 1.

In a suit for the administration of a decedent's estate, the commissioner classified the debt of J. among the general creditors of the decedent, and a decree was entered confirming the report and distributing a fund in court pro rata among the creditors. There were several other decrees for accounts of further debts of the decedent, and still a fund in court to be distributed, when J. made himself a defendant in the suit and filed his petition insisting that his was a fiduciary debt. Held, that the decree confirming the report was an interlocutory decree, and J. was not concluded from setting up his claim

as a fiduciary creditor of the estate. *Smith v. Blackwell*, 31 Gratt. 291.

What Constitutes.—A man marries a feme executrix or administratrix, and being so executor or administrator in his wife's right, administers the estate and wastes the assets of her testator or intestate, and then dies, leaving the feme executrix or administratrix him surviving. Held, the waste committed by the husband during the coverture, does not constitute a debt due from him to the testator's estate, which is entitled to preference in the administration of his own estate, over his own proper debts, under the statute, 1 Rev. Code, ch. 104, § 60. *Dissentiente. Henrico Justices v. Turner*, 6 Leigh 116.

In 1834, A died, having first executed his last will by which he devised his whole estate to his wife, B, during her life, with power to make advancements to her children, X, Y and other children at her death and to dispose of the residue among her children by will. She accordingly did this, and Y qualified as executor of her estate. Subsequently, Y died after making a will with Z as his executor. In 1857, X, by her next friend, filed her bill against Z to have her interest in her mother's estate ascertained and settled, through a trustee, on herself and her children, free from the debts or control of her husband. In 1858, a decree was rendered in that suit, ascertaining the amount due to X to be \$2,547.22, with interest on \$2,164.64. Although there was a sufficiency of assets in the hands of the executor at the time of the decree it was not paid. In 1871, suit was brought by X to have her claim settled by Z and his sureties on his executorial bond. Held, that the circuit court did not err in holding the claim of X to be a fiduciary demand, entitled to priority of payment out of the estate of Y. It was a claim to an equitable settlement on her and her children, out of her share of the estate of her mother, B, in the lands of the said Y,

as executor of B. *Imboden v. Arnall*, 1 Va. Dec. 47.

(8) "All Other Demands" Excepting Voluntary Obligations.

Following debts due in a fiduciary capacity, the statute gives priority to all other demands except voluntary obligations. Va. Code (1887), § 2660, as amended by acts, 1895-96, p. 289.

(9) Voluntary Obligations.

By special provision of the statute, voluntary obligations are postponed until the payment of all other demands against the estate of a decedent. Va. Code (1887), § 2660, as amended by acts 1895-96, p. 289.

c. Under West Virginia Statute.

(1) Funeral Expenses.

The funeral expenses and costs of administration are placed in the same class, and are given preference over all other classes of obligations. W. Va. Code (1899), ch. 85, § 25, p. 733.

(2) Costs of Administration.

The statute ranks the costs of administration with funeral expenses, and these debts are given preference over all other classes of obligations. W. Va. Code (1899), ch. 85, § 25, p. 733.

(3) Debt Due Federal Government.

Next in order after the payment of the funeral expenses and charges of administration if the assets are not sufficient for the satisfaction of all demands they must be applied to debts due the United States. W. Va. Code, 1899, ch. 85, § 25, p. 733.

(4) Taxes and Levies.

See generally, the title TAXATION.

Taxes and levies assessed upon the decedent previous to his death are next in order of priority. W. Va. Code, 1899, ch. 85, § 25, p. 733.

(5) Fiduciary Debts.

Next in order of priority after taxes and levies are debts due as personal representative, guardian or committee, where the qualification was in this state, in which debts shall be included a debt for money received by a hus-

band acting as such fiduciary in right of his wife. W. Va. Code, 1899, ch. 85, § 25, p. 733. See ante, "Fiduciary Debts," IV, H, 6, b, (7).

There is no priority given by the statute to a debt due as administrator over a lien created by judgment in the lifetime of the judgment debtor, who is also the administrator. *Alderson v. Henderson*, 5 W. Va. 182.

(6) "All Other Demands Rateably," Except Voluntary Obligations.

The next in order of priority are all other demands rateably, excepting voluntary obligations. W. Va. Code, 1899, ch. 85, § 25, p. 733.

(7) Voluntary Obligations.

Voluntary obligations are the last of decedent's debts to be discharged. W. Va. Code, 1899, ch. 85, § 25, p. 733.

d. Specialty Debts.

A mere recital, in a deed of trust, that the cestuis que trustent are liable as indorsers for the maker of the deed, and that he is willing to indemnify them from all loss in consequence of their becoming indorsers, by conveying property for that purpose, was held not to entitle the indorsers to rank as specialty creditors in the administration of the personal assets of the maker. *Powell v. White*, 11 Leigh 309. Under the present statute, debts of record, of specialty, and by simple contract, are all brought into one class. Va. Code, 1887, § 2660; W. Va. Code, 1899, ch. 85, § 25, p. 733. See also, post, "Retainer," IV, H, 6, g.

Absence of Notice.—In *Mayo v. Bentley*, 4 Call 528, it was held, that an administrator who had no notice of a specialty debt might pay or confess judgment to a simple contract creditor. Under the present statute, these debts are brought into the same class. Va. Code, 1887, § 2660; W. Va. Code, 1899, ch. 85, § 25, p. 733. See post, "Claims Constituting Lien on Realty," IV, H, 6, e.

Quære—if an executor die indebted to the estate of his testator, without

any judgment or decree against him for the balance due; and his executor, without notice of such debt, apply the assets of his estate to the payment of debts of inferior dignity, is he guilty of a devastavit? *Boyd v. Kaufmans*, 6 Munf. 45. See also, Rev. Code, 1819, ch. 103, § 60.

e. Claims Constituting Liens on Realty.

Priority Over All Classes of Debts.

—A judgment lien, obtained in the lifetime of a decedent and which attached during his life to real estate, of which he died seized and possessed, has priority over the funeral expenses of said decedent so far as regards the disposition of the proceeds of the real estate upon which the lien has attached. The court feels warranted in holding that even at common law a lien upon personal property, obtained in the lifetime of a decedent, has superiority over a claim for the payment of funeral expenses out of that property; and this is true although by the death of the decedent such personal property comes into the hands of the personal representative. The latter takes the property cum onere, and has no greater rights therein than his decedent. Chapters 119 and 120 of the Code of 1887 are codified enactments of the common law for administering the assets, real and personal, of deceased persons, with such innovations and amendments as the legislature has thought wise to engraft upon the law of the commonwealth. Construing these chapters in this light, it is clear that the liens obtained in the lifetime of a decedent, whether upon his real or personal property, are paramount to all other claims whatsoever, attaching thereon after his death. *Wood v. Wood*, 5 Va. Law Reg. 395.

Notice to Executor.—An executor must at his peril take notice of a judgment against his testator, in whatever court it may have been rendered; and if he exhausts the assets by paying debts of inferior dignity, he must sat-

isfy such judgment *de bonis propriis*. *Nimmo v. Com.*, 4 Hen. & M. 57, 4 Am. Dec. 488; *Mayo v. Bentley*, 4 Call 528. Under the present statute, debts of record, of specialty, and by simple contract, are all brought into one class. Va. Code, 1887, § 2660; W. Va. Code, 1899, ch. 85, § 25, p. 733.

Over Simple Contract Debts.—A judgment obtained during the life of an intestate is a lien upon his lands in the hands of his heirs for the payment thereof, and was held to be entitled to priority of payment out of the proceeds of the sale thereof over a simple contract creditor, who acquired no equal or superior lien for his debt upon the realty during the life of the debtor. *Laidley v. Kline*, 8 W. Va. 218.

Over Debt Due as Administrator.—There is no priority given by statute to a debt due as administrator, over a lien created by judgment in the lifetime of the judgment debtor, who is also the administrator. *Alderson v. Henderson*, 5 W. Va. 182.

Judgment against Administrator.—A judgment recovered by a creditor against an administrator is not a lien on the realty of the intestate. *Woodyard v. Polsley*, 14 W. Va. 211; *Laidley v. Kline*, 8 W. Va. 218.

Authority of Commissioner to Go behind Judgment.—A commissioner appointed to ascertain the debts of a decedent, and their order of priority, has no authority to go behind a judgment rendered against the decedent in his lifetime; and since acts, Va. 1865-66, ch. 171, §§ 1, 2, provide for setting up the fact of a confederate transaction only as a defense to a suit while pending, so as to reduce the judgment to be rendered, the action of the commissioner in scaling the judgment as a confederate transaction will not affect the judgment creditor, who was not a party to and had no notice of the proceedings. *Marshall v. Cheatham*, 88 Va. 31, 13 S. E. 308.

f. Debts Due from Deceased Executor to Testator's Estate.

The statute of 1705, ch. 33, § 13, giving preference to debts due from deceased executors to their testator's estates, in the administration of the estates of such executors, was not repealed by the statute of 1748, ch. 4, § 13, notwithstanding the general repealing clause therein contained, or by the statute of 1785, ch. 61, § 50, or by the Revised Statutes of 1792, in *pari materia*; those statutes subsequent to that of 1705, containing nothing inconsistent with it, and being only cumulative. *Tunstall v. Pollard*, 11 Leigh 1.

g. Retainer.

The right of retainer is given only to the executor or administrator regularly appointed and qualified. *Shields v. Anderson*, 3 Leigh 729. See post, "Executors De Son Tort," VI.

Sureties in a bond, who pay it off after the death of the principal, are entitled to rank as specialty creditors of the principal, and if they be administrators of his estate, may retain whatever they pay on account of such suretyship, out of the assets that come to their hands as administrators, against other specialty creditors. *Powell v. White*, 11 Leigh 309. The case of *Copis v. Middleton*, 1 Turn. & Russ. 224 and *Jones v. Davids*, 4 Russ. 277, so far as they conflict with this doctrine, disapproved.

The opinion of Parker, J., in the court below, that after the death of an administrator, a debt due to him from the decedent should be paid out of assets collected by the administrator *de bonis non*, in preference, to claims of other creditors of equal dignity, examined by Tucker, P., and disapproved. *Powell v. White*, 11 Leigh 309.

Where the claim of an appellee creditor of a decedent was determined by the appellate court to be a debt by simple contract only, the administrator had a right, as against such creditor, to retain the amount of his own sim-

ple contract demand against the testator. *Shearman v. Christian*, 9 Leigh 571. See Va. Code, 1887, § 2661, providing that creditors are to be paid in the order of their classification, those of a class to be paid rateably when not enough to pay them in full.

An administrator is not entitled to retain for his debt due by simple contract, as against bonds with collateral conditions creating contingent liabilities, which may never occur before the breach of such condition, although he has no notice of such contingent liability for eight years after his qualification as administrator, and the breach of the condition is not ascertained for eleven years after his qualification. *Cookus v. Peyton*, 1 Gratt. 431. See Va. Code, 1887, §§ 2660, 2661.

The vendors of land gave the vendee a bond of indemnity, with surety, against an outstanding lien in the land, and thereupon the vendee paid a part of the purchase price. The vendee was obliged to pay a large sum to discharge the lien, and, upon the death of the surety, was appointed administrator of his estate. One of the principal obligors in the indemnifying bond left the state, the other became insolvent, and the vendors recovered judgment against the vendee for the balance of the purchase money. Held, that, as against the debts of the surety of equal and inferior dignity to that of the indemnifying bond, the vendee might retrain the assets as satisfaction pro tanto of his claim on the indemnifying bond, and, as administrator of the surety, might retain in his hands the amount due from him personally on the judgment of the vendors, in part satisfaction of the claim in favor of the surety's estate against the vendors, his principals in the bond of indemnity. *Shores v. Wares*, 1 Rob. 1. See Va. Code, 1887, §§ 2660, 2661.

Where a surviving partner is the administrator of a deceased partner, he is entitled to retain out of the separate assets in hands, against separate claims

of no higher dignity, on account of all debts for which he is entitled to share the separate estate with the separate creditors. *Morris v. Morris*, 4 Gratt. 293. See Va. Code, 1887, §§ 2660, 2661.

Where the same person is the personal representative both of the creditors and the debtor, he may retain out of the effects of which he is possessed as the representative of the debtor to satisfy the debts due to him as the representative of the creditor. *Green v. Thompson*, 84 Va. 376, 5 S. E. 507. See *Caskie v. Harrison*, 76 Va. 85; *Harvey v. Steptoe*, 17 Gratt. 289.

An administrator d. b. n., who was also administrator of the estate of the former administrator, settled the accounts of the latter, by which settlement it appeared that there was due his estate a large sum of money for advances made to the heirs. He then transferred or assigned to himself, as administrator, a bond of the first intestate's estate, in payment of the amount thus ascertained to be due. Held, that, as he represented both the debtor and creditor estates, he could apply the funds of the former in payment of a debt due the latter, and could therefore assign to himself a chose in action of the debtor estate for the same purpose, and account to the debtor estate as so much cash administered. *Green v. Thompson*, 84 Va. 376, 5 S. E. 507.

h. Partnership Debts.

See generally, the title PARTNERSHIP.

Where a party who is a member of an insolvent partnership is indebted on his individual account to different parties, and dies, the social assets are applicable first to the social debts, and, if insufficient, the social creditors come in as general creditors *pari passu* with separate creditors of the same class upon the separate estate of the deceased partner. *Freeport Stone Co. v. Carey*, 42 W. Va. 276, 25 S. E. 183; *Pettyjohn v. Woodruff*, 86 Va. 478, 10 S. E. 715. See also, *Robinson v. Al-*

len, 85 Va. 721, 8 S. E. 835; *Ashby v. Porter*, 26 Gratt. 455; *Morris v. Morris*, 4 Gratt. 293.

In *Moon v. Pasteur*, 4 Leigh 35, it was held, that a debt due by recognition of, special bail, is of higher dignity than a debt due by specialty, and should have preference accordingly in the administration of the assets of a decedent. But under the statute, debts of record, of specialty, and by simple contract, are all brought into one class. Va. Code, 1887, § 2660; W. Va. Code, 1889, ch. 85, § 25, p. 733.

A partnership creditor, who has acquired a lien upon the individual assets of the deceased partner is entitled to priority over individual creditors to the extent of his lien. *Straus v. Kerngood*, 21 Gratt. 584.

Two copartners entered into an agreement by which one of them was to take the entire assets of the firm, and pay off the firm debts, discharging the other from all liability, and to hold the surplus as his own. Upon the death of the purchasing partner, it was held that the outgoing partner could compel the part of the decedent's estate which belonged to the firm to be first applied to the payment of the firm debts. *Shackelford v. Shackelford*, 32 Gratt. 481.

In *Morris v. Morris*, 4 Gratt. 293, the court did not pass upon the question (since decided in the cases above set out) as to whether a joint or partnership creditor is entitled to share in the separate estate of his debtor with the separate creditors of such debtor, but it was held that where a debtor partner by his will subjects his real estate to the payment of his debts, the partnership creditor is entitled to share with the separate creditors in such fund. In this case it was also held that where two partners give their joint and several bond to a creditor of the firm for a partnership debt, the creditor is entitled to share with the separate creditors in the separate estate of the deceased partner.

In *Robinson v. Allen*, 85 Va. 721, 8 S. E. 835, it was held that, where the assets of the estate of a deceased partner are not sufficient to pay all the debts of the estate in full, the statute, Va. Code, 1887, § 2885, which makes the representative of a deceased partner liable for the firm debts to the same extent that he would have been if the debts had been contracted by the partners severally as well as jointly, does not affect the order in which such assets should be applied to the payment of debts under Va. Code, 1887, § 2660. See also, *Ashby v. Porter*, 26 Gratt. 455.

In *Pettijohn v. Woodruff*, 86 Va. 478, 10 S. E. 715, *Fauntleroy, J.*, thus states the rule in Virginia for the application of the social and separate assets as between the social and separate creditors: "Whatever may have been the rule in other states, independently of statute law, the law of Virginia, is, that the legal effect of the partnership is, to set apart or dedicate the social assets as a fund for the payment of the social debts, for the mutual protection of the partners inter se (subject to the right of the partners, while all alive, by consent, to vary that dedication, as in *Shackelford v. Shackelford*, 32 Gratt. 481), and for any unpaid balance due them the social creditors come in as general creditors, *pari passu*, with the separate creditors of the same class, upon the separate estate of the deceased partner. This principle has the sanction of the deliberate and unanimous decision of this court in *Ashby v. Porter*, 26 Gratt. 465, and an implicit legislative adoption of § 2855, Code of 1887, taken, word for word, from § 13, ch. 144, Code of 1849, with the construction which it had received by this court, and that construction has been followed and reaffirmed by this court in the case of *Robinson v. Allen*, 85 Va. 721, 8 S. E. 835."

i. Debt Due Bank in Which Decedent Has Deposit.

A having contracted a debt to a

bank, by note payable sixty days after date discounted by the bank for his accommodation, dies before the note comes to maturity, having on deposit in the bank, at the time of his death, a sum of money exceeding the amount of the note. Held, that in case A's estate prove insolvent, the bank has a right, in equity, to retain the amount of his note out of the money it held for him on deposit, whether there be debts of A of superior dignity to the debt he owed the bank, or not; equity, in such case, regarding the bank as debtor to A only for the excess of his money on deposit above the contents of his note. *Dubitante, Brooke, J.*, if it appeared, that the decedent's estate owed debts of superior dignity. *Ford v. Thornton*, 3 Leigh 695.

j. Widow's Rights.

See generally, the titles DOWER, vol. 4, p. 782; HUSBAND AND WIFE; WILLS.

The widow's rights, if any, in the assets of a testator's estate, must be determined before the assets are decreed to the residuary legatees. *Garland v. Garland*, 2 Va. Dec. 351.

An intestate's widow filed a bill for the distribution of his personal estate against the administrator and his sureties, alleging that the administrator had left the state, and making the agent of the administrator a party. The widow stated in her bill that she understood that the administrator had left funds in the hands of his agent for the payment of his debts. Upon the death of the agent, the bill was revived against his executrix, and it appeared, from her answer, that whether there were funds of the administrator in her hands to which the widow was entitled must depend on the result of an account. Held, that the widow was entitled to a decree against the administrator and his sureties without waiting for such account to be stated. *Moore v. George*, 10 Leigh 228.

k. Debt Due by Recognizance.

A debt due by recognizance of spe-

cial bail is of higher dignity than a debt due by specialty, and shall have preference accordingly, in the administration of the assets of a decedent. *Moon v. Pasteur*, 4 Leigh 35.

l. Debts in Same Class Paid Rateably.

These statutes direct that debts shall be paid in the order of their classification, and those of any one class are to be paid rateably when there is not enough to pay them in full. But a personal representative who, after twelve months from his qualification, pays a debt of his decedent, shall not thereby be personally liable for any demand against the decedent of equal or superior dignity, whether of record or not, unless before the payment he had notice of the demand. Va. Code, 1887, § 2661; W. Va. Code, 1899, ch. 85, § 26, p. 733. These provisions, however, do not affect any lien acquired in the decedent's lifetime. Va. Code, 1887, § 2662. See also, *Trevillian v. Guerant*, 31 Gratt. 525.

Under § 25, ch. 85, and § 3, ch. 86 of the Code of West Virginia, it is error for the court to take a debt proved as a general debt against an estate, under the fourth clause of said § 25, out of said class, and postpone it to the payment of the other debts of the same dignity and class. The payment of all such debts must be pro rata. *Gardner v. Gardner*, 47 W. Va. 368, 34 S. E. 792.

Where an executor as surety for the testator pays debts out of his own funds, he is entitled only to his rateable share of the assets to repay his advances; and by crediting himself with the full amount of such debts he commits an error to the prejudice of the other creditors having unpaid debts of equal dignity. *McCormick v. Wright*, 79 Va. 524.

Provisions Mandatory.—The provisions of the statutes fixing the order of payment are mandatory; they can not be changed or disregarded by the court. *Deering v. Kerfoot*, 89 Va. 491, 16 S. E. 671; *Gardner v. Gardner*, 47 W. Va.

368, 34 S. E. 792; *Trevillian v. Guerant*, 31 Gratt. 525.

m. Preference by Executor or Administrator.

The representative's right to prefer one creditor over another is generally abolished and all debts of the same class are made payable pro rata in case of deficiency of assets. *Scott v. Cheatham*, 78 Va. 82.

It is the duty of an executor or administrator to pay the debts of his decedent according to the order of their priority. If he pays an inferior debt with notice of a superior debt, he will be liable to the superior creditor as for a devastavit; but except as to judgments and decrees, as to which the personal representative was bound to take notice, the payment of an inferior debt before notice of a superior debt is good. 8 Am. & Eng. Ency. Law (2d Ed.) 1055; *Mayo v. Bentley*, 4 Call 528. It is provided by statute that a personal representative, who, after twelve months from his qualification, pays a debt of his decedent, shall not thereby be personally liable for any debt or demand against the decedent of equal or superior dignity, whether it be of record or not, unless before such payment he shall have notice of such debt or demand. Va. Code, 1887, § 2661; W. Va. Code, 1899, ch. 85, § 26, p. 733.

But it is not a devastavit for the executor to pay debts of inferior dignity, if he retains sufficient assets to pay those of higher rank. *Braxton v. Winslow*, 4 Call 308.

Where there were two bonds, one payable at the death of the intestate, and the other not, it was formerly held that the administrator might delay the creditor in the first with dilatory pleas until the second became payable, and then confess judgment upon the latter pending the prior suit upon the first, and plead it in bar of the first action. For among creditors of equal dignity, the administrator was allowed to pre-

fer either; and the second bond, was debitum in præsenti, though payable at a future day. *Mayo v. Bentley*, 4 Call 528. But under the present statute, the executor has no right to prefer creditors of equal degree, and the assets must be rateably distributed among them. Va. Code, 1887, §§ 2660, 2661.

7. Enforcement of Claim.

a. Order of Distribution.

Payment Ordered by Court from Curator.—See Va. Code, 1887, § 2702.

When Report of Accounts Confirmed.—See Va. Code, § 2703; W. Va. Code, 1899, § 3319.

Application for Final Distribution.—See W. Va. Code, 1899, § 3324.

b. Nature and Form of Procedure.

(1) Summary Rule to Show Cause.

A fiduciary can not be compelled by summary process of rule, to show cause why he shall not be fined and imprisoned, to pay a decree against him as such, especially where his accounts have not been settled in the suit, and it has not been shown that he has assets in his hands. *Cheatham v. Cheatham*, 81 Va. 395.

Where a creditor, instead of proceeding at common law to recover his claim against a decedent's estate, obtains an order for its payment on a summary rule to show cause, this is a departure from the established modes of procedure, and the order so obtained has not the force of a judgment, but is void on its face. *Thurman v. Morgan*, 79 Va. 367.

In Garnishment Proceedings.—A court of law can not compel an executor summoned as a garnishee to pay a legacy left to the debtor, the remedy in such case being in equity. *Whitehead v. Coleman*, 31 Gratt. 784.

(2) Suits or Actions.

See the title CREDITORS' SUITS, vol. 3, p. 780.

(a) General Consideration.

Intervention by Petition in Suit by Heirs.—Heirs residing out of the state, having instituted a suit for a sale of

land descended to them, and the same having been sold, and the proceeds being in the hands of a commissioner directed by the court to collect them; a creditor of the ancestor seeking to subject these proceeds to the payment of his debt, should apply by petition to the court to be made a party in the cause, and to have the fund applied by proceedings in that cause to the payment of his debt. Or if he proceeds by foreign attachment the commissioner should be a party, and be restrained by the indorsement on the process, from disposing of the proceeds. *Carrington v. Didier*, 8 Gratt. 260.

(b) Bill or Declaration.

aa. Allegations.

Qualification of Executor and Lapse of Proper Time.—A bill in equity, filed by the widow of a deceased party against the administrator of the estate of her deceased husband, charging a failure on the part of the administrator to collect and account for the assets of his intestate, and to pay over to her the portion of the personalty of her deceased husband to which she is entitled as his widow, which does not show when the administrator qualified and gave bond for the performance of his duties, or that a year had elapsed from the time of such qualification of such administrator, is demurrable, and can not be sustained. *Harris v. Orr*, 42 W. Va. 745, 26 S. E. 455.

A bill by an executor for the sale of his testator's land to pay debts should show the names of the widow, heirs, devisees, and all known creditors; otherwise, a sale thereunder passes no title. *Underwood v. Underwood*, 22 W. Va. 303.

Setting Out Claim.—Where an executor has a claim against the estate of his testator, depending on a quantum meruit only, he may exhibit a bill in equity against his coexecutors and legatees to have such claim established and fixed at a certain sum. In such

case he ought to state the claim with reasonable certainty, by setting forth his own estimate of his services; but should he fail to do so, his bill ought not to be dismissed, but leave to amend it should be granted on motion. *Baker v. Baker*, 3 Munf. 222.

Definiteness and Particularity.—

Where the executor of an executor is sued for a debt due by the first executor to the estate of his testator, the pleadings must state distinctly that the claim is against the second executor as representing his testator in his executorial character, in order to entitle the plaintiff to rank as a creditor of the first dignity under the act of assembly. *Shearman v. Christian*, 6 Rand. 49.

Notice of Dishonor of Bill.—See generally, the title **BILLS, NOTES AND CHECKS**, vol. 2, p. 401.

Notice of dishonor is a necessary charge in a bill to subject a decedent's estate to a liability as endorser of negotiable paper. *Tidball v. Shenandoah Nat. Bank*, 98 Va. 768, 37 S. E. 318, 6 Va. Lew Reg. 638.

bb. Parties.

See generally, the titles **CREDITORS' SUITS**, vol. 3, p. 780; **PARTIES**.

(aa) Plaintiffs.

The rights of general creditors of a decedent are subject to all equities attaching to the decedent's estate at the time of his death. General creditors take the estate in the plight in which they find it, and their rights can not be enlarged or improved beyond their debtor's, to the prejudice of a creditor who has taken a lien which he has not recorded, or which can not be recorded. The creditors who seek to assail the lien must come with a lien by judgment, or otherwise, giving them a right to charge the property specifically. *Dulaney v. Willis*, 95 Va. 606, 29 S. E. 324; *McCandlish v. Keen*, 13 Gratt. 615.

After a decree for a general account of debts in a creditors' suit, other creditors may come in and prove

their claims before the commissioner to whom the cause is referred. This should be done by the creditor or some one authorized by him, and not by the administrator of the debtor whose duty it is to represent the estate. The better practice is to require the creditor to file an affidavit that the debt remains due, but the affidavit is not evidence to prove the debt. *Conrad v. Fuller*, 98 Va. 16, 34 S. E. 893.

The personal representative of a deceased partner, as a general rule, is the only person who has the right to sue the surviving partner for an account of the partnership affairs; but, under special circumstances, a distributee, legatee, or creditor of the decedent may file a bill against the personal representative of the decedent and the surviving partner. *Conrad v. Fuller*, 98 Va. 16, 34 S. E. 893.

(bb) Defendants.

aaa. Personal Representative.

Where an executor has died after partially administering the estate of his decedent, and a suit is brought to recover a claim against said estate simply, no defendant is necessary, except the personal representative. *McGlaughlin v. McGlaughlin*, 43 W. Va. 226, 27 S. E. 378.

Joinder of Representatives of Two Deceased Persons.—The representatives of two deceased persons can not be joined in the same action, although the undertaking of the testators might have been joint and several. *Grymes v. Pendleton*, 4 Call 130.

bbb. Remaindermen.

In a suit by creditors to subject the real estate of a decedent to the payment of his debts, where it appears that the decedent devised his real estate to his wife for life, with remainder in fee in equal parts to his two children, but, if either died without issue, remainder over to his sister, with power to the wife to sell and reinvest proceeds, if deemed advisable, the sister

is not a necessary party. *New v. Bass*, 92 Va. 383, 23 S. E. 747.

ccc. Heirs.

The widow and adult children of an intestate divided his lands and chattels among themselves, leaving the administrator only certain choses in action wherewith to pay debts. An account of administration, as nearly accurate as lapse of time and meagre evidence allowed, showed the administrator to be in advance to the estate with nothing wherewith to pay a judgment obtained against him by a creditor of the decedent, who sued in chancery the administrator, his sureties, and the widow, heirs and distributees, to collect out of the decedent's unaliened lands, or otherwise, the bond debt represented by said judgment. Held, that the suit might be maintained against the heirs, etc., to collect the debt out of the unaliened lands, upon evidence other than the judgment, and that equity would allow resort at once to said lands, instead of going upon the sureties of the administrator. *Watts v. Taylor*, 80 Va. 627.

ddd. Persons Primarily Bound in Suit against Indorser.

See the title **BILLS, NOTES AND CHECKS**, vol. 2, p. 401.

Persons primarily bound on negotiable paper are necessary parties to a suit in equity to subject the estate of an endorser, as they may have defenses unknown to the endorser, and, being first liable, equity will not, except under special circumstances, subject the estate of an endorser until that of the principal has been exhausted. *Tidball v. Shenandoah Nat. Bank*, 98 Va. 768, 37 S. E. 318, 6 Va. Law Reg. 638.

cc. Answer.

When Treated as Petition for Rehearing.—The answers of executors to a petition asserting a claim against the decedent's estate, consisting of a judgment confirmed by an interlocutory decree, though interposed more than

four years after the confirmation of the judgment, are properly treated as a petition for rehearing, no statutory bar existing to a petition for a rehearing of an interlocutory decree. *Staples v. Staples*, 85 Va. 76, 7 S. E. 199.

dd. Evidence.

(aa) Competency and Admissibility.

Judgment against Personal Representative and Suit against Heirs.—See post, "Weight and Sufficiency," IV, H, 7, b, (2), (b), dd, (dd); "Evidence," IV, H, 7, g, (7).

Testimony of Surviving Obligor.—See generally, the title WITNESSES.

In an action on a joint bond against the personal representative of a deceased obligor, a surviving obligor is an incompetent witness for the defendant. *Brown v. Johnson*, 13 Gratt. 644.

(bb) Presumption and Burden of Proof.

Ex Parte Settlements.—See post, "Evidence," IV, H, 7, g, (7).

An executor or administrator occupies a position antagonistic to the estate he represents with reference to independent claims preferred by him against the estate, and his ex parte settlements though duly confirmed, are not even prima facie evidence in his favor of the correctness of such claim. The burden of proof is on him to establish his demand by proper proof just as if no settlement had ever been made. *Scott v. Porter*, 99 Va. 553, 39 S. E. 220.

In Action for Breach of Covenant.—An executor who prefers a claim against the estate of his testator for breach of a covenant to do a collateral thing has the burden of proof to establish the due execution of the covenant, the breach by the testator, and the amount he is entitled to recover by reason of such breach. *Scott v. Porter*, 99 Va. 553, 39 S. E. 220.

Rebuttal of Presumption as to Personal Liability.—A bond, note or account may, on its face, appear to be

the personal debt of an executor, and yet, in truth and in fact, be the debt of the estate. The presumption is that the face of the paper discloses the true debtor, and the burden of proof is on him who controverts the fact; but if the debt has been paid by an executor, and he can establish the fact that it is not his personal debt, though it so appears on the face of the paper, but is, in truth and in fact, a debt of the estate, he should be allowed credit for it. *Breckinridge v. Breckinridge*, 98 Va. 561, 31 S. E. 892.

(cc) Declarations and Admissions.

In a suit to settle the estate of a decedent, the appellant filed a claim against the estate, alleging that the decedent, in 1858, had been appointed a commissioner to collect the purchase money bonds under a decree of sale, and to deposit them in bank, and that the appellee was entitled to the fund arising from the collection of the bonds. The claim was based upon an alleged admission made by the decedent in 1877, that he had collected the bonds. This statement was made in a suit wherein the decedent had stated, as counsel, that he had collected the bonds, and had deposited them as directed, and that his report thereof had been confirmed by the court. The appellant's petition did not deny the deposit and confirmation by the court, but merely denied that the money was deposited or accounted for by the decedent in his lifetime. Held, that, since the claim was based on the decedent's admission, his entire statement must be taken together; and as it appeared from his whole statement that a decree was made confirming his report, in which he alleged that he had deposited the money as directed, it must be taken as established, and can not be collaterally attacked. *Perkins v. Lane*, 82 Va. 59.

(dd) Weight and Sufficiency.

Unsupported Assertion of Party Contesting.—Where a claim against an

estate based on a judgment obtained against such estate is presented for settlement, and there is no evidence to show that such claim has ever been paid, except the unsupported assertion of persons contesting it, a rejection thereof by a commissioner to whom it has been referred is error, and the action of the court in sustaining an exception to the commissioner's report, and entering judgment against the estate for the amount due, was proper. *Armentrout v. Shafer*, 89 Va. 566, 16 S. E. 728.

Judgment against Personal Representatives.—There being no privity between the personal representatives and the party to whom the real estate has descended or been devised, a judgment against such personal representative is not even prima facie evidence against the heir or devisee. *Laidley v. Kline*, 8 W. Va. 218; *Brewis v. Lawson*, 76 Va. 36; *Watts v. Taylor*, 80 Va. 627. See also, Va. Code (1873), ch. 127, § 3.

A judgment against personal representatives in a suit to which the heirs were not parties, does not affect the heirs for want of privity, and is not evidence against them in a suit to subject the decedent's real estate; and Va. Code, 1873, ch. 127, § 3, does not alter the rule. *Brewis v. Lawson*, 76 Va. 36; *Watts v. Taylor*, 80 Va. 627. Yet, a suit against personal representatives jointly with heirs, etc., by a creditor of the decedent, to collect out of real estate or otherwise, a bond debt whereon judgment existed against the personal representatives, is maintainable by evidence other than the judgment, though the judgment be set forth in the bill, the heirs, etc., having as full opportunity to defend against the debt as though no judgment existed. *Watts v. Taylor*, 80 Va. 627.

Codicil.—A testator by a codicil to his will declares "I herein mention a debt of \$600 I owe the Presbyterian church of Charlottesville, Virginia, and I wish it duly paid, without interest,

out of my estate, to that church after my sister's death." The codicil is dated November 7, 1884. The sister died in 1896, and a suit was brought by one member of the church suing on behalf of himself and four hundred other members in 1898. There was no proof of the existence of such a debt except the statement of the codicil, and no evidence was offered against it. Held, though a church can not take as legatee under a will, this is not a legacy, but a debt, and the codicil alone is sufficient proof of its existence. *Perkins v. Seigfried*, 97 Va. 444, 34 S. E. 64.

ee. Judgment or Decree.

(aa) **Preliminary Conditions.**

See generally, the titles ACCOUNTS AND ACCOUNTING, vol. 1, p. 82; JUDICIAL SALES; LIENS.

Order, Account and Settlement of Liens.—Where, in the case of a deficiency of personal assets, a creditor of the decedent files a bill for the purpose of subjecting land devised by him to the payment of his debt, it is error for the court to decree a sale before ordering an account and settling the priorities of the liens thereon, though the parties agree that a certain statement filed in the cause shall be taken as a true exhibit of the indebtedness of the estate to the plaintiff. *Daingerfield v. Smith*, 83 Va. 81, 1 S. E. 599.

(bb) **Basis as Determining Error.**

Admission in Answer.—It is error to decree that an administrator de bonis non shall pay a debt of his testator out of the assets in his hands, upon an admission in his answer that there are debts due the estate uncollected more than sufficient to pay all the debts. *Kent v. Cloyd*, 30 Gratt. 555.

If on a bill filed by creditors to subject the estate, real and personal, of a decedent, to the payment of his debts, a copy of decedent's will is filed, by which he devised and bequeathed certain property to his wife for life, and nominated her as executrix, the wife is made a party defendant as execu-

trix and "as widow," this is sufficient to bind her personally by any proper decree made in the cause. *New v. Bass*, 92 Va. 383, 23 S. E. 747.

(cc) Form and Sufficiency.

aaa. Terms of Payment.

It is error to decree against an executor, absolutely, that he shall pay money at fixed future periods, out of funds which shall subsequently come into his hands. *Hite v. Hite*, 2 Rand. 409.

bbb. Rendering Decree in Alternative.

Sale of Rent Insufficient.—On a bill by a creditor against the devisees or heirs at law of a decedent, the court should first make a decree for renting the land, and, if the rent should prove insufficient to satisfy the debts, a report should be made to the court for further proceedings to be had before a decree can be made ordering a sale. **An alternative decree for the sale of land, if the rent offered be insufficient, is erroneous.** *Daingerfield v. Smith*, 83 Va. 81, 1 S. E. 599.

ccc. Conditional Decree.

A conditional decree, directing an executor to pay certain debts due by his testator's estate, or due from him in his fiduciary capacity when he shall have collected certain other specified claims or debts coming to his testator's estate, constitutes no lien upon the real estate of such executor. *Gay v. Skeen*, 36 W. Va. 582, 15 S. E. 64.

ddd. Propriety of Personal Decree.

Where an order accepted by the personal representative, is rejected in a creditor's suit, as a valid claim against the decedent's estate, there can be no personal decree for the amount thereof against such representative, because it is asserted in the bill as a debt due by the estate, and the decree must be consistent with the case made by the pleadings. *Staples v. Staples*, 85 Va. 73, 7 S. E. 199; *Mundy v. Vawter*, 3 Gratt. 518.

Where it appears that the estate of one of the deceased obligors in a bond

has been fully administered in a suit for partition to which the complainant was not a party, that the assets were sufficient to pay all claims, and that the personal representative took no refunding bond, a personal decree against him is proper. *Beverly v. Rhodes*, 86 Va. 415, 10 S. E. 572.

The personal representatives of a deceased debtor are not, as such, the debtors of the creditors of their testator or intestate, within the sense of the statute. They are not liable in the debit, but in the detinet only. The personal estate is in their hands to be administered according to law, and is not, therefore, the subject of garnishment by the creditors of the estate of the decedent. *Parker v. Donnally*, 4 W. Va. 648. But, quære, whether in a suit and attachment against the creditors of such decedent debtor, an equitable lien on the debt against the estate of the latter, in favor of the former, might be created by the service of an attachment on the personal representatives of such decedent, carrying with it all the rights, liens and sureties of such debtor? *Parker v. Donnally*, 4 W. Va. 648.

(dd) Operation and Effect.

A commissioner appointed to ascertain the debts of a decedent, and their order of priority, can not go behind a judgment rendered against the decedent in his lifetime; and since acts, 1865-66, ch. 171, §§ 1, 2, provide for setting up the fact of a confederate transaction only as a defense to a suit while pending, so as to reduce the judgment to be rendered, the action of the commissioner in scaling the judgment as a confederate transaction will not affect a judgment creditor who was not a party to the proceedings, and had no notice thereof. *Marshall v. Cheatham*, 88 Va. 31, 13 S. E. 308.

Decree for Account.—In a suit to settle the accounts of an executor and ascertain the debts against his decedent's estate, a decree for an account

of debts stops the running of the statute of limitations as to all debts against the decedent. *Covington v. Griffin*, 98 Va. 124, 34 S. E. 974.

ff. Exceptions and Objections.

On appeal from a decree charging an administrator and his sureties with a debt, an objection that the debt was barred by the statute of limitations at the time of the qualification of the administrator will not be considered where the record fails to show that it was thus barred, but the evidence tends strongly to show that the debt was either collected or assumed by the administrator. *Harman v. McMullin*, 85 Va. 187, 7 S. E. 349.

A suit was instituted in the circuit court of A county to subject decedent's estate to his debts, and assign or commute dower. The widow's name did not appear in the summons returned executed October 7th, 1878. The bill filed January rules, 1879, contained her name as one of the defendants; and a decree entered May 31st, 1879, brought the cause on to be heard on a bill taken for confessed as to all the defendants; an account of debts and dower was taken, reported and confirmed. The cause removed to the circuit court of B county. The land was sold free of dower, and the widow was present at the sale and bid, and the sale was confirmed. In 1881 she filed a petition alleging that she had never been properly made party to the suit, and asked that it be begun *de novo*. The petition was dismissed. On appeal it was held, that proper presumptions favor the jurisdiction of the court and the validity of its proceedings; that between the issuance of the first summons and filing of the bill separate writs were probably issued and served on the widow and returned, though that fact did not appear in the record, that her petition was, under the circumstances, properly dismissed. *Hill v. Woodward*, 78 Va. 763.

c. Compromises by Creditors.

Where there is a joint decree against

the executors of two persons, and a creditor receives a moiety of the debt from the representative of one of them, and covenants not to levy the residue of the decree upon the estate of that one, the representatives of the other are not thereby discharged. *Garnett v. Macon*, 6 Call 308.

d. Personal Liability of Executor or Administrator.

(1) Absence of Knowledge of Debt.

Where the executors have been assured by the testator that he owed no debts and they know of none, they will not be liable for the value of personal property, which he, in his lifetime, had put into the possession of his children. *Lewis v. Overby*, 31 Gratt. 601.

(2) Disregarding Priorities in Payment of Debts.

(a) General Rule.

It is the duty of a personal representative to pay the debts of the decedent in the order of their priority, as prescribed by law; and if he pays an inferior debt, leaving a debt of a preferred class unpaid, such payment constitutes a *devastavit* in case of a deficiency of assets, so as to render him personally liable at law and in equity to the preferred creditor who is injured thereby, unless the payment was made without notice of the superior debt. *McCormick v. Wright*, 79 Va. 524; *Nimmo v. Com.*, 4 Hen. & M. 57, 4 Am. Dec. 488; *Mayo v. Bentley*, 4 Call 528.

(b) As Constituting a Devastavit.

Paying debts of inferior dignity is not a *devastavit*, if the executor retains sufficient assets to pay those of higher rank. *Braxton v. Claiborne*, 4 Call 308.

(c) Failure to Take Notice of Judgment.

At common law, an executor or administrator was obliged, at his peril, to take notice of a judgment against his testator, and, if he exhausted the assets by paying debts of inferior dignity, was bound to satisfy such judg-

ment out of his own estate. *Nimmo v. Com.*, 4 Hen. & M. 57, 4 Am. Dec. 488; *Mayo v. Bentley*, 4 Call 528. But a personal representative who had no notice of a specialty debt could pay or confess judgment to a simple contract creditor. *Mayo v. Bentley*, 4 Call 528. Under the statute, however, debts of record, of specialty, and by simple contract are all brought into one class and are to be paid rateably. Va. Code, 1887, § 2660; W. Va. Code, 1899, ch. 85, § 25, p. 733.

(d) Refund Where Payment Out of Individual Fund.

Where an executor as surety for the testator pays debts out of his own funds, he is entitled only to his rateable share of the assets to repay his advances and by crediting himself with the full amount of the debts, he commits an error to the prejudice of the other creditors having unpaid debts of equal dignity. *McCormick v. Wright*, 79 Va. 524.

(e) Right to Refund from Creditors.

Where an administrator, out of the intestate's assets, voluntarily pays debts of an inferior class in preference to debts of a higher class, and there is a deficiency of assets, he is not entitled to have the creditors so paid refund. The case has no analogy to the case of an executor paying legacies before paying the debts, where the executor is entitled to be substituted to the creditor's right to have the legatees refund. *Findlay v. Trigg*, 83 Va. 539, 3 S. E. 142. See also, *Staples v. Staples*, 85 Va. 76, 7 S. E. 199.

(f) Decree.

Where, in a suit against an administrator and his sureties for a devastavit in paying debts of an inferior class in preference to debts of a higher class, the record shows there is a deficiency of assets, and that the funds in his hands embrace money that came to him as commissioner of sales of lands, as well as money that came to his hands as administrator, without show-

ing the respective amounts of each, there can be no decree until there has been an account of the amount of each, respectively, as the sureties are not accountable for the money that came to his hands as such commissioner. *Findlay v. Trigg*, 83 Va. 539, 3 S. E. 142.

(g) Failure to Pay Debts in Same Class Rateably.

An administrator can not pay, within twelve months after his qualification, one debt in full, or in excess of its rateable share of assets, over another of the same class, either with or without notice of such other debt; and, if he does, he is personally liable to the omitted debt for its share of money applied in such payment. If such payment be made after twelve months, he is not liable, unless he had notice of the other debt. *McCoy v. Jack*, 47 W. Va. 201, 34 S. E. 991.

In 1856 an infant qualified as one of the administrators of a decedent. He paid out for just debts all the assets that came to his hands, but did not apportion them rateably. In 1858 he turned over everything in his hands to his coadministrator and left the state. In 1877 a bill was filed charging him with devastavit. He pleaded infancy and the bar of the statute of limitations. Held, that, being an infant and innocent of fraud or tort, he was not liable for the alleged devastavit, and the lapse of the period of limitation would bar the claim against him if he was otherwise liable. *Saum v. Cofelt*, 79 Va. 510.

Right to Refund from Creditors.—

An administrator, with money of his decedent, paid, on a note made by his decedent, an amount in excess of the sum applicable out of the assets to that debt, under the mistaken belief that he was surety in such note, and that the estate would pay a somewhat larger per cent. of its liabilities than it did. Held, that the administrator could not maintain an action of assumpsit against

a surety in the note to compel him to refund the amount so paid in excess of the rateable share of the assets applicable to such debt. *Proudfoot v. Clevenger*, 33 W. Va. 267, 10 S. E. 394.

(4) Turning Over Legacies and Distributive Shares before Paying Debts.

See post, "Payment of Debts as Prerequisites to Distribution," IV, K, 1.

(5) Turning Over Property to Trustee in Will Prior to Payment of Debts.

An administratrix c. t. a., who permits the trustee under the will to take possession of the personal property belonging to the estate before the payment of its debts, is guilty of a devastavit, and, to the extent of such property, becomes personally chargeable with the debts of the estate. *Lewis v. Mason*, 84 Va. 731, 10 S. E. 529.

(6) On Promise to Pay.

The fact that an executor wrote to a creditor of his testator that he would pay his claim as soon as he was able to dispose of his crops does not bind the executor personally, in the absence of proof of assets or forbearance to sue or some other consideration. *Taliaferro v. Robb*, 2 Call 258.

As to the necessity of consideration to support a promise to pay money, see the title *CONTRACTS*, vol. 3, p. 307.

In order for the promise of an executor or administrator to render him personally liable it must be supported by a sufficient consideration as in the case of other contracts. *Taliaferro v. Robb*, 2 Call 258; *Snead v. Coleman*, 7 Gratt. 300, 56 Am. Dec. 112.

(7) On Contracts Generally.

See post, "Contracts," IV, I.

(8) On Torts Generally.

See post, "Torts," IV, J.

(9) Payment of Invalid Claims.

An executor or administrator is not liable for the payment of invalid claims if they were such as any judicious man, managing his own affairs, might have settled. *Kee v. Kee*, 2

Gratt. 116, 133. See ante, "Degree of Skill and Diligence Required," IV, A, 2.

e. Recovery of Amount Overpaid to Creditor.

See post, "Indemnity and Protection of Executor or Administrator," IV, K, 7, d.

f. Liability of Vendee of Land Purchased from Testator under Agreement to Pay Debts.

A, and his wife B, conveyed 211 acres of land to C, their son, in consideration of love and affection, and the further consideration that he pay to X \$300, to Y \$100, and to Z \$100, and that he pay off and discharge all debts remaining against the grantors at the time of their death, or either of them, which deed C accepted, and took possession of and held the land thereunder. Held, C is personally liable for the debts of the grantors, and the land conveyed to C, whilst held by him, would be subjected by a court of equity to pay the debts of the grantors. *Matheny v. Ferguson*, 55 W. Va. 656, 47 S. E. 886.

g. Proceedings by Creditors against Heirs, Devisees, Distributees, Legatees and Privies.

(1) In General.

See generally, the titles *CREDITORS' SUITS*, vol. 3, p. 780; *HEIR, HEIRS AND THE LIKE*; *WILLS*.

It is the established doctrine in this state that the rights of the general creditors of a decedent's estate are subject to all the equities attaching thereto at the time of his death; that they take the estate in the same plight and condition in which the debtor left it, and their rights can not be enlarged and improved beyond those of the debtor, to the prejudice of a creditor who has taken a lien, though he may have failed to record it. The creditor who seeks to assail it must come with a lien by judgment or otherwise giving him a right to charge the property specifically. *Dulaney v. Willis*, 95 Va.

606, 29 S. E. 324; *McCandlish v. Keen*, 13 Gratt. 615.

(2) Nature and Extent of Liability.

(a) At Common Law and under Statute.

It seems that the common-law rule exempting heirs, devisees, distributees and legatees from liability for the debts of the decedent, with the exception of debts of record and the specialty debts in which the heirs are named, has been done away with by the statute making the real estate of the decedent assets for the payment of his debts in the same order as personal estate. Va. Code, 1887, §§ 2665-2669; W. Va. Code, 1899, ch. 86, §§ 3-7, pp. 734-735; *Alexander v. Byrd*, 85 Va. 690, 8 S. E. 577; *Piper v. Douglas*, 3 Gratt. 371.

The act of March 1st, 1842, was the first statute of this state making real estate assets for the payment of simple contract debts. That act, however, was subject to a proviso declaring that no debt not evidenced by writing, signed by the debtor, or some person legally empowered by him, shall be charged on the real estate by virtue of this act. This proviso was omitted at the revisal of 1849, so that, as the law now stands, the real estate is subject to the payment of all the just debts of the decedent without qualification. Acts, 1841-42, p. 55; Va. Code, 1849, ch. 131, § 3; W. Va. Code, 1873, ch. 127, § 3. *Alexander v. Byrd*, 85 Va. 690, 8 S. E. 577.

(b) Heir Takes in Subordination to Rights of Creditors.

Where the property is not sufficient to pay the debts of the ancestor, the heir takes only in subordination to the rights of creditors. *Martin v. Columbian Paper Co.*, 101 Va. 699, 44 S. E. 918; *Max Meadows Land, etc., Co. v. McGavock*, 96 Va. 131, 30 S. E. 460.

The interest of an heir to real estate, not conveyed by a judicial sale, because of defective notice of the action, is still liable to the claims of the general

creditors of the decedent. *Menefee v. Marge*, 1 Va. Dec. 644.

By the laws of Louisiana all heirs, universal legatees and legatees by universal title, who have received portions of a decedent's estate, are liable to make contributions to creditors, whose debts remain unpaid, in proportion to what they have received, but are not bound in solido, or one for the other. *De Ende v. Wilkinson*, 2 Pat. & H. 663.

Where real estate in the hands of heirs is sought to be subjected to the payment of the decedent ancestor's debts, and that portion of it assigned to one of the heirs before the commencement of the suit has been aliened to a bona fide purchaser, whether absolutely or in trust to pay his debts, and that heir has become insolvent, the rest of the real estate in the hands of those heirs who have not aliened it, is liable, not only for the proportionate share which each heir would at first have borne, but for the whole debts of the decedent, to be contributed by each one in proportion to the value and extent of the land descended to him. *Lewis v. Overby*, 37 Gratt. 601; *Ryan v. McLeod*, 32 Gratt. 367.

Heir of Heir.—The heir of an heir is responsible upon an obligation in which their heirs are bound, provided he have assets by descent from the obligor. *Waller v. Ellis*, 2 Munf. 88.

(c) Liable for Sum Total of Assets Received.

At common law an estate taken by descent subjects the heir to pay, to the extent of the value of the land, all the debts of the ancestor due by any contract of record, e. g., a judgment or recognizance, or any contract of specialty; that is, under seal, which expressly binds the heirs. *Piper v. Douglas*, 3 Gratt. 371; *Alexander v. Byrd*, 85 Va. 690, 8 S. E. 577.

Under the circumstances of a given case, the heirs were held bound to account for only so much of certain lands as they had actually gotten or might

get possession of, with the rents and profits derived therefrom, deducting the cost and expense of recovering the lands. *Dickinson v. Hoomes*, 8 Gratt. 353.

A debtor in Virginia moved to Mississippi and died, and administration was there granted on his estate, which was administered and distributed according to the laws of that state. The distributees resided in Virginia. Held, that the distributees were responsible here for the debts of their intestate, to the amount of the assets so received. *Hairston v. Medley*, 1 Gratt. 96.

If after the qualification of an executor, he die without closing his administration, and the legatees, without the intervention of an administrator de bonis non, take possession of the assets, a court of equity, on a bill for discovery, will consider such of them as are solvent responsible to creditors for the whole amount, and will not give them credit for the proportions of such as prove to be insolvent, yet in decreeing against the solvent legatees, the court will not charge them jointly, but pro rata. *Hopkirk v. Dennis*, 2 Munf. 326.

(d) On Covenants of Warranty.

See generally, the titles COVENANTS, vol. 3, p. 741; WARRANTY.

At common law, heirs were liable on a covenant of warranty made by their ancestor expressly binding them, but the judgment would have to be satisfied out of the lands descended to them. Otherwise, by W. Va. Code, ch. 86, § 3, which provides that all real estate of a decedent shall be assets for the payment of his debts in the order in which personal estate is directed to be applied. *Rex v. Creel*, 22 W. Va. 373, 379.

(e) Rents and Profits.

Upon a bill against an heir at law, to subject real estate descended to a debt of the ancestor, the heir at law is not accountable for rents and profits accrued before decree. *Blow v. Maynard*, 2 Leigh 30.

Heirs are not bound for rents and profits accruing before a judgment or decree has been rendered against them. *Dickinson v. Hoomes*, 8 Gratt. 353, 436.

(f) Clerk's Fees.

But an heir is not bound for clerk's fees and taxes due from the ancestor. *Haydon v. Goode*, 4 Hen. & M. 460.

(g) Apportionment.

In *Pugh v. Russell*, 27 Gratt. 789, land in possession of devisees was subjected to a debt of testator under a suit instituted long after his death, after his estate had been settled and distributed, and after a portion of the land had been aliened. Testator left realty and personalty. The latter had been exhausted by the administrator, who committed a devastavit. Long after the devastavit and exhaustion of the personalty, suit was brought by Russell, a creditor of the testator, to subject his realty in the hands of his devisees. One of the devisees had aliened his share. The supreme court subjected the unaliened land to the payment of the debt. In the opinion it was said that where there is in the case material for a just apportionment of the debts among the devisees, such apportionment should be made with a reservation to the creditors of a right to resort to the others in case of a deficiency. See also, *Lewis v. Overby*, 31 Gratt. 601; *Ryan v. McLeod*, 32 Gratt. 367; *Alexander v. Byrd*, 85 Va. 690, 8 S. E. 577.

(3) Nature and Validity of Proceedings.

(a) Summons and Process.

See generally, the titles JURISDICTION; SUMMONS AND PROCESS.

Where defective notice was had upon an heir in an action for distribution, and for sale of realty, who did not join, or in any manner assent, either to the original or any subsequent proceeding of the court in the sale of the decedent's realty, all such proceedings as to such heir are nullities. *Menefee v. Marge*, 1 Va. Dec. 644.

(b) Bill in Equity.

See generally, the title **CREDITORS' SUITS**, vol. 3, p. 780.

A bill in equity will lie for the enforcement of demand sounding in damages for the breach of contract by the testator, to be satisfied out of his real estate in the hands of his heir or devisee, in default of the personalty to discharge the same. *W. Va. Code*, 1860, ch. 131, § 6; *Fowler v. Kelly*, 3 *W. Va.* 71.

(c) Attachment.

See the title **ATTACHMENT AND GARNISHMENT**, vol. 2, p. 70.

Foreign Attachment.—And where, in an action by nonresident heirs, the proceeds of the sale of their ancestor's lands are in the hands of a commissioner, creditors of the decedent may enforce payment of their debt out of such proceeds in the hands of the commissioner by an action of foreign attachment, making the commissioner and heirs parties. *Carrington v. Didier*, 8 *Gratt.* 260.

(4) Bill, Declaration or Complaint.

Mode of Declaring.—In declaring against a remote heir, he should be charged as heir of the heir of the obligor, or as heir of the obligor with a videlicet, setting forth the intervening descent; but it is not necessary to state how he is heir. *Waller v. Ellis*, 2 *Munf.* 88.

An heir should be charged in the debet and detinet; but if he be charged in the detinet only, the defect is not fatal, after verdict, or upon general demurrer. *Waller v. Ellis*, 2 *Munf.* 88.

(5) Account of Personalty Proper.

In a suit to subject the lands in the hands of heirs, for the debts of the ancestor, where there is no specific lien, an account of personal assets should be first directed. *McLoud v. Roberts*, 4 *Hen. & M.* 444. See post, "Accounting," IV, L. See also, the title **JUDICIAL SALES**.

(6) Issues and Defenses.

A suit was instituted in Virginia

against a citizen of Louisiana, who appeared and filed his answer, and before a final decree was rendered, died. On motion of the complainant representing that the defendant had died intestate out of Virginia, leaving property in Virginia, an administrator was duly appointed, the suit revived, and a decree rendered against him. On the faith of this decree, a judgment was rendered against the executors of the decedent in Louisiana, by the court of probate of New Orleans, and was partly satisfied by them. In a suit in Virginia against the heirs for the balance of the judgment, the executors having fully administered and paid over to them, it was held, that the court would not take notice of any false suggestion or irregularity in the appointment of the Virginia administrator, even though it should appear that the decedent did not die intestate, and left no estate in Virginia. *De Ende v. Wilkinson*, 2 *Pat. & H.* 663.

(7) Evidence.

Degree of Proof.—In a suit on a judgment against an administrator, the heirs are entitled to require strict proof outside of the judgment itself of the justice of the claim on which it was founded. *Daingerfield v. Smith*, 83 *Va.* 81, 1 *S. E.* 599.

Weight in Evidence of Judgment against Executor.—The statute approved February 19, 1884, making a judgment or decree against the personal representative prima facie evidence against the heir or devisee of the decedent, applies only to judgments or decrees rendered since the passage of the act. *Staples v. Staples*, 85 *Va.* 76, 7 *S. E.* 199.

An intestate left lands and personalty; also widow and children, who divided the whole estate amongst themselves, leaving the administrator only certain choses in action with which to pay debts. Accounts of the administrator showed him in advance to the estate, with nothing to pay judg

ment against him by decedent's creditors, who sued in chancery the administrator and his sureties, and the widow, heirs and distributees, to collect out of decedent's unaliened lands, or otherwise, the bond debt represented by said judgment. It was held, that the suit was maintainable against the heirs, etc., to collect the debt out of the unaliened lands upon evidence other than the judgment, and that equity would allow resort at once to said lands. *Watts v. Taylor*, 80 Va. 627.

It is the settled law of this state, whatever may be the rule in other jurisdictions, that inasmuch as there is no privity between the personal representative and the heirs of a decedent a judgment rendered against the former is not even prima facie evidence against the latter; that such judgment is not a lien on the real estate descended to the heir and does not prevent the statute of limitations from running in favor of the heir when the real estate descended is sought to be subjected for the debt on which such judgment was obtained. *Laidley v. Kline*, 8 W. Va. 218; *Custer v. Custer*, 17 W. Va. 113; *Merchants' Nat. Bank v. Good*, 21 W. Va. 455; *Saddler v. Kennedy*, 26 W. Va. 637.

(8) Judgment or Decree.

(a) When Peremptory Judgment Proper.

If, in an action against an heir, he plead "no assets by descent, nor at the time the writ issued, nor at any time since, except a tract of 107 acres of land;" and issue is joined on the replication, that he had sufficient other lands by descent; and the jury find for the plaintiff, "the debt and one penny damages," a peremptory judgment will be rendered thereon. *Cohoons v. Purdie*, 3 Call 431.

(b) Grounds for Reversal.

Failure to Take Account.—Where an administrator of an intestate who lived and died in another state, answered that he had no assets in his hands, and

knew of none that might come to his hands, it was held, that the court would not reverse a decree against the distributees because no account of the administration was taken. *Hairston v. Medley*, 1 Gratt. 96. See post, "Exceptions and Objections," IV, H, g, (9).

(9) Exceptions and Objections.

Marshaling Assets and Securities.—

If, in a suit to subject testator's lands to the payment of his debts, to which his devisees are parties, a decree is rendered for the sale of lands specifically devised, and the devisees neither object, nor ask the court first to sell land not devised, nor to be indemnified out of unsold lands, neither they, nor those claiming under them, will be heard, years afterwards, when the lands have passed into the hands of other persons, to say that they have an equity to have made good to them, out of such other lands, the loss which they have sustained. *Gwinner v. Michael*, 103 Va. 268, 48 S. E. 895.

During the pendency of a cause in a court of equity against the distributees of an interstate debtor, by his creditor, the estate of the debtor was committed to the sheriff, who, without an amendment of the bill, or the issue of process against him, came in and filed his answer, and no objection was taken to his doing so in the court below. Held, that the decree would not be reversed against the distributees on this account. *Hairston v. Medley*, 1 Gratt. 96.

h. Mode and Sufficiency of Payment.

By Executing Note.—If there is a valid demand binding assets of a decedent, it is not discharged merely by reason of the fact that the executor gives a note therefor signed by him, with the addition to his name of the words, "Executor of —, Deceased." *Crim v. England*, 46 W. Va. 480, 33 S. E. 310.

Depreciated Currency.—Where an administrator, out of confederate money collected by him in the course of his administration, pays off specie

debts of his decedent, he is to be credited in the settlement of his account with the debts so paid at their nominal amount. *Moss v. Moorman*, 24 Gratt. 97.

Confession of Judgment.—Where a personal representative confesses judgment on condition that if the demand be improper it shall be corrected, the estate is entitled to a credit on the judgment to the extent that the demand is improper. *Staples v. Staples*, 85 Va. 76, 7 S. E. 199.

Collateral Agreement Partly Performed.—Where a debtor has agreed to do a collateral thing in satisfaction of his bond to his creditor, and dies after having partially performed the agreement, the bond should not be treated as paid, but the debtor should have credit thereon for the money paid, or the value of the services rendered in pursuance of the agreement. *Hughes v. Patterson*, 91 Va. 664, 22 S. E. 485.

I. CONTRACTS.

1. Contracts Made by Personal Representative.

a. Rule as to Binding Estate.

The rule is well settled that an executory contract of an executor or administrator, if made on a new and independent consideration, moving between the promisee and the executor or administrator as promisor, is his personal contract, and does not, in the absence of authority given by statute or by the will of the decedent, bind the estate, though the consideration moving from the promisee is such that the executor or administrator could properly have paid from the assets and been allowed for on the settlement of his accounts. This rule is for the protection of the estate, and not the other party to the contract. *Wick v. Dawson*, 48 W. Va. 469, 473, 37 S. E. 639.

"It seems to be well established as a general principle, that contracts made with an executor or administrator are personal, and do not bind the estate of the testator or intestate. The rep-

resentative has no power to charge the assets in his hands by contracts originating with himself; nor can any other person reach the assets for claims originating since the death of the decedent, by suit against the representative as such. For such contracts and claims the remedy is against the executor or administrator in his private capacity. Whilst, on the other hand, for the contracts of the decedent the representative is bound, not personally but in his representative capacity." *Fitzhugh v. Fitzhugh*, 11 Gratt. 300, 62 Am. Dec. 653.

b. Promise to Pay Debt as Binding Executor Personally.

An executor wrote to a creditor of his testator that as soon as he was able to dispose of the crops he would pay his claim, or let him have any property in his possession at a moderate valuation. Held, that this did not bind the executor in his own right, without an averment of assets, or a forbearance to sue or some other consideration. *Taliaferro v. Robb*, 2 Call 258.

Assets in the hands of the executor constitute a sufficient consideration for a promise by him to pay a debt of the testator. In an action against an executor personally on a promissory note given by him for a debt of his testator, the defendant may show an insufficiency of assets to pay the debt; and if the plaintiff can not show that there was other sufficient consideration for the promise, he must fail in his action. In this way the defendant can sustain no injury. If there was other consideration for the promise than a sufficiency of assets, then it is consistent alike with justice and the intention of the parties that the executors should be personally liable for the debt. *Snead v. Coleman*, 7 Gratt. 300, 56 Am. Dec. 112.

An executor, trustee, or any other person acting in *autre droit*, who covenants in his own name, and yet adds to his signature the word, "ex-

ecutor," "agent," "trustee," etc., is personally liable, the addition being regarded as a mere description of the person, unless he was recognized as contracting in his representative capacity. *Carr v. Branch*, 85 Va. 597, 8 S. E. 476.

Liability Arising Out of Contract.—Where an executor or administrator in executing an obligation appends to his signature words descriptive of his representative character, such fact will not prevent personal liability from attaching where the nature of the debt is such as to charge him personally. *Snead v. Coleman*, 7 Gratt. 300, 56 Am. Dec. 112.

c. Contracts of Guaranty.

An administrator sold the plaintiff certain shares of bank stock on which the decedent had borrowed money from the bank and had given his notes. The plaintiff paid the full price of the stock, upon the administrator's undertaking to pay the notes. The administrator paid one note but did not pay the other, and the bank retained the amount out of the dividends and the shares. Held, that the decedent's estate was not liable for the failure of the administrator to perform his undertaking, for the administrator had no authority to make the contract in his official capacity. *Childress v. Morris*, 23 Gratt. 802.

d. Bonds and Notes.

See the title **BILLS, NOTES AND CHECKS**, vol. 2, p. 401.

If an executrix without being subject to any compulsion or any undue influence, for the purpose of protecting the estate of her testator from demands of his creditors, gives her own bond as executrix for a fictitious debt and confesses judgment thereon, she is not entitled to relief in equity, nor will the obligee be aided, but the court will leave him to his remedy at law. But if the obligee be a creditor independently of the bond, the court will decree an account of assets, and allow

him what may be justly due, not exceeding the amount of the judgment; the rule in such case being that he is bound by his own fraud so far as it operates against him. *Clay v. Williams*, 2 Munf. 105, 5 Am. Dec. 453.

"It is true that her bonds signed as executrix bind her personally." *Morgan v. Fisher*, 82 Va. 417.

Where Note Given for Debt.—A note given by an executor or administrator for a debt of the decedent is prima facie evidence of the existence of assets so as to render the note personally binding on him, without proof of the actual existence of assets. But such presumption may be rebutted, and when the absence of assets is shown by the executor or administrator the note imposes no personal liability on him. *Snead v. Coleman*, 7 Gratt. 300, 56 Am. Dec. 112.

e. Covenants and Warranties.

See generally, the titles **COVENANTS**, vol. 3, p. 741; **WARRANTY**.

An executor, trustee or any person acting en autre droit, who covenants in his own name, and yet adds to his signature the word, "executor," "agent," "trustee," etc., is personally liable, the addition being regarded as a mere description of the person, unless he was recognized as contracting in his representative capacity. *Carr v. Branch*, 85 Va. 597, 8 S. E. 476.

f. Acceptances of Order upon Estate.

An order drawn upon the executor of an estate by a legatee, when not a valid charge against the estate, does not become such by its acceptance by the executor; he having no authority to bind the estate by executing any evidence of indebtedness. *Staples v. Staples*, 85 Va. 76, 7 S. E. 199.

g. Release of Liens.

See generally, the title **LIENS**.

The vendee being insolvent, a contract between one of the executors of the vendor and the second purchaser which is doubtful in its import, will not be construed into an agreement to

release the lien upon the land. If one of the executors did contract to release the lien, it being the only security for the debt, it would not be enforced in a court of equity against the other executors. *Stuart v. Abbott*, 9 Gratt. 252.

• An administrator has full control of the personal estate, and may sell the choses in action if the exigencies of the estate require it, or he may exchange a bond due to the estate for the note of a third person, and release the lien on real estate by which such bond is secured, and if done without fraud the transaction will be binding upon the administrator and those whom he represents. *Stribling v. Splint Coal Co.*, 31 W. Va. 82, 5 S. E. 321.

h. Agreement to Pay Compound Interest.

See generally, the title INTEREST.

A note, executed by an executor for the amount of the principal and accrued interest of a debt due by the estate, was allowed to run two years, when the interest then due was added to the amount of the note, and the whole embraced in a judgment, which was confessed by the executor. Held, that the executor having no authority by virtue of his office to bind the estate to the payment of compound interest, the estate should be charged only with the principal sum originally due, with simple interest at the legal rate. *Staples v. Staples*, 85 Va. 76, 7 S. E. 199.

i. Relating to Partnership Affairs.

See generally, the title PARTNERSHIP.

Contracts between a surviving partner and the representative of his deceased partner, which respect to the partnership estate, while not interdicted, are regarded with suspicion, and will be jealously scrutinized and only allowed to stand, if assailed, when they appear to be reasonable, fair and just. This is especially true of a purchase by a surviving partner of the interest

of the deceased partner. *Tennant v. Dunlop*, 97 Va. 234, 33 S. E. 620.

2. Contracts Made by Decedent.

a. In General.

For contracts of the decedent the representative is bound, not personally, but in his representative capacity. *Fitzhugh v. Fitzhugh*, 11 Gratt. 300, 62 Am. Dec. 653.

Actions Concerning Lands.—Although a bill in equity will lie for the enforcement of a demand sounding in damages for the breach of contract by the testator, to be satisfied out of his real estate in the hands of his heir or devisee, in default of the personalty to discharge the same, under W. Va. Code, 1860, ch. 131, § 6, yet it is error to base a decree for such relief on a bill to which the devisees were not made parties. *Fowler v. Kelly*, 3 W. Va. 71.

b. Personal Contracts as Binding Executor.

It seems that in personal contracts, if the testator is bound, the executor is also bound, though not named. *Lee v. Cooke*, 1 Wash. 306. See also, *Stout v. Jackson*, 2 Rand. 132.

c. Funeral Expenses.

It seems that an action will not lie, against a personal representative as such for the funeral expenses of his testator or intestate. *Fitzhugh v. Fitzhugh*, 11 Gratt. 300, 62 Am. Dec. 653. See also, *Daingerfield v. Smith*, 83 Va. 81, 1 S. E. 599.

d. Goods Furnished or Services Rendered Estate.

A personal representative cannot be sued as such for services rendered or goods furnished the decedent's estate after his death. *Daingerfield v. Smith*, 83 Va. 81, 1 S. E. 599.

But in assumpsit against an executor, in his individual character for the price of goods sold and delivered to him for the use of the testator's widow and legatees, upon evidence being given of such sale and delivery of a promise by

the defendant to pay for goods out of his testator's estate and of assets sufficient for that purpose, the plaintiff may recover, although the promise was not in writing. *Collins v. Row*, 10 Leigh 114. See also, *Patton v. Williams*, 3 Munf. 59.

e. Rescission.

See generally, the title RESCIS-
SION, CANCELLATION AND
REFORMATION.

J., as the administrator, with the will annexed, of B., filed his bill, alleging that B. made a contract with P., in which he sold him certain real estate, and gave him power to sell certain other real estate, prior to which B. had made a will, in which he had devised the same real estate to other parties. B. appointed no executor in his will and upon the probate of the will, J. qualified as his administrator, with the will annexed, and brought a suit in chancery, against the said P. and the devisees under the will, solely to impeach and set aside the contract for want of consideration, etc. Held, that as J. as administrator, with the will annexed, was the only plaintiff, the bill did not show any ground for his relief as such, and should have been dismissed. *Jones v. Patton*, 10 W. Va. 653.

f. Specific Performance.

See the title SPECIFIC PER-
FORMANCE.

J. TORTS.

See generally, the title TORTS.

1. Of Deceased.

a. Abatement, Revival and Survival.

See the title ABATEMENT, RE-
VIVAL AND SURVIVAL, vol. 1, p. 2.

"At common law an action was abated by the death of either party, and would not be revived for or against the personal representative. If the cause of action survived, it was necessary to bring a new suit. This, how-
ever, has long since been altered by statute, and now, if the cause of action

survives, the action may be revived.

* * * It has sometimes been said that at common law all causes of action ex contractu survive; whereas all torts die with the person. But neither of these propositions is strictly accurate. The general rule is that rights of the former class do survive, but the rule is not universal. Thus, for instance, a breach of promise to marry, or a breach of the implied contract of a medical practitioner, or of an attorney, to exercise skill in his profession, and other injuries of a personal nature, although arising ex contractu, that might be mentioned, constitute exceptions to the rule, unless, indeed, some special damage to the personal estate can be stated on the record. * * * Nor do all actions in tort, at common law, die with the person. The true test is, not so much the form of the action, as the nature of the cause of action. Where the latter is a tort unconnected with contract, and which affects the person only, and not the estate, such as assault, libel, slander, and the like, there the rule actio personalis, etc., applies. But where * * * the action is founded on a contract, it is virtually ex contractu, although nominally in tort, and there it survives." *Lee v. Hill*, 87 Va. 497, 12 S. E. 1052.

b. Negligence.

See generally, the title NEGLIGENCE.

Executors to whom real estate was devised in their representative capacity for certain purposes were held individually liable to a person who was injured by falling into a coal hole in a sidewalk in front of the premises, which negligently failed to keep properly covered. *Belvin v. French*, 84 Va. 81, 3 S. E. 891.

c. Retention of Profits of Land.

See generally, the title TRESPASS.

Trespass for the mesne profits of land, recovered in ejectment against the decedent, lies against his executor. *Lee v. Cooke*, Gilmer 331.

d. Property Destroyed or Converted.

See generally, the title DETINUE AND REPLEVIN, vol. 4, p. 634.

Detinue against an executor for property destroyed or converted by his testator, or in the possession of the co-executor, can not be sustained. *Allen v. Harlan*, 6 Leigh 42, 29 Am. Dec. 205.

e. Fraud in Inducing Contract.

See generally, the title FRAUD AND DECEIT.

In *Boyles v. Overby*, 11 Gratt. 202, it was held, that an action on the case for fraud in selling to the plaintiff an unsound slave, which he was induced to purchase by means of a false and fraudulent warranty of soundness, or by means of a fraudulent concealment of the unsoundness of the slave, could not be maintained against the personal representative of the vendor. This case, however, was disapproved in *Lee v. Hill*, 87 Va. 497, 12 S. E. 1052, and the true rule was said to be that, where the cause of action is a tort, unconnected with contract and affecting the person only, and not the estate, the action dies with the person; but, where the action is founded on contract it is virtually ex contractu, though nominally in tort, and in such case, the action survives.

f. Breach of Promise of Marriage.

See generally, the title BREACH OF PROMISE OF MARRIAGE, vol. 2, p. 613.

An action for breach of promise of marriage will not lie against the personal representative of the promisor, either at common law or under the statute, where no special damages are alleged and proved. In such case, the maxim *actio personalis moritur cum persona* applies. *Grubb v. Sult*, 32 Gratt. 203, 34 Am. Rep. 765; *Flint v. Gilpin*, 29 W. Va. 740, 3 S. E. 33. See also, *Burton v. Mill*, 78 Va. 468, 483.

2. Of Personal Representative.**a. Conversion of Property.**

See generally, the title TROVER AND CONVERSION.

Trover may be sustained against a personal representative as such, although the goods never came into his hands. *Ferrill v. Brewis*, 25 Gratt. 765. See also, Va. Code, 1887, § 2655.

If an administrator sells a chattel, whereof his intestate died possessed, but which of right belonged to another, and applies the proceeds to the payment of his intestate's debts in due course of administration, without any notice of the right or claim of the true owner, he is personally liable to the true owner for the value in trover brought by the owner against him. *Newsom v. Newsom*, 1 Leigh 86, 19 Am. Dec. 937. See also, *Martin v. Stover*, 2 Call 514.

b. Property Unlawfully Detained.

See generally, the title DETINUE AND REPLEVIN, vol. 4, p. 634.

Detinue for a chattel lies against an executor as such, provided the chattel actually came into the executor's possession. *Catlett v. Russell*, 6 Leigh 344; *Allen v. Harlan*, 6 Leigh 42, 29 Am. Dec. 205; *Greenlee v. Bailey*, 9 Leigh 526.

And detinue for property in the possession of an executor although it was first taken and detained by the testator, is maintainable, and the judgment and process should be against the executor, and not against the estate. *Allen v. Harlan*, 6 Leigh 42, 29 Am. Dec. 205.

K. DISTRIBUTION.

See generally, the titles HEIR, HEIRS AND THE LIKE; WILLS.

1. Payment of Debts as Prerequisite to Distribution.

See ante, "Proceedings by Creditors against Heirs, Devisees, Distributees, Privies and Legatees," IV, H, 7, g.

An heir or distributee is only entitled to the residue of the estate after the payment of the debts of the ancestor. *Maxmeadows Land, etc., Co. v. McGavock*, 96 Va. 131, 30 S. E. 460; *Kippen v. Carr*, 4 Munf. 119; *Kinnaird v. Williams*, 8 Leigh 400, 410. See also, *Edmunds v. Scott*, 78 Va. 720.

An executor can not defend himself against the suit of a creditor, showing that, before he had notice of the plaintiff's demand, he paid over the assets to the legatees of the testator. *Kippen v. Carr*, 4 Munf. 119.

W in his trust deed to secure to his wife's heirs, at her death, money turned over to her as the price of the property of her first husband, wherein she had dower, expressly admitted his obligation "to return and pay over" the amount to the heirs. Held, that the amount was a debt of W's, and any deficiency in the proceeds of the trust property was payable out of his general estate in the hands of his legatees. *Watkins v. Dupuy*, 87 Va. 87, 12 S. E. 294.

A debtor was indebted to a creditor on several bonds, on which there was a surety. Held, that a legacy left to the debtor by the creditor might be applied by the court as a credit on the bond on which there was a surety, no application having been made by either the debtor or creditor. *Lingle v. Cook*, 32 Gratt. 262.

Where an executor or administrator, without taking a refunding bond, pays legacies or distributive shares, leaving debts unpaid, and a deficiency of assets results, he is guilty of maladministration, and is liable as for a devastavit. *Lewis v. Mason*, 84 Va. 731, 10 S. E. 529; *Morrison v. Lavell*, 81 Va. 519; *Edmunds v. Scott*, 78 Va. 720; *Lewis v. Overby*, 31 Gratt. 601; *Cookus v. Peyton*, 1 Gratt. 431.

The fact that the assets turned over to the legatee would have been lost if retained by the executor does not affect his liability to creditors. Thus an executor was held liable for slaves turned over to legatees although they were subsequently emancipated by the federal government. *Morrison v. Lavell*, 81 Va. 519.

Presumption of Payment from Lapse of Time.—The statute of limitations is ordinarily inoperative to bar a claim for a legacy or distributive share, yet

lapse of time may raise a presumption of payment or satisfaction. *Leake v. Leake*, 75 Va. 792; *Anderson v. Burwell*, 6 Gratt. 405.

No dealing of the executor with a legatee, or advancement made to him, can in any manner affect or modify the liability of the testator's estate to the payment of his debts. *Leake v. Leake*, 75 Va. 792.

An administratrix with the will annexed, who permits the trustee under the will to take possession of the personal property belonging to the estate before the payment of the debts, is guilty of a devastavit, and, to the extent of such property, becomes personally chargeable with the debts of the estate. *Lewis v. Mason*, 84 Va. 731, 10 S. E. 529.

An administrator paying away the assets of the estate to distributees, without notice of debts or liabilities of his intestate, must account to creditors for the amount so paid away, with interest. *Cookus v. Peyton*, 1 Gratt. 431.

Payment before Order or Decree.

An executor can not defend himself against the suit of a creditor by showing that before he had notice of the plaintiff's demand he paid over the assets to the legatees of the testator, unless he took and filed a refunding bond as required by law. *McGlaughlin v. McGlaughlin*, 43 W. Va. 226, 27 S. E. 378; *Kippen v. Carr*, 4 Munf. 119.

2. Assent of Personal Representative.

a. Necessity of Assent.

In General.—Since the title to the testator's personal property vests in the executor, notwithstanding directions in the will that it be applied to other purposes, the law imposes upon every legatee the necessity of obtaining the executor's assent to the legacy before his duty to pay or deliver it becomes fixed. *Hairston v. Hall*, 3 Call 218; *Smith v. Townes*, 4 Munf. 191.

"Even if R.'s remedy had been suspended by his being executor as well as creditor (which the court doth not

admit), the suspension ceased with his death; and if as executor he did not assent to the devisees taking possession, as is alleged, he could have maintained a suit for the estate; and also as guardian; besides his right to sue for his own debt in equity, or to retain for it as executor." *Pendleton v. Whiting, Wythe* 38.

Emancipation of Slave.—Slaves emancipated by will can not maintain an action at law against the executor to recover their freedom, without proving the assent of the executor to the bequest. *Reid v. Blackstone*, 14 Gratt. 363; *Woodley v. Abby*, 5 Call 336; *Nicholas v. Burrus*, 4 Leigh 301.

b. What Amounts to Assent.

A testator bequeathed a slave to an infant son, and provided that his wife should hold the slave for his son until he attained full age. The executor delivered the slave to the wife. Held, that this was an assent by the executor to the legacy to the son. *Lynch v. Thomas*, 3 Leigh 682.

Where executors or administrators with the will annexed, who are legatees of slaves under the will, agree to a division of the slaves, and each takes possession of those allotted to him, this is an assent to the legacies by the executors or administrators. *Frazer v. Bevil*, 11 Gratt. 9.

c. Evidence of Assent.

(1) In Actions by or against Personal Representative.

(a) Presumption and Burden of Proof.

The assent of the executor need not be proved, where the legatee had possession during the lifetime of the testator. *Lowry v. Mountjoy*, 6 Call 55.

A testatrix devised certain slaves to her son for life, and at his death to her grandchildren, with the provision that, if they should be taken in consequence of any debt due by the son, the slaves should be divided among the grandchildren, as soon as they were known to be out of the possession of the son, whom she appointed executor of her

will. The slaves were taken and sold on an execution against the son. Held, that the legatees could not recover them without proving the assent of the executor to the legacy. *Hairston v. Hall*, 3 Call 218.

(b) Competency.

A legatee suing for a slave specifically bequeathed, may prove by the executor, if he has no objection to being examined, his assent to the legacy; but he can not prove by him that the testator had title to the slave, and could bequeath it. *Smith v. Townes*, 4 Munf. 191.

(c) Sufficiency.

In an action of law, brought by one of a certain lot of slaves, who was under twenty at testator's death and thirty-one at the time of the action, to recover his freedom, the defendant demurred to the evidence, which consisted of the testator's will; proof that the executor, not long after testator's death, assented to a liberation of four slaves who were then by the will entitled to freedom; proof that, in the opinion of witnesses, and as the executor himself had said, in open court, the testator's estate, other than his slaves, was amply sufficient for payment of his debts, though the executor's accounts of administration had never been settled; and proof, that the pauper plaintiff was, in the executor's presence, sold under execution on a judgment against the executor for a debt of the testator, under which sale defendant claimed. Held, from such evidence, stated in the demurrer to the evidence, the assent of the executor to the emancipation of the plaintiff under his testator's will, might fairly be inferred; and, therefore, the plaintiff was entitled to judgment of freedom. *Nicholas v. Burrus*, 4 Leigh 289.

In a given case it appeared, that before a deed to a purchaser, a payment had been made to the father on account of his legacy, and a receipt given, stating that the money paid "was

passed to the credit of Mrs. L. W., executrix of D. W., deceased." Held, such payment did not show an assent by the executrix to her own or the daughter's legacy. *Burchard v. Wright*, 11 Leigh 463.

(2) In Action between Contesting Legatees.

Where the plaintiff and defendant claim under the same executory bequest, and a case is agreed, submitting the right to be adjudged, according to the legal construction of the will, without saying anything about the executor's assent to the legacy, the court will assume such assent between the present parties. *Royall v. Eppes*, 2 Munf. 479.

d. Operation and Effect of Assent.

(1) Legatee May Sue.

In His Own Name.—A specific article of personal property may be bequeathed, though not in the testator's possession at the date of his will, or at the time of his death; so that upon the assent of the executor, the legatee may sue for it in his own name. *Smith v. Townes*, 4 Munf. 191.

May Sue Executor.—Where the executor has assented to a specific legacy and waived a refunding bond, the legatee may maintain an action at common law against the executor for its recovery. But the intention to waive the refunding bond must be very clear. *Nelson v. Cornwell*, 11 Gratt. 724.

(2) Property Not Subject to Execution on Judgment against Executor.

See generally, the title EXECUTIONS, ante, p. 416.

After the assent of an executor to a specific legacy the property is changed, and a creditor obtaining a judgment against the executor, can not levy an execution upon the property in the hands of the legatee. He may pursue the executor at law, or follow the property in equity, making all the legatees parties. *Burnley v. Lambert*, 1 Wash. 308, cited in *Woodley v. Abby*, 5 Call 336; *Lewis v. Bacon*, 3 Hen. &

M. 89; *Gordon v. Justices of Frederick*, 1 Munf. 1, 21; *Whitehorn v. Hines*, 1 Munf. 585; *Hopkirk v. Dennis*, 2 Munf. 326, 328; *Gallego v. Attorney General*, 3 Leigh 450, 24 Am. Dec. 650; *Nicholas v. Burruss*, 4 Leigh 289, 303; *Burchard v. Wright*, 11 Leigh 463; *Davis v. Newman*, 2 Rob. 466, 49 Am. Dec. 764; *Hurst v. Morgan*, 31 W. Va. 521, 8 S. E. 285; *Wilcocks v. Phillips*, 25 Fed. Cas. 1201.

(3) Enurement.

A testator bequeathed slaves to his son for life, remainder to his son's children. The executor, being apprehensive that the son would sell the slaves to persons who would carry them out of the state, applied to a court of chancery to restrain the son from so doing, and to compel him to give security that the property would be forthcoming at his death for the legatees in remainder, the executor alleging that he had never assented to the legacy, and the legatee for life alleging that he had assented thereto. Held, that if the executor had not assented to the legacy, he had a plain remedy at law to recover the subject; and if he had assented to it to the legatee for life, that assent enured to the benefit of the legatees in remainder, and though they might, the executor could not, ask the aid of the court to secure the subject to the legatees in remainder. *Bishop v. Bishop*, 2 Leigh 484.

Where executors or administrators with the will annexed are legatees of slaves under the will, and slaves are given to one of these legatees for life, and if he should die without heirs, then over to a grandson of the testator, the assent to the legacy in favor of the first taker is an assent in favor of the contingent legatee over. *Frazer v. Beville*, 11 Gratt. 9.

3. Time of Distribution.

The widow's rights, if any, in the assets of a testator's estate, must be determined before the assets are decreed

to the residuary legatees. *Garland v. Garland*, 2 Va. Dec. 351.

An intestate's widow filed a bill for the distribution of his personal estate against the administrator and his sureties, alleging that the administrator had left the estate, and making the agent of the administrator a party. The widow stated in her bill that she understood that the administrator had left funds in the hands of his agent for the payment of his debts. Upon the death of the agent, the bill was revived against his executrix and it appeared from her answer, that whether there were funds of the administrator in her hands to which the widow was entitled must depend on the result of an account. Held, that the widow was entitled to a decree against the administrator and his sureties without waiting for such account to be stated. *Moore v. George*, 10 Leigh 228.

A suit pending against the executor for more than his testator's estate is worth, within twenty years before suit brought against him by legatees or distributees for their share of the estate, would rebut any presumption of payment, arising from lapse of time, against their demand, for until the debts are paid they have no claim to the estate. *Winston v. Street*, 2 Pat. & H. 169.

4. To Whom Distribution May Be Made.

a. Shares of Infants.

Until a legacy is payable, the executor can not relieve himself and his sureties from responsibility for it, by paying over the legacy to the guardian of the legatee; and if the executor is also the guardian of the legatee, he can not elect to hold the legacy as guardian, before it is payable, so as to relieve his sureties as executor, and charge his sureties as guardian. *Swope v. Chambers*, 2 Gratt. 319.

In 1859 a testator gave his estate to his widow and six children as in the case of intestacy, directing that those

of his children who had not been educated should be educated out of the general fund at the charge of the estate. At the end of the year, the executors turned over the land, slaves and other personal estate to the widow, one daughter, who was of age, and the guardian of the five minor children, who agreed to hold it all together, to be managed by the guardian for the support and maintenance of the widow and children and the education of the minor children as far as necessary for such purpose, the widow and children to live on the land. They acted under this agreement until 1868. Held, that, as the agreement was obviously beneficial to the infants, a court of equity would have approved and confirmed it. *Hannah v. Boyd*, 25 Gratt. 692.

An administrator sold a part of the estate of his intestate to the guardian of a minor distributee of the estate. It was agreed between the guardian and the administrator that payment should be made by the appropriation of money in the administrator's hands due the ward. Accordingly, the guardian, as such, receipted to the administrator for money due his ward as having been actually paid by the administrator to him. Held, that the said administrator was personally liable to the administrator of the minor for the amount of such payment. *Asberry v. Asberry*, 33 Gratt. 461.

b. Shares of Absent or Unknown Legatees and Distributees.

In a suit by certain heirs of a person having an equitable interest in an estate against the executrix of the person who held the legal title, and who, in his lifetime, had conveyed the estate to bona fide purchasers without notice, one of the heirs not having been heard of for seventeen years, and, being then an infant, her share was divided among the other heirs, upon their executing bonds payable to the judge and his successors in office, with condition to indemnify the executrix

against the claim of the absent heir. *Norman v. Cunningham*, 5 Gratt. 63.

Where there is no hand to receive a legacy, the executor should invest it in an interest-bearing fund, or bring it into court to be so invested. *Lyon v. Magagnos*, 7 Gratt. 377.

c. To Trustee.

A testator gave his property to his wife for life, and at her death to be divided equally among his five children, two of whom were daughters. He then directed whatever portion came to the daughters to be "put into the hands of trustees of their own choosing, requiring them to give ample security for the faithful performance of the trust committed to them," and afterwards directed: "Should any of my children die without an heir of their body, it is my desire that whatever may be then left, of what they have received from my estate, revert to the same, with such restrictions in regard to my daughters that may be entitled to a portion, as hereinbefore provided." One of the daughters married, and during the pendency of a friendly suit for partition of the testator's estate, but before any portion was actually assigned to her, united with her husband, who was insolvent, in a deed conveying whatever interest she might be entitled to under the will of her father, to a trustee, to secure certain debts of her husband named in the deed. Held, that the executor of the testator had no power under the will to pay the daughter's legacy to any one except a trustee chosen and qualified as the will directed, and if the daughter had the right to convey it at all, she could only do so with the concurrence of her trustee, and therefore the deed of trust was a nullity. *Christian, J., dissenting. Haymond v. Jones*, 33 Gratt. 317.

d. Guardian.

See generally, the title GUARDIAN AND WARD.

A legacy from a father to his daughter, payable a certain amount within twelve months after August, 1877, and the balance at the discretion of the executors, out of the profits of the estate, was held, to have been discharged by the payment to the daughter's guardian, in depreciated currency under the act of 1781. *Yates v. Salle, Wythe* 163. See also, *Shriver v. Garrison*, 30 W. Va. 456, 4 S. E. 660.

A guardian has control over his ward's interest in a bond executed to an executor and transferred by him to the guardian as a part of the ward's estate. He may receive money paid thereon, he may sue and recover thereon in the name of the executor for his own use as guardian, and the executor can not prevent it; or he may sell and transfer it. *Hunter v. Lawrence*, 11 Gratt. 111.

e. Committee of Insane Distributee.

An administrator as such, being indebted to an insane distributee, offered to give the committee of such distributee his bond for such indebtedness, and the committee accepted such offer and the administrator executed to the committee his bond and the latter gave him a receipt, reciting therein that the note of the administrator had been received for the amount of such indebtedness and the administrator, in a subsequent ex parte settlement of his administration accounts, was credited with the amount, but the bond was never paid and the administrator, having died and his estate found to be insolvent, the bond will not be held to be a payment of the indebtedness and the sureties on the administration bond will be made liable therefor to the representatives of such distributee. *Hoge v. Vintroux*, 21 W. Va. 1.

f. Liability for Payment to Improper Party.

L. died in 1840, and by his will said: "I give to my niece E., wife of B., the sum of \$400, which said sum I wish put to interest and that paid to E. an-

nually during the lifetime of her husband, B., and at his death, should she be the longest liver, then I wish the principal paid over to her, said E." S., the executor of L., paid the interest to E. until 1862, when he died. B., the administrator of S., in April, 1863, paid to the administrator de bonis non of L. the \$400 and interest in confederate money. E. died in 1866, leaving her husband surviving her. Held, the payment by B. to, the administrator de bonis non of L., was no satisfaction of the legacy as to B., but the estate of S. was liable to pay it, principal and interest, and B. being the only child of S., and having ample assets, the decree might be against him personally. *Stark v. Lipscomb*, 29 Gratt. 322.

5. Mode and Sufficiency of Payment or Delivery.

a. Presumption as to Payment.

A suit pending against the executor for more than his testator's estate is worth, within twenty years before suit brought against him by legatees or distributees for their share of the estate, would rebut any presumption of payment, arising from lapse of time, against their demand, for until the debts are paid they have no claim to the estate. *Winston v. Street*, 2 Pat. & H. 169.

b. Credit of Individual—Demand of Personal Representative.

General Consideration.—A debt due an administrator individually from a distributee may, in equity, be allowed as a payment on that distributee's share of the estate. *Preston v. Davis*, 102 Va. 178, 45 S. E. 865.

A debt due to the executor individually from a legatee may be insisted on as part payment of the legatee's legacy. *Hooper v. Hooper*, 32 W. Va. 526, 9 S. E. 937.

But an instrument, signed by the heirs at law and distributees, approving of the manner in which the administrator had administered the estate,

"by paying the expenses" of the widow "and her family, and the tuition and other expenses of her children while at school, and charging the said disbursement to the estate," and requesting the commissioner to allow disbursements as charged by the administrator, does not sanction the conduct of the administrator in bringing into the administration, as a credit on the shares of the other distributees, an individual demand, having no connection with the estate, which he held against one distributee. *Preston v. Davis*, 102 Va. 178, 45 S. E. 865.

Where a distributee purchased slaves at an executor's sale, but suit was not brought on the bond for the price until twelve years after it was given, and six years after the death of the executor to whom it was given, and no account of the executorship was ever rendered, and suit was brought against the administrator of the executor in the same year to compel such settlement, and execution on the judgment was levied on the slaves voluntarily conveyed by the distributee, it was held, on a bill by such voluntary donee to enjoin the sale of the slaves until the distributive share of the donor should be ascertained and set off against the judgment, that, if the slaves so levied on were sold, the amount made on the execution by such sale, and not their estimated value, should be allowed on account of the judgment. *Hickerson v. Helm*, 2 Rob. 628.

Judgment Paid as Surety.—Where an executor, as surety, has paid a valid judgment against a distributee, he is entitled to charge the amount of such judgment against the share of such distributee. *Boyd v. Townes*, 79 Va. 118.

Debts Due from Guardian of Legatee or Distributee.—The debt of a guardian of a distributee to an administrator individually can not be set off against the share of the distributee which has been decreed to be paid by

the administrator to the guardian. *Shriver v. Garrison*, 30 W. Va. 456, 4 S. E. 660.

c. Payment in Bonds.

Where an executor is directed by the will to sell the entire estate of his testator, real and personal, and to distribute the surplus, after the payment of debts, among the legatees, he may assign the bonds taken for the purchase money to the legatees, and be discharged to such extent, the bonds appearing to have been well secured when taken and to be due from responsible persons. *Guerrant v. Johnson*, 4 Munf. 360. See ante, "Guardian," IV, K, 4, d.

Bond of Principal—Administrator.—An administrator, being indebted to an insane distributee of his intestate's estate, gave the committee of such distributee his bond for such distributee's share of the estate, and took a receipt reciting that the note of the administrator had been received for the amount of such indebtedness, and the administrator, in a subsequent *ex parte* settlement of his accounts, was credited with such amount. Held, that the sureties in his administration bond, on his insolvency without payment thereof, were liable for such amount, and that the bond would not be deemed a payment. *Hoge v. Vintroux*, 21 W. Va. 1.

d. Payment out of Private Estate of Executor.

A parol agreement, by an executor, to pay a legacy out of his own estate, is not void under the act to prevent frauds and perjuries, if a decree was previously obtained for the legacy to be satisfied out of certain property appointed by the testator; for part of which property the executor was accountable under the decree, and responsible *de bonis propriis*; and such agreement was made in consideration of forbearance to enforce the decree. *Patton v. Williams*, 3 Munf. 59.

e. Depreciated Currency.

A legacy from a father to his daughter, payable a certain amount within twelve months after August, 1777, and the balance at the discretion of the executors, out of the profits of the estate, is discharged by the payment to the daughter's guardian, in depreciated paper money, under the act of 1781, providing that, in all cases of payment in paper currency of any debt, contract or obligation whatsoever, the party paying, or on whose account the money shall have been paid, shall have full credit for the nominal amount of the payment. *Yates v. Salle*, Wythe 163.

Confederate Money.—Where the legatee owned an absolute estate in the legacy payable in good money, it was held, that a payment thereof in confederate money was void. *Stark v. Lipscomb*, 29 Gratt. 322.

A testator by his will gave his widow a tract of land for life, and directed that at her death it should be sold and that two-thirds of the proceeds should go to his brother and the balance to other relatives. In 1857, in a friendly suit in which all persons interested were parties, there was a decree for the sale of the land on a credit of one, two and three years. In 1859, the sale was confirmed, and the executor appointed a commissioner to collect the interest on the bonds and pay the same to the widow. In 1863, an order was entered in the cause to collect the bonds and invest in confederate bonds, and the report of the collection and investment was confirmed by a decree which also directed the confederate bonds to be assigned to the widow for life upon giving security. Of these proceedings, the widow had no notice; and when the bond was tendered, she refused to receive it. In 1866, she filed a petition for rehearing, and excepted to the report. In 1873, her petition was dismissed and she appealed. Held, that the decree of 1863 was erroneous, be-

cause it was without notice to the widow, and because it permitted the purchaser to pay his debt in a depreciated currency. *Purdie v. Jones*, 32 Gratt. 827.

f. Application of Payments.

Where the husband gives a receipt for £200 in part of a bequest to his wife, the payment should be applied to the principal, and not to the interest. *Cary v. Macon*, 4 Call 605.

g. Equalization.

A testator gave his widow the interest on \$5,000 for life, and the residue to his three daughters, A., B. and C. His widow bought his real estate, C. and husband going security for the deferred payments; and, by agreement, her \$5,000 was invested in the real estate, which was to be liable for those payments at her decease. For default of payment fifteen years later the real estate was sold, and was bought by C., who paid part, and gave bonds for the deferred payments. For similar default five years later the real estate was again sold, and the proceeds ordered to be paid to A. and B., to equalize them with C., who had received her share of the estate. Before this was done the widow died and the \$5,000 fell in; but it appeared that if this sum were divided, and paid from the proceeds of the last sale, the remainder would be inadequate to pay the amounts due A. and B. for equalization, and that the whole of such proceeds would not pay C.'s obligation for the sale to her. Held, that the payments to A. and B. should be first made from the fund arising from the last sale. *Mosby v. Withers*, 89 Va. 160, 15 S. E. 857.

In a division of slaves among legatees, if those allotted to some of them be valued at more, and to others at less, than their respective shares; and the commissioners making the division direct, that each person whose allotment is too large shall pay a surplus, without designing to whom; it seems

that such payments are to be made to the executor, and by him to the other legatees, so as to make the division equal; and he is accountable if he delivers the slaves allotted to any legatee, without receiving the surplus payable from him to her. *Sheppard v. Starke*, 3 Munf. 29.

h. Evidence of Payment or Delivery.

A testator having a leasehold estate producing a yearly rent, bequeaths to his father \$50 per annum during his life, to be paid out of the rent, and to his wife one-half, and to his daughter the other half, of the rent remaining after paying the legacy to his father. The wife is appointed executrix, and qualifies as such. Afterwards she sells the leasehold estate, and makes a deed in her individual name (not calling herself executrix) transferring to the purchaser all her right, title, interest and property in the premises. On a bill by the daughter against the purchaser, held, the execution of the deed by the executrix in her individual name does not prove that the act was done in the character of legatee, and she must be considered as holding as executrix at the time of the deed, unless there be evidence establishing that she had previously taken as legatee. *Burchard v. Wright*, 11 Leigh 463.

i. Interest on Legacies and Distributive Shares.

See generally, the title INTEREST.

Where the husband of a legatee declined, during the Revolutionary War, to take her legacy when offered by the executor, partly in certificates and partly in money, saying that he had rather it should remain in the hands of the executor until the surviving son of the testator came of age, interest was thereby suspended; and the surviving son will be allowed a year after coming of age to look into his affairs, before the legacy begins to bear interest again. *Cary v. Macon*, 4 Call 605.

An executor is not chargeable with interest on a legacy payable to an in-

fant, until a guardian has been appointed, and he has received notice of such appointment. *Cavendish v. Fleming*, 3 Munf. 198.

Where a legacy is left in trust and the trustee refuses to act, the executor is not bound to pay the legacy until a new trustee is appointed by the court of chancery, and he is not chargeable with interest, until after the decree. *Johnson v. Mitchell*, 1 Rand. 209.

An executor, who is the residuary legatee, is bound to pay interest on legacies left by his testator, though no demand has been made for them for fourteen years, though during all that time the legatees have been dead, and there has been no administration on their estates, and though the executor did not know, and had no means of knowing, whether they were alive or dead, or where they resided in their lifetime. *Bourne v. Mechan*, 1 Gratt. 292.

Where an executor during the Civil War did not apply to the court for relief, or to have the funds invested, he is chargeable with interest on legacies with respect to funds kept and used by him, although he and the legatees were in different states, in the absence of proof that he was prevented by the war from deriving any profit from the funds, or that he and the legatees were separated by hostile armies. *Sharpe v. Rockwood*, 78 Va. 24.

A testator directed his executors to set apart so much of his property, not specifically bequeathed, as they might think sufficient to produce an annual income, by rent or interest, of \$2,000, which amount he desired them to pay in the following manner, namely, the sum of \$500 annually to his sisters and niece, to be paid to each of them for life. The executors failed to set aside the property as directed, and died wholly insolvent and largely indebted to the estate. In a suit by one of the annuitants against the administrator de bonis non, she claimed not only the

principal, which the executors failed to pay her, but interest thereon. Held, that to decree for such interest against the administrator de bonis non, thereby diminishing the estate of the residuary devisees and legatees, was erroneous. *Adams v. Adams*, 10 Leigh 527.

Where a testator, in his will, makes advancements to his children, and directs that they shall be charged interest thereon, it is proper to charge such interest in making distribution of his estate. *Hays v. Freshwater*, 47 W. Va. 217, 34 S. E. 831.

A testator gave \$1,000 to each of thirteen children; directed his executors to sell his whole estate when they should think most expedient; and, out of the proceeds, to pay first his debts, and then these legacies, agreeably to seniority; and gave the whole surplus to the same thirteen legatees. There being no other provision for these children, it was held, that interest should be allowed on these legacies from the testator's death. *Hite v. Hite*, 2 Rand. 409.

Where, at the time of the final accounting of an administrator, the debts were all paid, and the distributees all of age, and there was no reason why they should not be paid the amounts due them, but the administrator nevertheless persistently refused to pay such amounts and compelled the distributees to resort to the courts to enforce payment, it was held, that the distributees were entitled to interest against the administrator from the date of the final settlement. *Preston v. Davis*, 102 Va. 178, 45 S. E. 865.

j. Advancements.

Where a reasonable allowance by an administrator for the support of infant distributees exceeds the entire income of the estate, no part of such income should be charged in favor of the distributees against the administrator, and the principal only should be treated as the subject of distribution. *Jackson v. Jackson*, 1 Gratt. 143.

6. Enforcement of Distribution.

a. Nature of Suit.

See generally, the title CREDITORS' SUITS, vol. 3, p. 780.

A suit of distributees to ascertain and pay the debts of the estate, and to distribute the surplus, is substantially a creditor's suit. *Norvell v. Little*, 79 Va. 141.

b. Right to and Scope of Relief.

A creditor of an absent debtor, who is one of the heirs and distributees of a deceased intestate in Virginia, may go into a court of equity, for the purpose of having a division and distribution of the estate of the decedent, and of procuring payment of his debt, out of the share of the absent debtor, in the estate. *Moore v. White*, 3 Gratt. 139.

Distributees of a decedent may maintain a bill in equity to assert their rights in the decedent's estate, though they cannot have distribution thereof without having the executor or administrator of the decedent before the court as a party to the cause. *Hansford v. Elliott*, 9 Leigh 79.

The fact, that an ex parte settlement, made by an executor, must be surcharged and falsified, before the payment of a certain legacy can be enforced, will not justify the legatee in instituting a suit to recover such a legacy, before it is payable. *Rowland v. Rowland*, 11 W. Va. 262.

A suit in chancery being brought by legatees against the executors and widow of the testator, for a settlement of the administration account, and distribution of the personal estate among the plaintiffs; if it appears that the widow has not fully received her share, the court should not dismiss the bill as to her, but decree in her favor the sum to which she appears entitled. *Ball v. Ball*, 3 Munf. 279.

Where a widow is executrix of the will of her late husband, and claims certain real estate under the will as a devisee therein, and also claims it as

her individual property upon a resulting trust, as against her husband's estate, she may set up her individual claim to the property in a bill filed by her to construe the will, and settle the estate. *Cresap v. Cresap*, 54 W. Va. 581, 46 S. E. 582.

Where an administrator who is also a distributee brings suit for distribution and partition, he thereby elects to hold as distributee, and not as executor. *Poindexter v. Jeffries*, 15 Gratt. 363.

Where slaves specifically bequeathed are in the possession of a person who is at the same time executor of the testator and husband of a legatee, such possession will enure to him in the character of executor only, unless there is some election or some act indicative of an intention to take in the character of husband, especially where the bequest is to several legatees jointly, and no division among them has taken place. *Blakey v. Newby*, 6 Munf. 64.

c. Limitation of Action.

See generally, the title LIMITATION OF ACTIONS. See also, post, "Limitations and Laches," IV, O, 3.

The personal representative of a decedent is deemed a trustee exercising a continuing trust as to legatees, and though he may rely on the staleness of the demand of a legatee, or upon any presumption of payment or satisfaction arising from lapse of time, yet the statute of limitations has no application to a suit by a legatee to recover his legacy. *Jones v. Jones*, 92 Va. 590, 24 S. E. 255.

d. Bill or Declaration.

See generally, the title PLEADING.

(1) Parties.

See generally, the title PARTIES.

(a) Legatees.

Distributees of a decedent may maintain a bill in equity to assert their rights in the decedent's estate, although they can not have distribution thereof without having the executor or administrator of the decedent before

the court as a party in the case. *Hansford v. Elliott*, 9 Leigh 79.

In a suit in equity brought by one legatee against the administrator of the testator to have his legacy paid, when the fund out of which it is to be paid is not definitely ascertained, all the legatees having an interest in such fund must be made parties to such suit. *Rexroad v. McQuain*, 24 W. Va. 32.

As a general rule, one distributee can not maintain a suit to recover his distributive share of the estate without making the other distributees parties. *Sillings v. Bumgardner*, 9 Gratt. 273.

A testator directed that certain real property be sold and the proceeds divided in different proportions among several legatees, and appointed two executors, both of whom united in the sale of the property. One of the legatees assigned his legacy, and the assignee brought a suit in chancery against one of the executors only, without making the other legatees parties. Held, that it was error to decree in favor of the plaintiff without making the other legatees parties to the suit. *Findlay v. Shaffey*, 1 Rand. 73.

Specific Legatees.—In a suit by residuary legatees against the executor for a distribution of the estate, the specific legatees should be parties, unless it satisfactorily appears that their legacies have been satisfied. *Nelson v. Page*, 7 Gratt. 160.

Residuary Legatees or Distributees.—All the residuary legatees or distributees, together with the executors or administrators of such as have died since the testator or intestate, ought to be parties to a suit for division of a residuum. *Richardson v. Hunt*, 2 Munf. 148; *Hooper v. Royster*, 1 Munf. 119; *Purcell v. Maddox*, 3 Munf. 79; *Sheppard v. Starke*, 3 Munf. 29. But these cases were distinguished in *Moore v. George*, 10 Leigh 228, and one of the grounds taken was that in the above cases the suits were by residuary legatees, and in each case the bill or will under which the claim was made,

showed that there were other legatees, and who they were, and no excuse was offered for failing to make them parties. Whereas, the latter case was that of a distributee entitled to a fixed portion of the estate without regard to the number of the other distributees, and those other distinctions not known, or at least not ascertained by the court to be known, to the plaintiff.

Where there are assets enough to pay all the legatees, one entitled to a legacy of an amount certain may maintain a suit therefor without making the other legatees parties. It is otherwise in case of residuary legatees, unless it appears that all prior legacies have been satisfied. *Sharpe v. Rockwood*, 78 Va. 24.

A conveyed to B a tract of land on condition that he should pay certain parties, who subsequently became the heirs and legatees of A, certain sums of money to become due and payable annually after his death. After the death of A, one of the legatees, and her assignee of a part of the sum bequeathed to her, brought a bill to subject the land to the payment of such legacy, making only the administrator with the will annexed, and B parties defendant. Held, that the remaining legatees who were entitled to the residuum of the proceeds of the sale and the judgment creditors of A were necessary parties. *Snyder v. Brown*, 3 W. Va. 143.

Husband of Legatee.—The husband of a legatee is not a proper party to a bill by an administrator with the will annexed for distribution of the estate. *Triplett v. Woodward*, 98 Va. 187, 85 S. E. 455.

Assignee of Distributee.—Where a wife is entitled to certain notes and claims of her deceased husband, and she conveys and assigns the notes and claims to a married woman, upon the consideration that the woman will keep and maintain her during natural life, and the woman to whom the notes and claims were assigned dies shortly

afterwards, and her husband and children reconvey the notes and claims to the widow, she may maintain a suit against the administrator of her deceased husband to compel a settlement of his administration accounts; but, before she can have a distribution of the assets in his hands, the personal representative of the woman to whom she conveyed such claims and notes, and which were reconveyed to her by her heirs, must be brought before the court as a party. *Cornell v. Hartley*, 41 W. Va. 493, 23 S. E. 789.

Personal Representative of Legatees.—A bill in equity in behalf of persons, suing as children of a deceased residuary legatee for his share of the residuum, can not be sustained; it should appear that the plaintiffs are the administrators or other legal representatives of such legatee. *Hays v. Hays*, 5 Munf. 418.

Where the widow of an intestate has received her third of the estate and died, her personal representative is not a necessary party to a suit by the only child of the intestate to recover his proportion of the estate from the administrator. *Wills v. Dunn*, 5 Gratt. 384.

Personal Representative of Administrator.—Where one of two administrators who took no active participation in the administration of the intestate's estate has died, his administrator is not a necessary party to a bill filed by the distributee for an account of the administration of the estate. *Wills v. Dunn*, 5 Gratt. 384.

(b) Debtor of Estate.

A legatee is compellable to sue the personal representative of the testator for satisfaction of his legacy; and in such suit he can not ordinarily make a debtor to the estate of a party, because there is no privity between the legatee and the debtor. But there may be special cases where the debtor may be made a party. *Currence v. Daniels*, 5 W. Va. 418.

(3) Multifariousness.

See generally, the title MULTIFARIOUSNESS.

A bill by an administrator with the will annexed for distribution of the estate according to the provisions of the will is not rendered multifarious by the joinder of legatees who were also debtors and creditors of the estate, with a prayer for a settlement of their accounts, and for a surrender by one of them of papers which he held as agent of the testator. *Triplett v. Woodward*, 98 Va. 187, 35 S. E. 455.

A bill which seeks to enforce payment of a small judgment for costs against an administrator d. b. n. out of funds in his hands; to sell the real estate of decedents to pay such judgment; to establish a devastavit against the administrator and surcharge and falsify his accounts; to convene the heirs and creditors of said administrator, now deceased; to settle the accounts of his administrator, and sell his real estate; to convene the heirs, settle the accounts of the administrator, and distribute the estate of the third decedent; to convene the devisees, settle the account of the executor, and distribute the estate of a fourth decedent—is multifarious and inequitable. *Crickard v. Crouch*, 41 W. Va. 503, 23 S. E. 727.

(3) Dismissal.

In a suit by distributees against an administrator, the accounts having been referred, a report is returned before the defendant's evidence is filed. He excepts to the report, and files an affidavit showing a sufficient excuse for not sooner taking his evidence, and asks for recommitment of the report. Under these circumstances, though the testimony may sustain the defendant as to the subject of controversy, it would not be proper to dismiss the bill; but the plaintiff should have an opportunity to disprove the testimony, and is also entitled to an account of administration. The report

should be recommitted. *Thomas v. Dawson*, 9 Gratt 531.

e. Judgment or Decree.

See generally, the title JUDGMENTS AND DECREES.

(1) Accounting as Condition Precedent.

Where an executor admits in his answer that he has assets of the estate more than sufficient to satisfy all legatees, it is not error to decree against him without a previous account of assets. *Sharpe v. Rockwood*, 78 Va. 24; *McRae v. Brooks*, 6 Munf. 157.

But it seems that it would have been error to have decreed in the absence of either an account or an admission showing assets sufficient to satisfy the decree. *Sharpe v. Rockwood*, 78 Va. 24; *Wills v. Dunn*, 5 Gratt. 384.

Where a suit is brought by distributees against an administrator for a balance found against him due to the estate, and the bill contains allegations and charges which show he is liable for such balance, and in his answer he does not controvert such material charges, the court does not err in decreeing against him for such balance on the bill and answer without referring the case to a commissioner to have an account taken. *Hix v. Hix*, 25 W. Va. 481.

The bill of distributee, besides making the administrator and his sureties defendants, stated, that the complainant had understood that the administrator, who had gone out of the commonwealth, appointed B, his agent to transact his business in this state, and that he put property or moneys into B's hands to satisfy his debts, but she was not sure that the fact was so, and therefore did not think it just to aver it positively. She made him a defendant, and called on him to state whether he had or expected to have, any such funds, and, if any, what. B dying, and the cause being revived against his executrix, she answered that her testator, so far from being indebted to

the administrator, or having in his hands any estate wherewith to satisfy any part of the debt due to the complainant, was himself a creditor of the administrator to a very considerable amount, and that the administrator was still considerably indebted to her as executrix; that she had a lien upon certain slaves, in which the wife of the administrator had an interest at the termination of a life estate; but even the property, if it could be sold, would be insufficient to pay the debt due to her as executrix. An account having been taken ascertaining the amount due to the plaintiff from the administrator, it was held, that there ought to be a decree for the same as against the administrator and his sureties, without delaying the plaintiff for an account to be stated between B and the administrator. *Hoore v. George*, 10 Leigh 288.

(2) Rendition.

Where both the heirs and personal representatives of deceased distributees are parties to a suit for the settlement of the estate, and the personal representatives make no objection to payment to the heirs, and there is no suggestion of any outstanding debts against the deceased distributees to be adjusted, a decree may properly be made directly in favor of the heirs, rather than to the personal representatives. *Robertson v. Gillenwaters*, 85 Va. 116, 7 S. E. 371.

In Favor of Persons Not Parties.—

In a suit for the settlement of an administrator's account and a division of the residuum of the estate, the court can not decree a distribution in favor of persons who were not parties to the cause. *Sheppard v. Starke*, 3 Munf. 29.

(3) Operation and Effect.

It seems that a final decree, in a suit by legatees, for the division of a testator's estate, is a bar to a bill exhibited by the same persons, or their legal representatives, suggesting that the ex-

ecutor had kept back part of the property, but not averring that this was new matter since discovered, or that the decree was obtained by fraud. *Legrand v. Francisco*, 3 Munf. 83.

i. Costs.

See generally, the title COSTS, vol. 3, p. 604.

A suit was brought against an administrator for distribution before any assets came into his hands, but during the progress of the cause he received assets of the estate. Held, that the plaintiff was entitled to a decree for the assets, but that the administrator was not chargeable with the costs of the suit, as he had been guilty of no default. *Eidson v. Fontaine*, 9 Gratt. 286.

7. Effect of Distribution.

a. Status of Distributees.

A widow who received her distributable share of the personal property of her husband is not a purchaser for value, so as to be entitled to set up the defense of purchaser for value without notice. *Snoddy v. Haskins*, 12 Gratt. 363.

b. Subsequent Control of Property.

Transfer of Bond.—Where a bond executed to an executor is transferred by him to a guardian as a part of the ward's estate, it is no longer subject to the control of the executor. *Hunter v. Lawrence*, 11 Gratt. 111, 62 Am. Dec. 640.

Executor as Legatee.—Where one of two executors is legatee under the will, and a division of the testator's property is made according to the will, and the executor legatee dies, the creditor in a judgment afterwards obtained against the surviving executor can not levy on one of the slaves allotted to the deceased executor in the hands of his administrator. *Chapman v. Washington*, 4 Call 327.

c. Distribution to Legatee for Life.

On giving proper security therefor, certain life tenants took the fund in which they had a life interest. Held,

they took it as borrowers, not as trustees, and their estates and the sureties on their bonds were liable therefor. *Hawthorne v. Beckwith*, 89 Va. 786, 17 S. E. 241.

In *Ferguson v. Epes*, 77 Va. 499, an executor was held liable for failure to take from a life tenant proper security for the return of the fund intrusted to him in the event of his dying before marriage and without heirs of his body.

Though it is a matter of course for a remainderman of personal chattels to file a bill against a tenant for life, for an account and inventory of the property, yet the court will not rule the tenant for life to give security to have the property forthcoming at his death, unless there appear some danger of its being wasted, or put out of the way. *Mortimer v. Moffatt*, 4 Hen. & M. 503.

d. Indemnity and Protection of Executor or Administrator.

See generally, the title INDEMNITY.

(1) Refunding Bond.

(a) Right of Executor to Require.

aa. Statutory Provision.

In Virginia and West Virginia it is provided by statute that a personal representative shall not be compelled to pay any legacy given by the will, or make distribution of the estate of his decedent, until after a year from the date of the order conferring authority on the first executor or administrator of such decedent; and, except where it is otherwise specially provided, that he shall not then be compelled to make such payment or distribution until the legatee or distributee shall give him a bond, executed by himself or some other person, with sufficient surety, with condition to refund a due proportion of any debts or demands which may afterwards appear against the decedent, and of the costs attending their recovery. Va. Code, 1887, § 2706; W. Va. Code, 1899, ch. 87, § 29, p. 744.

The statute, 1 Rev. Va. Code, 389,

§ 58, declaring that an administrator should not be compelled to make distribution without a refunding bond, has been extended by judicial construction to executors. *Mosby v. Mosby*, 9 Gratt. 584, citing *Sheppard v. Starke*, 3 Munf. 29.

bb. On Payment of Specific Legacies.

An executor can not be compelled to pay a legacy, until bond and security be given by the legatee to refund his due proportion of such debts and demands as may thereafter appear against the estate of the testator. *Stovall v. Woodson*, 2 Munf. 303. See Va. Code, 1887, §§ 706, 707.

cc. Distribution of Residuum.

An executor ought not to be compelled to make distribution of a residuum, until bond and security be given by the distributees, as required by the act of assembly in the case of an administrator. *Sheppard v. Starke*, 3 Munf. 29. See 1 Rev. Va. Code, 186, § 51; *Stovall v. Woodson*, 2 Munf. 303.

dd. Where Decree Directs Payment.

A decree is erroneous which directs the payment of a legacy by an executor without requiring a refunding bond of the legatee, though there was a confession of assets by the executor, and no express demand by him for a bond. *McRae v. Brooks*, 6 Munf. 157; *Stovall v. Woodson*, 2 Munf. 303; *Rootes v. Webb*, 4 Munf. 77; *Clay v. Williams*, 2 Munf. 105.

It is error, though the bill be taken for confessed, to decree against an administrator *de bonis non* that he shall pay a legacy, without requiring the legatee to give bond and security for refunding his "due proportion of any debts or demands, which may afterwards appear against the estate of the testator, and the costs attending the recovery thereof." *Rootes v. Webb*, 4 Munf. 77. See 1 Rev. Va. Code, ch. 92, § 51, p. 166; *Clay v. Williams*, 2 Munf. 105; *Stovall v. Woodson*, 2 Munf. 303.

Mere Omission to Require.—A de-

creed in favor of legatees against the executor will not be reversed on account of the mere omission in the decree to require a refunding bond of the legatees. *Handly v. Snodgrass*, 9 Leigh 484.

Exceptions and Objections.—Upon an accounting, a certain sum was found due the heirs, and the administrator assented to the decree entered for the distribution of such sum. Held, that he could not thereafter object to the decree because it did not require the heirs to execute refunding bonds. *Harman v. Davis*, 30 Gratt. 461.

ee. Order of County Court Directing Division.

An executor is not bound, by the order of a county court directing a division of the testator's estate among the distributees, to deliver up slaves without reserving a sufficiency to pay the debts, or without taking bonds to refund. *Walden v. Payne*, 2 Wash. 1.

ff. Where Requirement Discretionary with Court.

In *Young v. Vass*, 1 Pat. & H. 167, it was held, that under the circumstances, considering the admission of assets by the executor, and the character of the legacy and the legatees, it should be submitted to the discretion of the court below whether any refunding bond should be required of the legatees.

(b) When Not Entitled to Bond.

On Emancipation of Slaves.—When slaves emancipated by will, are set free by the executor, he is not entitled to a refunding bond to indemnify him against the claims of the testator's creditors, though the manumitted slaves are, notwithstanding manumission, subject to debts; and, the burden of debts ought to be distributed among such freed men as equally as practicable. *Elder v. Elder*, 4 Leigh 252.

Where a testator bequeathed slaves to a trustee in trust to send them to Liberia, provided that the colonization society would defray the expenses, it

was proper for the executors to hire out the slaves until a sufficient fund could be raised to pay the testator's debts, for when slaves emancipated by will are set free by the executor he is not entitled to a refunding bond to indemnify him against the claims of the testator in case of a sufficiency of assets. *Elder v. Elder*, 4 Leigh 252.

(c) Execution and Validity of Bond.

Where a bond in the penalty of \$10,000 was required to secure the payment of \$4,216.22, it was held, that amount of the penalty of the bond was excessive, one-half of it, or at most \$6,000, being sufficient. *Beckwith v. Avery*, 31 Gratt. 533.

(d) Operation and Effect.

An executor can not defend himself against the suit of a creditor by showing that before he had notice of the plaintiff's demand he paid over the assets to the legatees of the testator, unless he took and filed a refunding bond as required by law. *McGlaughlin v. McGlaughlin*, 43 W. Va. 226, 27 S. E. 378.

(e) Failure to Take as Affecting Liability.

aa. Rule Stated.

Where the assets in the hands of an executor are sufficient to pay all the debts of the estate and he makes distribution of the estate without requiring a refunding bond from the legatees he is personally liable to creditors for the fund so improperly distributed. *Beverly v. Rhodes*, 86 Va. 415, 10 S. E. 372; *Lewis v. Overby*, 31 Gratt. 601; *Edmunds v. Scott*, 78 Va. 720; *Cookus v. Peyton*, 1 Gratt. 431; *Morrison v. Lavell*, 81 Va. 519; *Lewis v. Mason*, 84 Va. 731, 10 S. E. 529; *McGlaughlin v. McGlaughlin*, 43 W. Va. 226, 27 S. E. 378.

The law of Virginia is that all debts or liabilities of the testator must be paid before any bequest can be effectual; and an executor who without taking proper refunding bonds delivers legacies directed by a will, is guilty of

a devastavit for which he and his sureties are liable to creditors of the estate. *Edmunds v. Scott*, 78 Va. 720.

An executor who exhausts the personal estate of his testator in paying specific legacies, without taking a refunding bond, will, as to the creditors of said testator, be considered as having committed a devastavit, whether he had notice of the debts due such creditors at the time he paid such legacies or not. *McGlaughlin v. McGlaughlin*, 43 W. Va. 226, 27 S. E. 378.

Where the testator's estate was sufficient to pay all his debts, and the estate was fully administered in a suit to which a creditor was not a party, and no refunding bonds were taken from the legatees, the executor is personally liable for the debt. *Beverly v. Rhodes*, 86 Va. 415, 10 S. E. 372.

Where an executor pays legacies before paying the debts of the estate, without taking proper refunding bonds, he is guilty of a devastavit, and he and his sureties are liable to the unpaid creditors. *Lewis v. Mason*, 84 Va. 731, 10 S. E. 529.

When Ignorant of Existing Debts.—

Where the executors distribute the personal property of the testator without taking a refunding bond, they are personally responsible to a creditor of the testator for its value, though they knew of no debt against the estate. *Lewis v. Overby*, 31 Gratt. 601; *Cookus v. Peyton*, 1 Gratt. 431.

A probability of ultimate loss, should the administrator retain the property instead of distributing it, will not affect his liability to creditors. Thus, where an administrator delivered the decedent's slaves to the distributees without taking refunding bonds, it was held, that he was not relieved of liability to creditors by the fact that the slaves might have been lost by emancipation if he had retained them. *Morrison v. Lavell*, 81 Va. 519.

bb. Flexibility of Rule.

See post, "Compelling Legatees and

Distributees to Refund without Bond," IV, K, 7, d, (2).

(f) Action on Bond.

aa. Allegata and Probata.

Assignment of Breach.—In debt on a bond given by distributees to indemnify an administrator for dividing the estate among them; the condition being, "that they should pay him their respective proportions of all debts which he should be compelled to pay, that should thereafter come against said estate;" it is a sufficient assignment of a breach to say, "that the plaintiff on a day subsequent to the date of the bond, had paid, by the consent of the defendants, a debt which was then due from the estate aforesaid, and which, as administrator, he was bound to pay, and that the defendants had not paid him their respective parts nor any proportion thereof, but the same had refused, although often requested." *Moss v. Moss*, 4 Hen. & M. 293.

"In an action of debt by the representative on a refunding bond, he should aver and prove facts showing a breach of the conditions of the bond, as that he has given notice of debts to the legatee or distributee, that he had not or has not assets to pay such debts, that he has made a request for a return of so much of the legacy or distributive share as is necessary to discharge those debts in due proportion, and that the amount requested is unpaid." *Moss v. Moss*, 4 Hen. & M. 293.

bb. Fixing Liability of Legatee under Bond.

A testator devises a tract of land for the payment of a particular debt, and the land is sold; but the creditor receives only the first payment of the purchase money, and refuses to take the balance, which is applied to the payment of other debts of the testator. Held, that whether the land was the primary fund for the payment of the particular debt, or not, that debt was in fact the debt of the testator's es-

tate, for which a legatee was responsible under his refunding bond. *Archer v. Archer*, 8 Gratt. 539.

(g) Waiver of Right to Require.

Right to Waive.—The personal representative has the right to waive a refunding bond, but the intention to waive the bond must be very clear. *Nelson v. Cornwell*, 11 Gratt. 724.

If the executor has assented to a specific legacy and waived a refunding bond, the legatee may maintain an action at common law against the executor for its recovery. But the intention to waive the refunding bond must be very clear. *Nelson v. Cornwell*, 11 Gratt. 724.

What Is Deemed a Waiver.—Although an executor may have assented to a specific legacy, such assent is no waiver of his right to a refunding bond. *Nelson v. Cornwell*, 11 Gratt. 724.

(2) Compelling Legatees and Distributees to Refund without Bond.

"It may be regarded as the settled law in this state and in Virginia as well as in England, that when an executor voluntarily pays a legacy, he can not afterwards maintain a bill to compel a legatee to refund, unless it becomes necessary for the discharge of debts; and when the executor is under the impression, that he can collect a large debt supposed to be due the estate, and it turns out, that he is unable to do so, though the executor be not guilty of culpable negligence with reference to the debt, and is therefore not chargeable with the whole amount of the debt; yet if under his misapprehension with reference to the debt he pays any legatee more than he should pay, he can not recover any part of what he has paid him, but such overpayment in this state and in Virginia will not be regarded as an admission of assets in his hands, so as to require him to pay to others more than what is coming to them of the amount actually received by him." *Green, J., in Anderson v. Piercy*, 20 W. Va. 232.

The rule, however, which refuses to an executor the right to recover back from a legatee an excess of advancements beyond his rateable proportion, which he may have paid to him, is not inflexible, even when the deficiency in the assets was not created by the subsequent appearance of debts. But after such voluntary payment, under such circumstances, the executor will have to make out a very strong case to rebut the almost conclusive presumption that he had a sufficiency of assets to justify the payment of the legacy which arises from the mere fact that he has paid it without taking a refunding bond. It will not be sufficient, in such case in order to rebut such presumption, for the executor to show that he has acted bona fide and with honest intentions; but he must show further that he acted in paying the legacy with prudence and caution, under the existing circumstances. *Hurst v. Morgan*, 31 W. Va. 521, 8 S. E. 285, citing *Jones v. Williams*, 2 Call 102; *Burnley v. Lambert*, 1 Wash. 312; *Gallego v. Attorney General*, 3 Leigh 450, 24 Am. Dec. 650; *Miller v. Rice*, 1 Rand. 438; *Davis v. Newman*, 2 Rob. 667, 40 Am. Dec. 764; *Nelson v. Page*, 7 Gratt. 160; *Anderson v. Piercy*, 20 W. Va. 282; *Shriver v. Garrison*, 30 W. Va. 456, 4 S. E. 660; *Robertson v. Archer*, 5 Rand. 319; *McClung v. Sieg*, 54 W. Va. 467, 46 S. E. 210. See also, *McEndree v. Morgan*, 31 W. Va. 521, 8 S. E. 285.

"In the course of the administration of estates, executors and administrators often pay debts and legacies upon the entire confidence that the assets are sufficient for all purposes. It may turn out, from unexpected occurrences, or from debts and claims made known at a subsequent time, that there is a deficiency of assets. Under such circumstances they may be entitled to no relief at law. But in a court of equity, if they have acted with good faith and with due caution, they will be clearly entitled to it upon the ground that

otherwise they will be innocently subject to an unjust loss from what the law itself deems an accident." *McClung v. Sieg*, 54 W. Va. 467, 46 S. E. 210.

Where an administrator, having no notice of a debt against the estate of his intestate, makes distribution of the estate, and is afterwards compelled to pay the debt, and there is no fraud or improper conduct imputable to him, respecting either creditor or the distributees, he may, in equity, compel the distributees to refund to him the amount of the debt, interest and costs which he has been compelled to pay, and his expenses in the defense of the suit, although he has taken no refunding bond. *McClung v. Sieg*, 54 W. Va. 467, 46 S. E. 210.

Mere Omission to Require.—In *Handly v. Snodgrass*, 9 Leigh 484, the former decisions, that a decree in favor of a legatee against an executor, who omitted to require a refunding bond, would be considered erroneous, and for such error be reversed with costs, was reviewed by the court, and a different rule established when there is a mere omission to require such bond.

Must Be Necessary for Payment of Debts.—Where an executor voluntarily pays a legacy, he can not afterwards compel the legatee to refund, unless it becomes necessary for the payment of debts, although the executor made such overpayment under the mistaken impression that the funds of the estate were sufficient to justify it. *Anderson v. Piercy*, 20 W. Va. 282.

Where an administrator voluntarily pays money to a distributee of his intestate, with full knowledge of the facts, but under a mistake of law, he can not recover it unless it is necessary for the payment of the debts of the intestate. *Shriver v. Garrison*, 30 W. Va. 456, 4 S. E. 660.

Laches.—A suit by an executor against the legatees for advances made to the estate beyond the assets will not be entertained after a great length of time has elapsed since the

qualification of the executor, and the estate has been distributed with the consent of the executor. *Robertson v. Archer*, 5 Rand. 319.

Surplus.—In *Davis v. Newman*, 2 Rob. 664, 40 Am. Dec. 764, the court reviews the English and Virginia decisions bearing on the subject. In *Nelson v. Page*, 7 Gratt. 160, the court below decreed that legatees whom the executor had voluntarily overpaid should refund, but the question whether an executor can recover of a legatee a surplus paid him on his legacy was not before the court of appeals, and therefore this case can not be considered as overruling the earlier case of *Davis v. Newman*, 2 Rob. 664, 40 Am. Dec. 764.

Rateable Portion.—Where, after payment of a legacy by an executor, there appears a deficiency in the assets caused by debts of which the executor had full knowledge, and the last payment of the legacy was made thirteen years after the executor qualified and after all the debts of the estate had been paid, the executor can not recover back a rateable portion of the legacy. *Hurst v. Morgan*, 31 W. Va. 521, 8 S. E. 285.

Apportionment.—The Virginia court makes no distinction between the legatees and heirs in respect to the payment of the debt of a decedent. "Where legatees are called upon to refund at the suit of a creditor, the general principle is that all must be before the court and the burden apportioned among them, if it can be done, without material delay or injury to the creditor. But if some of the legatees are insolvent, the others will be required to make good the deficiency to the extent of what they have received." *Leake v. Leake*, 75 Va. 792.

In *Ryan v. McLeod*, 32 Gratt. 367, where it is sought to subject real estate in the hands of the heirs to the payment of their ancestor's debts, one of them had sold his portion to a bona fide purchaser and had become

insolvent, and the portions of the other heirs were subjected to the payment of the whole of the debts. The same principle is applied in *Lewis v. Overby*, 31 Gratt. 601. Although these cases are not exactly in point, they show that where it is impossible to make the heirs contribute rateably, the portion which can not be collected from one of them because of his insolvency may be charged against the others.

"Another argument is based upon the statute authorizing personal representatives to require the execution, by distributees and legatees, of bonds with security, conditioned to refund due proportions of any debts or demands which may afterwards appear against the decedent and of the costs attending their recovery. Adopting the same line of argument, the court, in *Clark v. Williams*, 70 N. C. 679, reaches the conclusion that, where refunding bonds have not been taken and one distributee has become insolvent, the others are not required to make up his portion of the debt. This is exactly the opposite of what the Virginia court holds, respecting real estate in the hands of the heirs. The reason assigned for the decision is faulty. What is the effect of this statute when the personal representative puts it in force? It lays upon each distributee the same burden that a court of equity would ultimately put upon him, and makes him give security for the payment of the amount. It goes to the end of any possible future assertion of a demand against the distributees by suit in equity, and requires each one to give bond with security to do that which a decree, settling the rights of all parties in respect to any outstanding and unpaid debts against the estate, would require him to do. It, in no way, indicates or determines the nature or extent of the primary liability of a distributee or his liability when no bond has been given. As a bond with security is exacted by this statute, the case stands upon an entirely different

footing. The statute does not limit the liability without requiring bond with security. This argues, if anything, that, in the absence of security for his due proportion of the debt, the liability of the distributee would be greater, otherwise the outstanding debts might not be paid. It would not be, in case of the subsequent insolvency of any one or more of the distributees, if each is only liable rateably. Security by each for the payment of his share is a provision against such contingency. The view adopted by this court seems to be supported by authorities as well as reason." *McClung v. Sieg*, 54 W. Va. 467, 46 S. E. 210.

Where it is necessary, when all the distributees are within the jurisdiction of the court in which the administrator is entitled to proceed for such relief, then all of them shall be made parties, to the end that they shall contribute rateably and that it may not be in the power of the administrator to throw the whole liability upon one of them in the first instance, yet, when they are not all within the jurisdiction of the court, he may sue such of them as are within the reach of the court's process, and, if they are all nonresidents and any of them may have property within the reach of such process, it may be subjected by attachment in a suit in equity. *McClung v. Sieg*, 54 W. Va. 467, 46 S. E. 210.

Limitation to Property Subject to Claim.—The administrator's right to reimbursement is not limited to payment out of the specific money or property received from the estate by the distributee, and any property belonging to the distributee which is liable for his debts generally, may be subjected, but not for a larger amount than he has received from the estate. *McClung v. Sieg*, 54 W. Va. 467, 46 S. E. 210.

(3) Effect of Receipt or Release.

A testator by his will gave his whole

estate, real and personal, to his wife, for the support of herself and his daughter L. until the latter became of age or should marry. After making certain provisions in case the wife should marry again, the will stated: "Should my wife not marry, I wish, when L. comes of age or marries, one-half of my estate to go to my wife for life, and the other half to go to L., absolutely, and, at the death of my wife, the other half." The will gave the executor discretion to sell the whole estate, and he paid the debts and sold the estate at public auction, nearly all of the estate being bought by the widow, who gave her bond for the purchase money. The executor afterwards settled his account, was charged with the amount of the sales, and then settled with the widow, taking her receipt for the amount of her purchases. Held, that, as the will did not create a trust in the executor when he had paid the debts and turned over the remainder of the property to the widow, her receipt operated to discharge him. The fact that he had taken her bond did not affect his responsibility. *Mason v. Jones*, 26 Gratt 271.

An administrator had a settlement with the residuary legatees, and received receipts from them in full of their interests in the estate. He afterwards collected money on judgments in his favor as administrator. After the execution of such receipts, and until the administrator's death, a period of some seventeen years, all parties in interest treated the account as settled; and after the administrator's death no claim was made against his estate, except by complainant, an assignee of one of such legatees, who sued the administrator's estate for a settlement of his accounts. Held, that it must be presumed that the money collected in the judgment was embraced in the receipts. *Tate v. Jones*, 98 Va. 544, 36 S. E. 984, 6 Va. Law Reg. 408.

e. Improper, Erroneous, or Premature Payment or Distribution.

Payment under Mistake as to Character of Assets.—An executor voluntarily made considerable payments to the legatees, under the impression that a bond for a large amount, executed by a debtor of the testator to the testator in his lifetime, was good and would be collected. The bond turned out to be unavailing, and the other assets were less than what was paid the legatees. Held, that though the executor might not have been culpably negligent in respect to the bond, and therefore not chargeable with its whole amount, yet he could not recover back from the legatees any part of what he had paid them. *Davis v. Newman*, 2 Rob. 664, 40 Am. Dec. 764.

Distribution in Ignorance of Existence of Other Distributees.—Where an administrator distributes the funds of the estate, and, it afterwards appears that there are others entitled to a share thereof, he will be liable to them, though he made the distribution without knowledge of their existence. *Lawason v. Davenport*, 2 Call 95.

Payment under Mistake of Law.—Where an administrator, with full knowledge of all the facts, voluntarily pays the guardian of the infant children of his intestate sums of money in excess of the amounts to which they are entitled, under a mistake of law arising out of a misapprehension of the facts, he can not maintain a suit against such guardian to compel him to refund the amounts so paid to him in excess, unless the money is necessary to pay the debts of the estate. *Shriver v. Garrison*, 30 W. Va. 456, 4 S. E. 660.

Overpayment as Giving Equal Rights to Other Legatees.—Where an executor makes an overpayment to one legatee under a mistake as to the actual value of the assets of the estate, this is not such an admission of assets in his hands as should bind him to make a like overpayment to the other lega-

tees. *Anderson v. Piercy*, 20 W. Va. 282.

f. Right of Legatee to Require Refund.

On the question of the right of a legatee to sue another legatee for a refund, see *Gallego v. Attorney General*, 3 Leigh 450.

8. Residuum.

Right to Residue after Payment of Debts.—Before the enactment of the statute of distributions, if a testator appointed an executor without disposing of all his personal estate by his will, the executor was entitled to the residuum of the estate after the payment of debts, legacies and administration expenses, his appointment being considered as a gift to him of such surplus. *Shelton v. Shelton*, 1 Wash. 53. But since the passage of the statute of distributions, the executor is not entitled to the residuum. *Paup v. Mingo*, 4 Leigh 163, disapproving *Coleman v. McMurdo*, 5 Rand. 51.

L. ACCOUNTING.

See generally, the title ACCOUNTS AND ACCOUNTING, vol. 1, p. 82.

1. Duty to Account.

a. In General.

It is the duty of an executor to keep a correct account of the estate of his testator, and of all appointments or advancements made under the will, and to exhibit the same to any of the parties interested therein who may desire to see them. *Rhett v. Mason*, 18 Gratt. 541.

b. Liability for Failure to Make or Manner of Keeping.

Executors not keeping their accounts properly are held to a rigid accountability. *Kee v. Kee*, 2 Gratt. 116.

An executor will not be denied justice simply because he has neglected to make up an account of his administration where he appears to have derived no advantage from the delay and is guilty of no fraud or misconduct. *Jones v. Williams*, 2 Call 102.

Excuse for Delay.—An administrator was appointed September 24, 1879, but made no settlement of his accounts or statement of receipts until March 4, 1881, when he appeared before the commissioner in obedience to a decree to settle, but then refused to settle because the distributees demanded that he should settle as agent also, and two months afterwards he left the state, and went to England, where he was taken sick and remained for two years. Held, that these circumstances did not constitute a reasonable excuse for the delay in making a settlement. *Trevelyan v. Lofft*, 83 Va. 141, 1 S. E. 901.

c. Release from Liability to Account.

Want of Assets.—Where an intestate in her lifetime by deed of gift disposed of her entire personal property so that there was nothing to go, or that did go, at her death, into the hands of her administrator, it was held, that a bill against him for an accounting should be dismissed. *Perdue v. Dillon*, 89 Va. 182, 15 S. E. 385.

Delay in Applying for Accounting.—An account of administration demanded after a great lapse of time will be refused. *Parks v. Rucker*, 5 Leigh 149.

Equity will refuse to entertain a bill by legatees against the representatives of the executors and sureties, where there has been great delay in bringing the suit and great remissness in prosecuting it afterwards, especially where it appears probable that the debts of the estate were sufficient to exhaust all the personal assets. *Hayes v. Goode*, 7 Leigh 452.

An order for an account of administration may be refused on account of lapse of time, death of all parties cognizant of the transactions, destruction of the county records and loss of papers; otherwise there would be danger of injustice to the deceased administrator. *Stamper v. Garnett*, 31 Gratt. 550.

A bill by legatees against the representatives of an executor for an account of his administration will not be entertained in a court of equity twenty-eight years after the death of the executor, and from twelve to twenty years after the youngest legatee has attained full age, especially where the accounts are complicated, and it appears that nothing is probably due. *Carr v. Chapman*, 5 Leigh 164.

A bill was filed against the husband of a deceased executrix for an account of the testator's estate. About twenty years before, the defendant had exhibited in the county court an account of debts and disbursements paid out of the testator's estate, to which he made oath, and the same was received and recorded without any examination. Upon a bill filed by the children of the testator, it was held that, on account of the length of time, the transaction should be allowed to stand, although the defendant was unable to produce a single voucher. *Major v. Dudley*, Jeff. 51.

In 1797, a slave belonging to the estate of a decedent was sold under an execution against the administrator, and the administrator himself became the purchaser. In 1801, the administrator settled his account, whereby it appeared that he had no other property to settle the execution, and he accounted for the price of the slave. In 1810, the decedent's daughter, being still an infant, married, and soon after informed her husband of the facts in regard to the sale of the slave. In 1822, the administrator died, and after his death the daughter and her husband filed a bill against the administrator's personal representative, praying for an account and seeking to impeach the sale for fraud. Held, that the bill should be dismissed on account of laches. *Todd v. Moore*, 1 Leigh 457.

Accounting Prevented by Administrator.—Where a suit for an account of administration is brought against an

administrator within four years after his qualification, he can not set up the defense of laches and staleness although the suit has been prolonged thirty-six years, where he has acquiesced in the delay by refusing to render his accounts and by resisting the suit. *Tiernan v. Minghini*, 28 W. Va. 314.

Release by Distributee on Final Settlement.—A bill in chancery was filed by a distributee against an administrator and his surety alleging that the administrator had not duly accounted, and praying an account. The bill was taken for confessed as to the administrator; but the surety answered and proved that the plaintiff, on a full and final settlement, had released the administrator, and so was not entitled to an account. Held, that the bill should be dismissed as to both defendants. *Cartigne v. Raymond*, 4 Leigh 579.

2. Necessity of Accounting.

Though the administrator has made a statement of assets received and payments made by him since the bond was given, and finding a balance of the estate in his hands, endorses it as a credit on the bond, yet as the obligors do not acquiesce in that statement, they are not to be allowed the credit endorsed, but the balance due by the administrator must be ascertained by a correct settlement of his administration account. *James v. Johnston*, 22 Gratt. 461.

It is error to make a personal decree against an administrator without an account or admission showing assets of his intestate's estate in his hands sufficient to satisfy the decree. *Wills v. Dunn*, 5 Gratt. 384.

Before a sale is decreed under such circumstances, the administration accounts should first be settled. *Beckham v. Duncan*, 1 Va. Dec. 694.

3. Time of Rendering Account.

An executor having died within two years after the passage of the act of February 16th, 1825, requiring executors' accounts to be settled every two

years, and forfeiting their commissions if the accounts are not settled, it was held, that commissions would not be allowed him. *Boyd v. Boyd*, 3 Gratt. 114. See also, *Southall v. Taylor*, 14 Gratt. 269; *Strother v. Hull*, 23 Gratt. 672; *Whitehead v. Whitehead*, 85 Va. 870, 9 S. E. 10. See foot-note to *Turner v. Turner*, 1 Gratt. 11; *Morris v. Morris*, 4 Gratt. 293.

4. Proceedings for Accounting.

a. Nature of Proceedings in General.

The principles, which control the mode of proceeding, when the accounts of a personal representative settled ex parte returned and recorded in the proper court are to be surcharged and falsified, are the same as those, where a stated account is to be surcharged and falsified, except when there has been fraud in making the settlement, which is the basis of the stated account. *Seabright v. Seabright*, 28 W. Va. 376, 412.

b. Jurisdiction.

(1) Conflict of Laws.

See generally, the title CONFLICT OF LAWS, vol. 3, p. 100.

Where a testator in West Virginia in his will requests his executors to sell all his personal property "wherever situated," and a tract of land owned by him in Illinois, and dispose of the proceeds as directed in the will, and the testator had large personal property in Maryland, and there were no letters testamentary issued in that state, nor in the state of Illinois, and the executors took charge of the property in Maryland, and disposed of it, by selling a portion there, and bringing the residue into West Virginia, and disposing of it here, and sold the Illinois land, and received the proceeds, they and their sureties will in West Virginia be required to account for such property and proceeds. *Hooper v. Hooper*, 29 W. Va. 276, 1 S. E. 280.

The defendant was employed by the personal representatives of an intestate to go to Mississippi for the pur-

pose of collecting certain debts due the decedent in that state. Upon his arrival in Mississippi, the defendant ascertained that it would be necessary to qualify as administrator of the decedent's estate in order to collect the debts, and upon a sale of lands of the debtors for the payment of the debts, he became the purchaser. Held, that under the circumstances the defendant could be held to account for his administration in Virginia. *Powell v. Stratton*, 11 Gratt. 792.

Where an executor takes probate of his testator's will and letters testamentary in England, and collects the assets of the estate there, and brings them with him to Virginia, but never qualifies as executor in Virginia, he is liable to be sued by the legatees in the court of chancery of Virginia for an account of his administration, and for the legacies that remain unpaid. *Tunstall v. Pollard*, 11 Leigh 1.

(2) General Equitable Jurisdiction.

Equity has jurisdiction of a suit by a creditor at large of a decedent against his personal representatives, for an accounting, for the payment of complainant's claim, and for general relief. *Beverly v. Rhodes*, 86 Va. 415, 10 S. E. 572.

A testator, being surety in a covenant binding his heirs, charged his real estate with his debts, and devised it subject to such charge. The covenant was broken, and the covenantee, after the death of the testator, filed his bill suggesting a deficiency of personal assets, and praying for an account thereof, without having first recovered judgment at law against the testator's executor. Held, that the case was properly relievable in equity. *Poin-dexter v. Green*, 6 Leigh 504.

A court of equity will not direct an administrator of a debtor's estate to render an account of his administration, where there is no allegation that the administrator has not given sufficient security for the performance of his

duties. *Lane v. Eggleston*, 2 Pat. & H. 225.

(3) Another Suit Pending.

See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2.

Where a suit to settle an administrator's account is pending, and a bill in the same court by the sole devisee to compel a third person to discover assets in the shape of insurance on the decedent's life, and to compel the administrator to account for his failure to assert the rights of the estate to such insurance, was properly dismissed as to the third person, and it was proper also to dismiss the suit as to the administrator, since the liability of the administrator for negligence in not attending to the rights of the estate in such insurance could be fully adjudged, under the same rules, in the pending suit. *Beaty v. Downing*, 96 Va. 451, 31 S. E. 612.

c. Compelling Accounting.

(1) Persons Entitled to Require Accounting.

(a) In General.

As a general rule, any person who has an interest in the property of the decedent, or in the proper administration of it, has a right to file a bill in equity against the executor or administrator for a settlement of the administration account. *Stephenson v. Taverners*, 9 Gratt. 398; *Anderson v. Thompson*, 11 Leigh 439; *Duval v. Trent*, 6 Munf. 29; *Graff v. Castleman*, 5 Rand. 195; *Conrad v. Fuller*, 98 Va. 16, 34 S. E. 893; *Tate v. Jones*, 98 Va. 544, 36 S. E. 984; *Ball v. Ball*, 3 Munf. 279; *Cornell v. Hartley*, 41 W. Va. 493, 25 S. E. 789. See post, "Actions against Executors or Administrators," IV, O, 2.

One who is not entitled to any relief against an executor or administrator can not maintain a bill to surcharge and falsify the ex parte settlement of such fiduciary. *Dearing v. Selvey*, 50 W. Va. 4, 40 S. E. 478.

(b) Creditors.

See also, the title CREDITORS' SUITS, vol. 3, p. 780.

A creditor, having obtained judgment against the executors of the surety for the debt, is not bound to take out execution, before he can file his bill in equity, for an account of the personal and real estates of the principal and surety, and to get satisfaction out of the real, in default of the personal assets. *Duval v. Trent*, 6 Munf. 29.

(c) Legatees.

A suit in chancery being brought by legatees against the executors and widow of the testator, for a settlement of the administration account, and distribution of the personal estate among the plaintiffs; if it appear that the widow has not fully received her share, the court should not dismiss the bill as to her, but decree in her favor the sum to which she appears entitled. *Ball v. Ball*, 3 Munf. 279. See also, *Anderson v. Thompson*, 11 Leigh 439.

(d) Wife of Decedent.

Where a wife is entitled to certain notes and claims of her deceased husband, and she conveys and assigns the notes and claims to a married woman, upon the consideration that the woman will keep and maintain her during her natural life, and the woman to whom the notes and claims were assigned dies shortly afterwards, and her husband and children reconvey the notes and claims to the widow, she may maintain a suit against the administrator of her deceased husband to compel a settlement of his administration accounts; but, before she can have a distribution of the assets in his hands, the personal representatives of the woman to whom she conveyed such claims and notes, and which were reconveyed to her by her heirs, must be brought before the court as a party. *Cornell v. Hartley*, 41 W. Va. 493, 23 S. E. 789.

(e) Surety.

See generally, the title SURETYSHIP.

A surety whose principal is dead may bring any suit in equity which the creditor could bring for a settlement of the administration account on the estate of the decedent, and for the administration of the assets, whether legal or equitable. *Stephenson v. Taverners*, 9 Gratt. 398.

(f) Children of Testator.

Upon the death of a trustee of real estate appointed by will, who was also executor of the will, the children of the testator may file a bill against the representative of the executor and trustee for an account of the proceeds of the real estate, without having an administrator de bonis non appointed of the estate of their testator. *Graff v. Castleman*, 5 Rand. 195.

(g) Widow and Heirs of Deceased Partner.

A bill for an accounting can not be maintained by the widow and heirs of a deceased partner against his administrator and the surviving partner, when it fails to show collusion between them, or insolvency, or refusal by the administrator to compel a settlement, or something in their relations which prevents him from obtaining a settlement. *Conrad v. Fuller*, 98 Va. 16, 34 S. E. 893.

(h) Assignee of Residuary Legatee.

Where an assignee of a residuary legatee delayed suing for a settlement of the administrator's accounts until over twenty years after the assignment, his right of action was barred by laches. *Tate v. Jones*, 98 Va. 544, 36 S. E. 984.

(i) Administrator d. b. n.

Quære, whether an administrator de bonis non can call the representative of a previous executor or administrator to account, and recover any balance due from his testator or intestate to the estate. *Cocke v. Harrison*, 3 Rand. 494.

As to the right of an administrator de bonis non to sue the representative of the former executor or administrator

tor for assets wasted or converted, see post, "Administrators De Bonis Non or with Will Annexed," V.

(j) Covenantee.

A testator, being surety in a covenant binding his heirs, charged his real estate with his debts, and devised it subject to such charge. The covenant was broken, and the covenantee, after the death of the testator, filed his own bill suggesting a deficiency of personal assets, and praying for an account thereof, without having first recovered judgment at law against the testator's executor. Held, that the case was properly relievable in equity. *Poin-dexter v. Green*, 6 Leigh 504.

(2) Notice.

A settlement by commissioners of an administration account, without notice to the legatees or distributees, is against the constant practice of the court. *Campbell v. Winston*, 2 Hen. & M. 11.

A settlement of an executor's administration account, certified by commissioners on a day subsequent to his death, and not appearing to have been made in his lifetime with notice to himself, nor, after his death, with notice to his executor, is erroneous, and ought not to be received as the ground of a decree against his estate. *Boyd v. Kaufmans*, 6 Munf. 45.

(3) Limitations and Laches.

An account of administration, demanded after a great lapse of time, will not be granted. *Parks v. Rucker*, 5 Leigh 149; *Tate v. Jones*, 98 Va. 544, 36 S. E. 984.

A bill was brought against the defendant, who had married an executrix who was dead, for an account of the testator's estate. The defendant about twenty years before had exhibited in the county court under oath an account of debts and disbursements, which was received and recorded without examination. As the children of the testator came of age, they severally petitioned the county court, and some

of them brought suit to have their shares of their father's estate. Upon which petitions and suits several orders were made for persons to settle an account of the testator's estate, and in all these settlements the account first exhibited by the defendant was allowed as a good discharge for so much. In the present case, it was referred to persons to settle an account of the estate, who having some doubt about allowing this account prayed the direction of the court. Held, that the accounts should be allowed, in regard to the length of time, though the defendant had not one voucher to produce, and, as to the length of time, the transaction was of little more than twenty years' standing, and the suit had been pending ten years. *Major v. Dudley*, Jeff. 51.

An execution was issued against the decedent's estate, and a slave taken and sold by the sheriff in 1797, the decedent's administrator being the purchaser at the sale. In 1801, he settled his account, whereby it appeared that he had not other property to settle the execution, and he accounted for the price of the slave. In 1810, the decedent's daughter, while still an infant, married, and soon after informed her husband of the facts regarding the sale. The administrator died in 1822. Held, that a bill filed by the daughter and her husband against the administrator's personal representatives praying an accounting and seeking to impeach the sale for fraud should be dismissed on account of laches. *Todd v. Moore*, 1 Leigh 457.

Where a suit for an account of administration was brought twenty-six years after the death of the intestate, twenty-one years after the death of the administrator, long after his estate was settled up by his administrator, showing that there were no personal assets, and in the absence of the first administrator's books and papers, against his heir who at his death was an infant two years old, it was held, that the

staleness of the claim is conclusive against it. *Hillis v. Hamilton*, 10 Gratt. 300. See also, *Castleman v. Dorsey*, 78 Va. 342.

A court of equity will not entertain a bill by legatees against the representatives of an executor for an account of his administration filed twenty-eight years after his death and from twelve to twenty years after the youngest legatee attained full age, the account being ancient and complicated, although it appears that he had never settled an account, especially where it appears that there is probably nothing due. *Carr v. Chapman*, 5 Leigh 164.

Equity will not entertain a bill by legatees against the representatives of the executors and sureties, where there has been a great lapse of time after the suit might have been brought before it is instituted, and great remissness in prosecuting it afterwards, especially where it appears probable, that the debts of the estate were sufficient to exhaust all the personal assets. *Hayes v. Goode*, 7 Leigh 452.

Where a suit for an accounting is instituted against an administrator within less than four years after he qualifies, the defense of laches can not be relied on, though the suit has been prolonged thirty-six years, where the administrator has acquiesced in the delay by refusing to render his accounts and by resisting the suit. *Tiernan v. Minghini*, 28 W. Va. 314.

A., being indebted to B., made B. one of his executors and guardian of his children in 1755. B., however, attended very little to the duties of executor; and the devisees having got possession of the estate, B., endeavored to have a settlement of the administration, that he might receive the balance due him. B. died in 1766. After that and as late as 1784, the parties interested expressed a willingness to have the accounts settled; and an order of court was made for the purpose; but the defendants, refusing to proceed therewith, B.'s administrators filed

their bill for a settlement, etc. The defendants plead the statute of limitation. Held, to be a bar. *Pendleton v. Whiting*, Wythe 38.

Decree for Accounting Stops Running of Statute of Limitations.—In a suit to settle the accounts of an executor and ascertain the debts against his decedent's estate, a decree for an account of debts stops the running of the statute of limitations as to all debts against the decedent. *Covington v. Griffin*, 98 Va. 124, 34 S. E. 974.

(4) The Pleadings.

(a) Bill or Petition.

See generally, the title ACCOUNTS AND ACCOUNTING, vol. 1, p. 82.

aa. Form and Sufficiency.

A bill to surcharge and falsify accounts must set forth one or more items, whereby the plaintiff seeks to surcharge or falsify such accounts or ex parte settlement, unless there be errors or mistakes on the face of the account or of the ex parte report or settlement filed with the bill; such apparent errors need not be specified in the bill. If the bill is defective in these respects, it should be dismissed unless amended. But if such bill be not demurred to, and the court should improperly make a general order of reference directing a settlement of the accounts of the personal representative, instructing the commissioner to regard the ex parte settlement as prima facie correct, subject to be surcharged and falsified by either party, and this be legally done by the plaintiff, while the cause is before the commissioner, and a report be accordingly made, such cause ought not to be afterwards dismissed for such defects in the bill. *Seabright v. Seabright*, 28 W. Va. 412.

A bill by a creditor of a decedent to settle the estate and the accounts of the administrator, and to charge him with a devastavit, and to have a personal decree against the administrator, and to subject lands owned by the decedent at his death, and to follow such

lands into the hands of a grantee of the heirs or devisees, and set aside their conveyances to such third party for fraud or other legal ground, is not multifarious. *Turk v. Hevener*, 49 W. Va. 204, 38 S. E. 476. See also, *McGlaughlin v. McGlaughlin*, 43 W. Va. 226, 27 S. E. 378.

bb. Parties.

(aa) Personal Representative.

It is error to decree an account to be taken of money received by a decedent, when his personal representative is not before the court upon proper process. *Donahoe v. Fackler*, 8 W. Va. 249.

Where a suit is brought by one or more distributees of the estate of a decedent for a settlement of the estate and the recovery of the distributive shares, the administrator is a necessary party. *Woodyard v. Buffington*, 23 W. Va. 195.

A bill can not be maintained by distributees against an executor in his own wrong, who has sold property of the deceased, to have an accounting and obtain a decree against the former for the proceeds of the sale, unless the rightful personal representative be a party plaintiff or defendant. *Nease v. Capehart*, 8 W. Va. 95.

The heir, legatee or distributee must either bring the executor or administrator of the decedent before the court or administer himself; otherwise, he can not sustain a bill for an account of the effects of the decedent; for it is not sufficient to allege that the rights of his predecessor are all united in him, as there may be outstanding claims to adjust. *Moring v. Lucas*, 4 Call 577.

Where a distributee of a decedent's estate survives her husband, but dies leaving an heir, her personal representative is a proper party to a suit in equity for a settlement of such estate. *Robertson v. Gillenwaters*, 85 Va. 116, 7 S. E. 371.

Personal Representatives of Deceased Administrator.—Where one of

two administrators has taken no active part in the administration of the intestate's estate, and has died, his administrator is not a necessary party to a bill filed by the distributee for an account of the administration of the estate. *Wills v. Dunn*, 5 Gratt. 384.

(bb) Legatees.

Where a creditor files a bill against the executor for an account of assets, and against the legatees for contribution, and there is a dispute between the executor and the legatees as to whether the executor should pay the debt without contribution from them, and some of the legatees are not made parties, the bill may properly be dismissed as to the legatees. *Sampson v. Payne*, 5 Munf. 176.

(cc) Heirs.

Where a distributee of a decedent's estate survives her husband, but dies leaving an heir, both her personal representative and her heir are proper parties to a suit in equity for a settlement of such estate. *Robertson v. Gillenwaters*, 85 Va. 116, 7 S. E. 371.

(dd) Distributees.

Where a suit is brought by one or more distributees of the estate of a decedent for a settlement of the estate and the recovery of the distributive shares, the widow and all the other distributees are necessary parties. *Woodyard v. Buffington*, 23 W. Va. 195.

(ee) Joint Obligor with Decedent.

Where a creditor comes in under an order for an account of debts against a decedent's estate, and proves a debt upon which a third person is jointly bound with the decedent, such a third person is not a necessary party to the suit, as no relief is there sought against him. It is not the practice of the courts, nor is it the policy of the law, to encumber suits for the administration of assets of decedents' estates with collateral issues affecting the adjustment of equities between persons having no privity with many of

the other creditors. *Robinett v. Mitchell*, 101 Va. 762, 45 S. E. 287.

(ff) Debtors of Estate.

In a suit by a creditor to settle the estate of a decedent, it is not proper to unite the debtors of the estate as defendants. As a general rule, the debtors of the estate must be sued by the personal representative only. The creditor can only sue the personal representative for settlement, and, if land is to be sold, unite with him those interested in the land, unless some independent source of equity shall be made to appear as to the other parties introduced. *Wilson v. Wilson*, 93 Va. 546, 25 S. E. 596.

cc. Prayer.

Where a creditor files a bill to subject the personal and real estate of his deceased debtor to the payment of his debt, praying that the administration account be settled and that an account of all the debts and liabilities of the estate may be taken and their priorities fixed, a decree for a general accounting may be made under such prayer, and all the creditors permitted to come in and prove their debts, and an order entered staying all other suits, and all the assets may be administered in the one suit. *Duerson v. Alsop*, 27 Gratt. 229.

(b) Answer.

The answer of an executor under oath, setting out a personal claim against the estate of the testator, is not evidence by itself in a suit against the executor for an accounting, but must be supported by evidence. *Beckwith v. Butler*, 1 Wash. 224.

(5) Order or Decree.

In a bill by an executor for a construction of the will of which he was executor, an account was taken, showing collections by the executor of ante-war debts in confederate money, which, by order of the court, had been invested in confederate bonds. The contest in the circuit court was between legatees, and certain legatees

and next of kin. The court entered a decree, settling the question between the legatees, holding that the testator died intestate as to one moiety of the residuum, and directing that the amount invested in confederate bonds should be treated as a part of the residuum and the loss borne equally by all the parties interested in the residuum. This decree, upon appeal by certain legatees, was reversed by the appellate court as to some of the legatees and affirmed as to others, and affirmed in all other particulars; and, on motion of the next of kin, it was added that the decree should not prevent the next of kin from asserting, by proper proceedings, any claim they might be advised to assert against the executor on account of his transactions as such. Held, that the decree of the appellate court did not conclude inquiry as to the money collected and invested in confederate bonds, such inquiry being permissible under the reservation. *Young v. Cabell*, 27 Gratt. 761.

When an order of reference is made in any suit to surcharge and falsify the ex parte settlement of a personal representative, it should be a general order of reference, and not a restricted order of reference confined only to those items, which have been specified in the bill as the subjects of surcharge and falsification. *Seabright v. Seabright*, 28 W. Va. 412.

Operation and Effect.—Where within five years from the date of a judgment rendered against a deceased person, an account of debts against his estate was ordered, which operated to suspend the statute of limitations as against such judgment, a subsequent action to enforce such judgment against his estate was not barred. *Robinett v. Mitchell*, 101 Va. 762, 45 S. E. 287.

5. Stating, Settling, Opening and Review.

a. Form and Requisites of Account.

In 1851, a testator died leaving sev-

eral infant children. By his will he directed that his eldest daughter should have possession of the home property if she would keep the younger children with her and take care of them. He directed his executor to manage the estate until January 1, 1861, when it was to be divided equally among his children. The husband of the eldest daughter became administrator with the will annexed and took possession of the estate, but did not invest the money or settle his account. Held, that the account of the administrator with the will annexed up to 1861 should be settled as a guardian's account. *Strother v. Hull*, 23 Gratt. 652.

The court should direct the account as individual and as executor to be taken separately. *Staples v. Turner*, 29 Gratt. 330.

During the paper money period, all sums of debt and credit ought to be stated in due order of time and to stand as nominally entered, without scaling, when the executor is debtor; but, when there is an excess, it should be scaled. *Cary v. Macon*, 4 Call 605.

An administrator having appeared before the commissioner appointed for the purpose of making a settlement of his account, it was proper to include the settlement of his account as agent for the intestate during her lifetime, although no notice was given that he would be called upon to settle his accounts as such agent. *Trevelyan v. Lofft*, 83 Va. 141, 1 S. E. 901.

Blending Separate Accounts.—Where an executor enters the profits of the testator's lands in his administration account, it is right that discrimination accounts should be extracted by the commissioner, in order to show each devisee's proportion of debts and credits. *Cary v. Macon*, 4 Call 605.

Where an executor kept a general administration account, and a separate account of money borrowed by him from the estate, and in the latter entered a sum of sterling money received

in 1777, which he converted into current money at the exchange, and annually carried the interest into the administration account, such separate account should, on his death in 1780, be incorporated, at the proper dates, into the administration account, which should then be closed, the interest and commissions set against each other, and the balances upon them carried into the body of the administration account; and, if the balance then due upon the administration account should only be equal to or less than the specie money borrowed, such balance should be regarded as specie, but, if it exceeds the money borrowed, the excess should be scaled. *Cary v. Macon*, 4 Call 605.

Where the guardian of minor children is also acting as administrator *de bonis non* with the will annexed of the testator, his account as administrator should embrace only his receipts and disbursements as such; and it is error to blend his receipts and statements as administrator with receipts and statements under an agreement between him as guardian and the widow and adult daughter as to the disposition of the property. *Hannah v. Boyd*, 25 Gratt 692.

In Accordance with Decree.—The commissioner is bound to state the accounts, according to the decree of the court of appeals, and can not charge the appellant with any loss sustained or supposed to be sustained, by the appellee, in consequence of the principles on which the account was directed, in relation either to depreciation or interest. *Ambler v. Macon*, 4 Call 605.

b. Character and Contents of Account.

(1) General Consideration.

Where it appears from the face of an executor's settlement that he has paid in full some debts and left unpaid, in part or wholly, other debts of equal dignity, such settlement stands impeached *per se*. *McCormick v. Wright*, 79 Va. 524.

(2) Necessity of Itemized Account.

See the title ACCOUNTS AND ACCOUNTING, vol. 1, p. 82.

(3) Charges against Executor or Administrator.**(a) Property in General to Be Accounted for.**

An executor or administrator should be charged in the settlement of his accounts with all the assets of the decedent's estate which he has collected in money, or which he has converted to his own use by exchanging the debt or obligation due the estate for an obligation of a third party, and also with all debts which have lost to the estate by reason of his neglect to collect or take possession. *Anderson v. Piercy*, 20 W. Va. 282.

Executors or administrators are to be charged with the personal property owned by the testator at the time of his death, which came or ought to have come into their hands. *Hooper v. Hooper*, 29 W. Va. 276, 1 S. E. 280.

(b) Tobacco Received and Not Disbursed.

An executor or administrator is not chargeable specifically with tobacco received by him and not disbursed on account of his testator's estate, but only with the price actually received for such tobacco, where that can be ascertained, and, if not, with the then current value thereof. *McCall v. Peachy*, 3 Munf. 288.

(c) Amount of Paper Money Received in Specie.

Where an executor authorized to invest money, changes the bonds, shifts the debts, and applies the money to his own use, or that of his friends, without any fraudulent design, it is no reason for charging him with the amount of paper money received by him in specie. *McCall v. Peachy*, 3 Munf. 288.

(d) Cash in Safe at Time of Testator's Death.

Executors must be charged with the cash in the testator's safe at the time

of his death, which came into their hands, and they will not be allowed to rely on the appraisement bill for such items, which is much less than the cash actually received. *Hooper v. Hooper*, 29 W. Va. 276, 1 S. E. 280.

(e) Wearing Apparel of Testator.

The wearing apparel of a testator will not be charged against the executor where it is not proved to have been converted to his use by him, and a sale of it was not necessary for the payment of debts and legacies. *McCall v. Peachy*, 3 Munf. 288.

(f) Furniture Retained by Personal Representative.

Where an administrator with the will annexed lives in the house of his testator and a part of the furniture is retained and used by him until it is consumed by fire along with the house, the furniture must be considered as having been taken as his own and he must account for its value, although he had with him the younger children of the testator for whose board he was paid. *Strother v. Hull*, 23 Gratt. 652.

(g) Property Bequeathed for Use of Testator's Family.

Where a testator directed by his will that the new goods in his house, and the goods which he had ordered from Europe, should be disposed of for the use of his family in the same manner as if he were living, no account should be taken of them in the settlement of his estate. *Cary v. Macon*, 4 Call 605.

(h) Profits of Land Occupied by Executor in Other than Representative Right.

Where the occupation by an executor of the real estate of the testator was not in his representative capacity, it was held, that what the executor received from the land was not assets of the estate for which he was chargeable as executor. *Baker v. Baker*, 87 Va. 180, 12 S. E. 346.

(i) Assets Retained by Widow as Co-administratrix.

An administrator should not be

charged with any assets which have been retained by the widow as co-administratrix, and never reached his hands. *Hart v. Hart*, 31 W. Va. 688, 8 S. E. 562.

(j) Choses in Action.

An executor is not to be charged with a debt when it becomes due, but only when he actually receives it, unless it is shown to have been lost by his negligence or improper conduct. *Cavendish v. Fleming*, 3 Munf. 198; *Burnley v. Duke*, 1 Rand. 108; *Hooper v. Hooper*, 32 W. Va. 526, 9 S. E. 937; *Evans v. Shroyer*, 22 W. Va. 581; *Reitz v. Bennett*, 6 W. Va. 417.

An administrator is chargeable with sums actually collected, and not with estimates made by him as to what may be collected on claims due the estate. *Fauber v. Gentry*, 89 Va. 312, 15 S. E. 899.

If when an executor settles his account, he has not received a debt, and it appears, that it has been lost through his negligence or want of proper diligence, he should be charged with such debt as of the time, when he ought to have received it, had he used due diligence. The mere want of proper diligence on his part or his negligence does not make debts due his testator the property of the executor, and therefore, if when he settles his accounts, he can show, that a particular debt included in the inventory and not returned as worthless or doubtful was nevertheless a debt, which could not have been collected by the use of diligence either because of the actual insolvency of the debtor, or because he had a substantial defense, or because though when the inventory was made the debt was believed to be due, yet if it turns out, that it was not actually due, he ought not to be charged with such debt. For it remained the debt of his testator, though the administrator was negligent in not attempting its collection or in not bringing suit upon it with the promptness which

he ought to have exercised. *Anderson v. Piercy*, 20 W. Va. 324. See *Cavendish v. Fleming*, 3 Munf. 198; *Reitz v. Bennett*, 6 W. Va. 417.

When, however, a debt is returned in an inventory of an executor without its being noted as either worthless or doubtful, it will be presumed, when he settles his accounts, after ample time has elapsed for him to have collected such debt, that he has in fact collected it in full; and he should be charged with such debt as if collected in such reasonable time, as it ought to have been collected in. (See *Dilliard v. Tomlinson*, 1 Munf. 183.) In such case, as the assets are traced to his hands, it devolves upon him to show, that they have not been collected, and why they have not been collected, and not upon the legatees to establish misconduct or negligence on his part. *Anderson v. Piercy*, 20 W. Va. 282.

Where an administrator recovered judgment for a debt due the estate, but was enjoined by the judgment debtor from collecting the same on the ground that the decedent owed the judgment debtor, and such injunction has not been dissolved, the administrator can not be charged with the amount of the debt. *Fauber v. Gentry*, 89 Va. 312, 15 S. E. 899.

Although at common law the appointment by a creditor of his debtor as executor operated, as against legatees and distributees, with certain exceptions, as a release of the debt, this rule never applied to a debtor who was appointed administrator of his creditor. *Utterback v. Cooper*, 28 Gratt. 233.

Time of Charge.—An executor's account, rendered on oath, is prima facie evidence of the sums received by him for the estate of his testator, and of the times when received. *Cavendish v. Fleming*, 3 Munf. 198.

An executor is not to be charged with the debts due to the estate of his testator, at the time when they became due, but only at the time when

he actually received them; except such debts as are lost by his negligence or improper conduct. *Cavendish v. Fleming*, 3 Munf. 198. See also, *Reitz v. Bennett*, 6 W. Va. 423; *Anderson v. Piercy*, 20 W. Va. 324; foot-note to *Southall v. Taylor*, 14 Gratt. 269 (containing quotation from *Anderson v. Piercy*, 20 W. Va. 324); *Hooper v. Hooper*, 32 W. Va. 541, 9 S. E. 931; *Ruhl v. Berry*, 47 W. Va. 824, 35 S. E. 396.

Debts Due Estate.—In all cases where an executor or administrator has charged himself with, or assumed, the debts of others to the estate of the decedent, the same should be considered as payments to him; and if such debts were not due at the time they were charged or assumed, he should be charged only as at the time the same became payable. *McCall v. Peachy*, 3 Munf. 288.

Notes and Accounts Appearing in Appraisement.—An administrator should not be charged with notes and accounts appearing in an appraisement bill, but with only such as he has collected or lost by negligence or misconduct. His account under oath is prima facie evidence in his favor. *Hooper v. Hooper*, 32 W. Va. 541, 9 S. E. 937; *Holt v. Holt*, 46 W. Va. 397, 35 S. E. 19.

B. sold to W. and S. and S. certain real estate in Greenbrier county. A part of the purchase money remained unpaid at the death of W. and at the date of the administration in 1863, in that county, which was then under the authority of the confederate government. Prior to the death of W. the real estate in Greenbrier county had been sold by him and S. and S. to the Allegheny College, an incorporated institution which was insolvent at the date of this suit, and which had no assets except what it was entitled to out of this property. In 1864 the administrator, or executors de son tort, surrendered to the college its bonds executed in payment of the prop-

erty of their intestate, upon receiving the amount thereof in confederate money. In a suit by the legal administrators of B. appointed in 1866, to enforce the vendor's lien, the court below decreed that the administrators or executors de son tort, should pay the balance of the lien by reason of having received payment from the Allegheny College. Held, that the administrators, or executors de son tort, of W. should only be chargeable, if at all, with the cash value of the confederate money so received by them. But inasmuch as this confederate money was paid over to the distributees of W., or invested for their benefit, the administrators should not be charged with anything by the creditors, on account of the receipt of this money, until the other estate of W. is first exhausted; and they should have a credit in their settlement with the distributees with such amounts as they so paid them, and should be charged, as against such of them or the creditors, with the actual cash value of the residue of the confederate money, if any, so received and unaccounted for by them. *Williams v. Buster*, 5 W. Va. 342.

(k) Items of Inventory.

The executor or administrator is chargeable with the items of the inventory, unless he can show that the property inventoried did not belong to the decedent at the time of his death, or can account for it in some other manner. *Hooper v. Hooper*, 29 W. Va. 276, 1 S. E. 280.

An exception to the report of the commissioner for failure to charge executors with the full sum reported in the inventory as cash on hand at the death of testator was held to be without merit, where it was satisfactorily shown that the amount so reported included, through mistake, the result of collections, made and the proceeds of personal property sold by the executors after their qualifications. *Booton v. Booton*, 2 Va. Dec. 576.

(l) Sales by Executors and Administrators.

At common law where an executor or administrator sells property belonging to the estate, he is chargeable with the proceeds of the sale as so much cash in hand whether he sells for cash or on credit. *Clarke v. Wells*, 6 Gratt. 475; *Southall v. Taylor*, 14 Gratt. 269. But where the statute prescribes the manner and terms of the sale of a decedent's personalty, and the executor or administrator honestly makes a sale conforming to the statute, he incurs no liability if the property does not bring its full value, or he is unable to collect the price. See 11 Am. & Eng. Ency. Law (2d Ed.) 1204. See ante, "Sales, Mortgages and Pledges," IV, F.

Time of Sale.—Where an executor who is given discretion as to the time of sale, acts in good faith, he is not chargeable with the loss resulting from selling at the time he did, whether his judgment that the sale could be made without sacrifice was reasonable or not. *Staples v. Staples*, 24 Gratt. 225.

Private Sale.—Where an executor or administrator sells property at a private sale when he should have sold at public auction, he is chargeable with what would have been realized if the sale had been made at public auction. *Hudson v. Hudson*, 5 Munf. 180.

Sale for Inadequate Price.—An executor or administrator is chargeable as for a devastavit if he sells bonds belonging to the estate of the decedent for less than their value, unless the interests of the estate manifestly require it. *Pinckard v. Woods*, 8 Gratt. 140.

An administrator, in order to raise funds to pay off a debt owing by the estate, sold certain bonds of a foreign corporation without property in the state, and which were therefore not collectible without considerable delay and expense. The sale was advised by counsel and business men, and was made by the administrator in entire

good faith. Held, that he was not liable for a subsequent advance in the value of the bonds. *Trevelyan v. Lofft* 83 Va. 141, 1 S. E. 901.

(m) Relating to the Realty.

Lease.—A lease for years owned by the testator should be charged to the executor at the price it would have produced if sold at the testator's death, and not according to estimated rents charged upon the principle of annuities. *Cary v. Macon*, 4 Call. 605.

Rents and Profits.—Where a will gives the executors a naked power to sell real estate, neither the title nor the right to the possession passes to the executors, and they are not chargeable for the failure to rent the same until the sale can be made. *Dunn v. Renick*, 33 W. Va. 476, 10 S. E. 810.

A testator devised land—two-thirds to a son and one-third to the children of a deceased son—leaving the sale of the land to the discretion of the son who was also executor. The executor continued to live on the land, taking all the profits therefrom. The devisees lived with him, but served him without other compensation than their board. Held, that the executor, on accounting, should be charged with rent for one-third of the land. *Davies v. Hughes*, 86 Va. 909, 11 S. E. 488.

Where an executor is given credit for all the payments of debts made by him for the estate, he should be charged with all the rents and profits received by him. *Robertson v. Breckinridge*, 98 Va. 569, 37 S. E. 8.

A testator devised land to a widow for life and then to his children. All the children lived with the widow on the land, but the eldest son managed the estate until the death of the widow, a period of seventeen years, and while thus engaged he persuaded the widow to buy an adjoining tract of land out of the funds of the estate, and took the deed to himself. Upon the widow's death, the son and another administered on her estate. The other chil-

dren then asked the son for a partition of the land, but it was postponed until his death, when he left a will directing it to be sold for the benefit of his estate, as he considered that it belonged to him, and that his services as manager were a full equivalent for the land. It was purchased by one ignorant of these circumstances, and a suit was brought for a partition of the same among the other children. Held, that the son's representatives were liable for the rents and profits from the time of the widow's death until the sale, and for the price of the land sold, with interest thereon; and that, though the son was entitled to a fair compensation for his services as manager, such sum was chargeable against the widow's estate, and hence could not be allowed as an abatement of the purchase money. *Chancellor v. Ashby*, 2 Pat. & H. 26.

(n) Investments Made under Order of Court.

Where an estate is being administered by the court, the administrator can not be charged with investments in confederate bonds, made by order of such court. *Fauber v. Gentry*, 89 Va. 312, 15 S. E. 899. See ante, "Investments," IV, E, 2.

(o) Interest.

As to the general rule governing the liability of executors for interest of funds received and held, see the titles INTEREST; TRUSTS AND TRUSTEES.

aa. General Principles Governing Allowance.

The propriety of charging an executor with interest on a balance in his administration account depends on the particular circumstances of each case. He should not be charged with interest on a small annual balance, where it appears that he was in no default in not paying them over to the legatees, and never applied the money to his own use. *Wood v. Garnett*, 6 Leigh 271.

Whether interest ought to be charged

in an administration account is a question the decision of which may depend upon extraneous testimony. *White v. Johnson*, 2 Munf. 285.

In *Granberry v. Granberry*, 1 Wash. 246, the court said that an executor's account should be closed at the end of each year; and that interest should be allowed upon the different balances; until the whole transaction ended; and, that it was no excuse to say, that there was a risk which the executor was not bound to run, in making the money productive, because, if that were true, he might apply to a court of equity for its direction, as to lending it to individuals, or to the public, and which would make him safe, or he might bring the money into the court. Cited in *Miller v. Beverley*, 4 Hen. & M. 415.

When interest is charged against an executor or administrator (in settling his administration account), on balances due at the end of each year, it ought not to be carried to the accounts of the succeeding years so as to convert it into principal and make it bear interest; nor to be deducted from the payments made in such succeeding years. *Sheppard v. Starke*, 3 Munf. 29.

General Principles Governing Allowance.—When the debts have been paid, or there has been time in which to pay them, and the personal representative has only legacies and distributive shares to deal with, he is treated and settled with, as to interest, on the principles governing settlements between ordinary creditors and debtors, except that, under peculiar circumstances, he may become chargeable with compound interest. *Van Winkle v. Blackford*, 54 W. Va. 621, 46 S. E. 589.

As the case is to be remanded for restatement of the account, the principles governing the allowance of interest in such accounts will be set out, and, in connection therewith, an additional assignment of error will be disposed of. When the personal representative is not in default, although there is a balance against him in favor

of the estate, the interest on the balance is not carried into the account, but stands over until final settlement, or until sufficient disbursements have been made to discharge it, after the balance of principal against him has been extinguished. In restating the account, a different rule is to be applied. The administrator should separate from his general account the accounts of payments to legatees and distributees, long before he makes his settlement, where it does not appear that the existence of any debts prevented his doing so. Therefore, he ought to settle under the rule of debtor and creditor, charging interest on money due, and applying the payments to the liquidation of the interest first, and then of the principal. *Garrett v. Carr*, 3 Leigh 407, 416; *Handly v. Snodgrass*, 9 Leigh 484; *Van Winkle v. Blackford*, 54 W. Va. 621, 46 S. E. 589.

When a personal representative is in no sense at fault, and yet a balance for any year appears against him, the interest on such balance is not carried into the account for subsequent years, but stands over until final settlement or until sufficient disbursements have been made to discharge it, after having extinguished the balance of principal due. *Van Winkle v. Blackford*, 54 W. Va. 621, 622, 46 S. E. 589.

When Interest Received.—An executor or administrator is chargeable with interest in all cases where he has received it. *McCall v. Peachy*, 3 Munf. 288.

Default in Making Payment.—Where the debts of an estate have all been paid, and a final account settled by an administrator showing a balance against him, the payment of which he refuses without good cause, the distributees are entitled to recover interest against him on the whole sum found due, although such sum be in part composed of interest. On the final settlement the administrator stands in relation to the distributees as a bor-

rower of the sum due by him. *Preston v. Davis*, 102 Va. 178, 45 S. E. 865.

Specie Remaining in Hands Unreasonable Time.—An executor or administrator is chargeable with interest in all cases where paper money or specie remains in his hands more than a reasonable time (which in this case was said to be six months) without being applied to the purpose of the estate. *McCall v. Peachy*, 3 Munf. 288.

Interest is required to be paid by fiduciaries on funds kept and used by them. And if such funds are kept they are presumed to have been used, and to have been worth or to have made interest. *Sharpe v. Rockwood*, 78 Va. 24; *Templeman v. Fauntleroy*, 3 Rand. 434.

An executor is not chargeable with interest on a legacy payable to an infant, before a guardian has been appointed, and he has received notice of such appointment. *Cavendish v. Fleming*, 3 Munf. 198.

A testator directed that his lands should be sold, and the proceeds invested in bank stock, or such other property as his executor should think most advantageous to his children. The executor sold the lands, but did not invest the proceeds in bank stock, but accounted for them in money. Held, that the executors should be charged with interest on the balance in their hands annually, and that their disbursements for the maintenance of the children and other purposes should be defrayed out of the interest accruing on such balances. *Garrett v. Carr*, 3 Leigh 407.

Actual Receipts.—An executor or administrator is chargeable with interest only on his actual receipts, except as to debts lost by his negligence or improper conduct. *Cavendish v. Fleming*, 3 Munf. 198.

Money directed to be invested by executors in government securities, should be accounted for as if invested, after a reasonable time; but the ex-

ecutors should not be charged with interest during such reasonable time; nor should they be charged with interest on dividends of stock, where such dividends have not been actually received. *Carter v. Cutting*, 5 Munf. 223.

Right to Payment of Money Received Disputed.—An executor or an administrator is not chargeable with interest on money received by him while it is in dispute to whom it should be paid, and it does not appear that he actually received interest on it. *Dilliard v. Tomlinson*, 1 Munf. 183.

Estimated Hire of Slaves.—An executrix or other fiduciary whose duty it is to hire out slaves for the benefit of the cestuis que trustent will be held to account for interest on the estimated hires. *Cross v. Cross*, 4 Gratt. 257.

An executor or administrator, hiring slaves belonging to the estate of his testator or intestate, ought not to be charged with interest on such hire from the day it became due, no proof appearing that it was then collected or that interest from that day was received upon it, but a reasonable time to collect and apply the money should be allowed before the commencement of interest. *Dilliard v. Tomlinson*, 1 Munf. 183.

Lease for Years.—Where the testator owned a lease for years chargeable to the executor at the price it would have produced if it had been sold at his death, and not according to estimated rent valued upon the principle of annuities, interest should not accrue upon the price until after the war, if the leased premises were exposed to the enemy. *Cary v. Macon*, 4 Call 605.

Effect of War Period.—See generally, the titles LIMITATION OF ACTIONS; PAYMENT; WAR.

Where an administrator during the Civil War held money payable to distributees living within the United States line, he was not chargeable with interest during the period of the war.

Dromgoole v. Smith, 78 Va. 665. See also, *McVeigh v. Bank of Old Dominion*, 26 Gratt. 188.

Where an administrator resided during the Civil War in the midst of active hostilities whereby nearly all business was suspended, he was not liable for interest on funds of the estate. *Brent v. Clevinger*, 78 Va. 12.

Failure to Invest as Directed by Will.—Where an executor is directed by the will to put out funds at interest, and he neglects to do so he is to be considered as a borrower and annually charged with interest, and such interest, and not the principal, is to be applied to his disbursements. *Handly v. Snodgrass*, 9 Leigh 484.

Compound Interest.—He is so charged when he uses the money of the estate in trade and will not disclose the profits he has made, or where the fund is directed to be laid out to accumulate, or where he has acted as quasi guardian, as well as executor. *Van Winkle v. Blackford*, 54 W. Va. 621, 46 S. E. 589.

An executor or administrator is not to be charged with compound interest unless guilty of negligence or misconduct. *Hooper v. Hooper*, 32 W. Va. 526, 541, 9 S. E. 937; *Holt v. Holt*, 46 W. Va. 397, 35 S. E. 19.

Where testator directs his executor to manage his farms and distribute the profits among his grandchildren, when of age, the executor should not be charged with compound, but only with simple interest upon the yearly balances left over in his hands, unless testator directed that those balances should be invested in interest bearing securities. *Lovett v. Thomas*, 81 Va. 245; *Crigler v. Alexander*, 33 Gratt 674; *Garrett v. Carr*, 1 Rob. 196.

bb. Rate and Computation.

An administrator whose administration terminated before 1797 is to be charged but five per cent. upon the balance of principal found against him upon a settlement of his account. *Wills v. Dunn*, 5 Gratt. 384.

Time from Which Interest Runs.—

An executor or administrator is not chargeable with interest on a sum of money paid to him from the day when it became due, especially where it does not appear that he collected it on the day it became payable. A reasonable time to collect and apply money should be allowed before interest is chargeable. *Dilliard v. Tomlinson*, 1 Munf. 183; *Whitehorn v. Hines*, 1 Munf. 343; *Carter v. Cutting*, 5 Munf. 223.

Where an executor took bonds for purchases made at a sale by himself of his testator's personal property, and it did not appear when such bonds were paid off, it was held that he should be charged with the principal of the bonds in the year when they fell due but with interest thereon only from the end of that year. *Rosser v. Depriest*, 5 Gratt. 6, 50 Am. Dec. 94.

An intestate died in 1818, leaving a widow and eight children, all of whom were minors except the eldest, a son who qualified as his administrator. He settled his administration account in 1826, when the personal estate in his hands amounted to \$4,179, principal and interest. There was very little real estate, and all the family lived together, the administrator managing the estate, selling the crops and paying the expenses of the family, including the education of the children, out of the profits of the estate or his own means, with the aid of their labor. This was continued until 1846. Held, that under all the circumstances of the case, the administrator should not be charged with interest upon the balance in his hands ascertained by the settlement in 1826, until the breaking up of the family in 1846; and that he should be charged with interest upon the whole amount, principal and interest, from that time. *Peale v. Hickie*, 9 Gratt. 444.

An administrator ought not to be charged with the debts due the estate of his testator at the time when they became due but only at the time when

he actually received them, unless such debts are lost by his negligence or improper conduct. *Reitz v. Bennett*, 6 W. Va. 417; *Evans v. Shroyer*, 22 W. Va. 581; *Hooper v. Hooper*, 32 W. Va. 526, 9 S. E. 937; *Cavendish v. Fleming*, 3 Munf. 198.

Where the failure to bring an executor to a settlement appears to have proceeded from neglect of the residuary legatees, without any willful default on his part, interest ought not to be charged on the balance due from him to the estate, except from the date of the decree; nor in such case ought interest to be allowed him on payments to the legatees before the decree; though made in bonds which carried interest. *Fitzgerald v. Jones*, 1 Munf. 150.

Confederate currency received by an administrator during the Civil War should not be scaled as to the date of receipt, but he should be allowed until the end of the year to invest the same. *Dromgoole v. Smith*, 78 Va. 665.

How Computed—Interest on Annual Balances.—The rule with regard to charging interest on balances in the hands of executors is that where in any year there are disbursements but no receipts, or where the disbursements exceed the receipts of such year, such disbursement or excess of disbursement shall be applied to the payment of the balance of principal of the next preceding year or years, in which there may have been a balance. But if there be no principal remaining due to the estate, then, and not till then, the disbursements shall be applied to the payment of any interest which may be due. And if there be neither principal nor interest remaining due, interest shall then be allowed upon such disbursement, unless it be absorbed by subsequent receipts. And where the balance of principal of any preceding year shall be thus extinguished, the interest on such balance shall then cease. *Burwell v. Anderson*, 3 Leigh 348.

The propriety of charging an executor with interest on balances in his administration account, depends on the circumstances of each particular case; and he ought not to be charged with interest on small annual balances, where it appears that he was in no default in not paying them over to the legatees and has never applied the money to his own use. *Wood v. Garnett*, 6 Leigh 271.

When interest is charged against an executor or administrator in settling his administration account on balances due at the end of each year, it ought not to be carried to the amounts of the succeeding years so as to convert it into principal and make it bear interest, nor should it be deducted from the payments made in such succeeding years. *Sheppard v. Starke*, 3 Munf. 29.

In 1849 a suit was brought against the administrators of an executor for the settlement of his account of the administration of his testator's estate. The commissioner who was appointed to settle the account brought the administrator's account down to October, 1851, when he found a large sum of principal and a large sum of interest due from the executor. It was held that in stating the accounts with the legatees the principal and interest should not be aggregated and interest charged upon the whole against the executor, but, interest should only be charged upon the principal up to the date of the decree disposing of the fund, and then upon the whole fund from that date. *Chapman v. Shepherd*, 24 Gratt. 377.

Where a testator directs his executor to manage his farms and distribute the profits among his grandchildren, when of age, the executor should not be charged with compound interest, but only with simple interest upon the annual balances left over in his hands, unless the testator directs that such balances shall be invested in interest-bearing securities. *Lovett v. Thomas*, 81 Va. 245.

At the close of an administration account, the interest due from the administrator is not to bear interest. *Morris v. Morris*, 4 Gratt. 293.

An executor settled his accounts before a commissioner, and they showed a balance in his hands of a certain principal and interest thereon. The executor died before the money was paid over to those entitled thereto, and an action was brought against his administrator. Held, that the administrator was chargeable with interest on the principal and interest due from him at the date of his settlement, but only on the principal then due. *Kelly v. Love*, 20 Gratt. 124.

(4) Credits.

(a) Disbursements.

aa. General Rule.

Executors and administrators ought to be allowed in their accounts all reasonable charges and disbursements for the benefit of the estate they represent, in preference to the claim of any creditor of the deceased. *Nimmo v. Com.*, 4 Hen. & M. 57, 4 Am. Dec. 488.

bb. Expenses of Administration.

(aa) Right to Credit for.

Executors and administrators are entitled to allowance for reasonable expenses and where the record does not show such allowance, it can not be presumed to have been made. *Dromgoole v. Smith*, 78 Va. 665.

(bb) What Constitutes Expenses of Administration.

aaa. Expenses in Recovering Runaway Slave.

The expenses of an executor in recovering a runaway negro, whose value was credited to the estate, and also money paid for the hire of slaves to make a crop on the land of the decedents under the executor's care, the proceeds of such crop being credited to the estate, are reasonable charges and disbursements. *Nimmo v. Com.*, 4 Hen. & M. 57, 4 Am. Dec. 488.

bbb. Clerk Hire—Rent of Room—Postage.

An executor may be allowed the expenses of administration including clerk hire, rent of counting room, and postage, in addition to his commission of five per cent. where it appears that such allowance is equitable and just, and the circumstances of the estate justify it. *Hipkins v. Bernard*, 4 Munf. 83.

ccc. Hire of Land Agent.

Where a testator died in Virginia owning land in Arkansas and had no agent there, his executor in Virginia may recover for payments made to an agent employed by him to attend to such lands. *Crouch v. Davis*, 23 Gratt. 62.

ddd. Counsel Fees.

Where an executor is obliged to employ counsel to enforce the collection of debts due the estate, he is entitled to receive credit for the fees paid such counsel. *Hoke v. Hoke*, 12 W. Va. 427.

An executor or administrator may lawfully pay reasonable counsel fees out of the assets, as part of the expense of administration. *Crim v. England*, 46 W. Va. 480, 33 S. E. 310, citing *Schouler, Examiners*, § 544; *Lindsay v. Howerton*, 2 Hen. & M. 9; *Nimmo v. Com.*, 4 Hen. & M. 57. And if not paid by him, they may be decreed to be paid out of assets found in his hands unexpended. *Crim v. England*, 46 W. Va. 480, 33 S. E. 310.

An administrator is allowed his legal costs and reasonable counsel fees expended in defending a litigable demand against the estate, whether in the circuit or appellate court, if he acted in good faith in making such defense. *Turk v. Hevener*, 49 W. Va. 204, 38 S. E. 476.

An executor or administrator should be credited in his administration account with fees paid to counsel although such fees were greater than allowed by law. *Lindsay v. Howerton*, 2 Hen. & M. 9.

Where an administrator labors faithfully through protracted litigation extending over a period of thirty years, himself furnishing the means to carry it on, and finally recovers a heavy judgment for the trust estate, charging for his services only \$200, the costs recovered in such litigation should be credited to and not be charged against the administrators and sureties in a subsequent suit in equity by the distributees for a third accounting of the administrators. *Robertson v. Gillenwaters*, 85 Va. 116, 7 S. E. 371.

Where the collection of nearly \$3,000 due an estate involved the prosecution of several suits in equity, which were hotly contested for a number of years, a contract by the executor of the estate to pay the lawyers for conducting such suits a contingent fee of half the amount collected was held to be reasonable. *Baker v. Baker*, 87 Va. 180, 12 S. E. 346.

Executors were denied credit for the fees of counsel employed to defend claims against the estate where they improperly abandoned their defense and confessed judgment; because if they were justified in confessing judgment, it was improper for them to employ counsel to resist the claims. *Tate v. Tate*, 75 Va. 522.

cc. Funeral Expenses.

It seems that an action will not lie against a personal representative as such for the funeral expenses of his testator or intestate. *Fitzhugh v. Fitzhugh*, 11 Gratt. 300, 62 Am. Dec. 653; *Daingerfield v. Smith*, 83 Va. 81, 1 S. E. 599.

dd. Debts of Estate.**(aa) In General.**

An executor or administrator may pay a debt of his decedent, if it is confessedly just and due without waiting to be sued, and ordinarily it is his duty to do so and to credit himself with such payment in his settlement. *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. 26.

A personal representative may pay

a debt due by the default of his decedent, as treasurer of a public fund, before an action on the decedent's official bond is barred by the statute of limitations, without waiting to be sued for such debt, and may credit himself with its payment in the settlement of his account. *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. 26.

(bb) Burden to Show Liability of Estate.

In a suit in equity brought to enforce the settlement of the accounts of an administrator, the administrator, in order to obtain credit for amounts paid out by him, must show that such amounts were paid on the debts for which the estate of his intestate was liable. *Dawson v. Hemelrick*, 33 W. Va. 675, 11 S. E. 31.

A bond, note or account may, on its face, appear to be the personal debt of an executor, and yet, in truth and in fact, be the debt of the estate. The presumption is that the face of the paper discloses the true debtor, and the burden of proof is on him who controverts the fact; but if the debt has been paid by an executor, and he can establish the fact that it is not his personal debt, though it so appears on the face of the paper, but is, in truth and in fact, a debt of the estate, he should be allowed credit for it. *Breckinridge v. Breckinridge*, 98 Va. 561, 31 S. E. 892.

(cc) Retention of Debt for Creditor Estate Which Personal Representative Also Represents.

If the same person be the personal representative of two estates, one of which is debtor to the other, he may retain out of the effects of which he is possessed as the representative of the debtor, to satisfy the debts due to him as the representative of the creditor. *Morrow v. Peyton*, 8 Leigh 54; *Green v. Thompson*, 84 Va. 376, 5 S. E. 507. But, in such case, the time at which the transfer of assets should be made will depend upon the condition

of the debtor estate and the estate of the administration; accordingly, the court will not shift the responsibility of one set of sureties to the other, without some act or declaration on the part of the representative indicating an intention to transfer the assets. *Harvey v. Steptoe*, 17 Gratt. 301; *Morrow v. Peyton*, 8 Leigh 54. In such case, transmutation of possession by operation of law has been often repudiated in Virginia. *Smith v. Gregory*, 26 Gratt. 248; *Morrow v. Peyton*, 8 Leigh 54; *Swope v. Chambers*, 2 Gratt. 319; *Harvey v. Steptoe*, 17 Gratt. 301, 311. And in *Board of Education v. Cain*, 28 W. Va. 758, it is said: "A fiduciary can not transfer his mere indebtedness in one capacity to himself in another capacity, so as to exonerate his securities in the one and throw the burden upon his securities in the other. To make the transfer valid it must consist of something more than a naked liability; it must be substantial assets if made by an insolvent fiduciary." See also, *Smith v. Gregory*, 26 Gratt. 263. But if the fiduciary is solvent and able to pay over the funds, all that is necessary is for him, when he is ordered to pay it over, or when the law would authorize him to pay it over to a third person holding the other fiduciary character, to make his election and manifest it by some act, direction or admission. (*Swope v. Chambers*, 2 Gratt. 319; *Myers v. Wade*, 6 Rand. 444; *Broadus v. Rosson*, 3 Leigh 12; *Morrow v. Peyton*, 8 Leigh 54; *Piper's Estate*, 15 Pa. St. 533; *Gottsberger v. Taylor*, 19 N. Y. 150; *Pratt v. Northum*, 5 Mason 188.) See also, *Gilmer v. Baker*, 24 W. Va. 92. These principles apply as well where the same person is representative of an estate and guardian of a beneficiary, as where the same person is representative of two estates, one of which is debtor to the other. *Harvey v. Steptoe*, 17 Gratt. 301; *Smith v. Gregory*, 26 Gratt. 248. In *Harvey v. Steptoe*, 17 Gratt. 301, it was held, that the case at bar did not fall within

the reasons governing the decisions of *Morrow v. Peyton*, 8 Leigh 54, and *Myers v. Wade*, 6 Rand. 444.

(dd) Payment of Trust Debt Out of Proper Order.

A, who was trustee under a will for the benefit of infant children, died in June, 1865, indebted to the trust, and his executor paid to the other trustees in the will a part of that debt. Upon the settlement of A's estate, in 1877, it appeared that he was largely indebted for more than his assets. Held, that under the statute in force at the time of A's death, his debt as trustee was not embraced in the third class of creditors provided for in that act; but must be placed in the fourth class, with the general creditors of A; and his executor was not entitled to a credit in his administration account for the amount of the trust debt he had paid. *Price v. Harrison*, 31 Gratt. 114. See Va. Code, 1860, ch. 131, § 25.

(ee) Payment of Debt to Himself.

Where an administrator who was a creditor of the estate himself used in 1863 funds of the estate, and the amount so used was charged to him at its scaled value, it was held that, claiming as creditor, his using the funds was a payment of his own debt, and it was error to scale the amount. *Frazier v. Frazier*, 77 Va. 775.

On an accounting between an administrator and a distributee, the amount found to be due the distributee, by a commissioner to whom the accounting had been referred, is properly credited on a judgment owing to the administrator by the distributee, as of the date when the commissioner closed his account, and not as of the date of a decree. *Kent v. Kent*, 2 Va. Dec. 674.

Where an executor is allowed by the will the use of six hundred pounds for five years, without interest, he may pay it in depreciated paper money and the entry of such payment in his accounts will be evidence of the payment. *Granberry v. Granberry*, 1 Wash. 246, 1 Am.

Dec. 455. See *Burwell v. Anderson*, 3 Leigh 348.

(ff) Payment of Claims Founded on Illegal Consideration.

An executor should be denied credit in his account in toto for usurious debts of the testator paid or retained by him with knowledge of their usurious character, and in such case the principle of equitable relief against the usurious interest only does not apply. *Smith v. Britton*, 2 Pat. & H. 124.

An executor should not be allowed credit for paying a debt of his testator which appears on its face to have been for money lost at gaming. *Carter v. Cutting*, 5 Munf. 223.

An executor ought not to be allowed a credit for paying a debt of his testator, appearing on the face of the written instrument intended to secure it, to have been for money won at unlawful gaming. *Carter v. Cutting*, 5 Munf. 223.

(gg) Payment of Claims Barred by Statute of Limitation.

The statute, Va. Code, 1873, ch. 128, § 7, providing that an administrator shall have no credit for a claim which he pays knowing the facts whereby recovery could be prevented, does not require him to plead the statute of limitations to a claim apparently barred, where he knows facts making the statute inapplicable. *Radford v. Fowlkes*, 85 Va. 820, 8 S. E. 817.

Right of Heir to Oppose.—An heir can not oppose a credit for debts paid on the ground that at the time of payment they were barred by the statute of limitations, where he had agreed, in consideration of concessions made him by the other heirs and administratrix, not to object to payment by her of any just claim though they might be barred by the statute. *Radford v. Fowlkes*, 85 Va. 820, 8 S. E. 817.

(hh) Payment of Taxes.

See generally, the title TAXATION.

An administrator is entitled to an allowance for money paid by him for

taxes on the property of the decedent. *Nimmo v. Com.*, 4 Hen. & M. 57, 4 Am. Dec. 488.

The Virginia statute provides that the land of a decedent shall be charged to the estate until it can be properly charged to the heir or devisee, and that while so charged the taxes are payable out of the personal estate. *Dillard v. Dillard*, 77 Va. 820.

Where an administrator was a party to a suit for the partition of the intestate's land, and the land was not charged for taxation on the land book until after the decree confirming its partition, it was held that the administrator should be allowed credit for payment of the taxes which accrued before the decree confirming the partition, but not for those which accrued after the decree. *Dillard v. Dillard*, 77 Va. 820.

Where a will gives the executors a naked power to sell real estate, neither the title nor the right to the possession passes to the executors, and they are not chargeable for the failure to rent the same until the sale can be made; and if the heirs permit such real estate to be returned delinquent for the non-payment of taxes, and the executors pay said taxes to prevent the loss of the land, they will be entitled, as against the residuary legatees, to a portion of the proceeds of said real estate to credit for the taxes so paid. *Dunn v. Renick*, 33 W. Va. 476, 10 S. E. 810.

The executor of one who gives his property to his wife for life, with power to make advancements to their children, the property in her possession at her death to be equally divided among them, is entitled to credit for the payment of taxes on the life estate, and debts contracted by her, they having been paid by him with the acquiescence of the children. *Breckinridge v. Breckinridge*, 98 Va. 561, 31 S. E. 892.

(ii) What Constitutes Payment.

Where an agent employed by a cred-

itor of the estate to collect the debt, paid the amount of the debt to the creditor at the request of the administrator, and on his promise to repay to the agent the amount advanced with interest, the administrator, having afterwards repaid the amount to the agent, is entitled to credit. *Morrow v. Peyton*, 8 Leigh 54.

An administrator out of confederate moneys collected by him in the course of his administration, pays off specie debts of his decedent. He is to be credited in the settlement of his account with the debts so paid at their nominal amount. *Moss v. Moorman*, 24 Gratt. 97.

An executor who received confederate money from the sale of assets and paid it in discharge of ante-bellum debts, should be credited with the full amount so paid without scaling. *Wimbish v. Rawlins*, 76 Va. 48.

Where an administrator, residing where confederate notes were the general currency during the war, received and paid out such notes while he was indebted to the estate, in settling his accounts he should be charged and credited with the full amount of such notes received and paid out, without scaling them. *Estill v. McClintic*, 11 W. Va. 399.

The payment of the debts of his decedent, which were created before the war, by an administrator, out of his own funds collected from debts due him prior to the war, in Greenbrier county, in the years 1862 and 1863, at the instance and request of the widow and heirs, and with a view to save the real estate from being sold during the war (the personalty being exhausted), in confederate treasury notes, is a valid payment or advancement, for which the administrator is entitled to be reimbursed out of the real estate descended. *Surber v. Kent*, 5 W. Va. 96.

cc. Payments to or for Benefit of Legatees and Distributees.

Where land in which a widow is en-

titled to dower is sold by an executor under a charge for payment of debts, he should be credited, in his account of the proceeds, with the amount he has paid the widow in satisfaction of her dower interest. *Meeks v. Thompson*, 8 Gratt. 134, 56 Am. Dec. 134.

On an accounting between an administrator and a distributee, the amount found to be due the distributee, by a commissioner to whom the accounting has been referred, is properly credited, on a judgment owing to the administrator by the distributee, as of the date when the commissioner closed his account, and not as of the date of the decree. *Kent v. Kent*, 2 Va. Dec. 674.

An administrator with the will annexed, having the consent of the widow, made certain additions, the utility and propriety of which were doubtful, and also certain repairs upon a barn on land of which the widow was tenant for life. Held, that the expense of the additions should be allowed against the widow alone, and that of the repairs against the widow and children generally. *Hudson v. Hudson*, 5 Munf. 180.

The widow of an intestate with infant distributees remained in the use and occupation of the real estate of the intestate, and the administrator made disbursements for permanent improvements on the estate. Held, that, in the account between her and the administrator, she should be charged with interest on such disbursements, until a division of the estate is made, and for the difference between the then value and the amount of such disbursements. *Jackson v. Jackson*, 1 Gratt. 143.

Support of Decedent's Family.—Where a testator directed that the new goods in his house, and others he had ordered from Europe, should be disposed of for the use of the family in the same manner as if he were living, no account should be taken of them in the settlement of his estate. *Cary v. Macon*, 4 Call 505.

Where an executor has the management of the real estate as well as the personalty, he is entitled to credit in his account of the real estate for disbursements for the support of the testator's family. The distinction between the two species of property is this: The executor holds the personal property for the payment of debts, and he is under no obligation to apply it to the use of the legatees or distributees while the debts remain unpaid; and even when all the known debts are paid, the legatees have no right to demand of him the surplus, or the application of it, to their use, without giving him a refunding bond. As to the rents and profits of the real estate, though they might in equity be charged with debts, in case the personal estate should prove inadequate, yet, until the claim to charge them is asserted by suit of the creditors, the heirs or devisees are entitled to them, without being accountable therefor to the creditors, and the executor receiving them is a trustee thereof and bound to account for them to the heirs and devisees. *Hobson v. Yancey*, 2 Gratt. 73.

Where the court directed an administrator to use funds of the estate for the support and education of the intestate's children, and the subsequent settlements of his accounts show no items of the disbursements by him on their account, it may fairly be inferred that the sum of money with which he was chargeable, and omitted as items of debit in such settlements, were expended by the children as required by the decree. *Bradley v. Bradley*, 83 Va. 75, 1 S. E. 477.

(b) Assets Delivered to Successor.

An executor is entitled to credit in his official account for money of the estate, which he paid to his successor before the latter's qualification, and for which the latter charges himself afterwards in his official account. *Allen v. Shriver*, 81 Va. 174.

(c) Debt Due by Distributee.

An administrator can not have credit

in his administration account for an individual debt due to him by one of the distributees. The other distributees can not be charged with any portion of such debt, but, in equity, such debt will be treated as a payment on the distributee's share of the amount found due by the administrator. There is nothing in the evidence in the case in judgment to take it out of this general rule. The debt for which credit is asked consists of a store account, and an account for rent of the administrator against one of the distributees, and the writing signed by all the distributees approving the manner in which the administrator had administered the estate, by paying the expenses of the family and the tuition of the minor children, and requesting the commissioner of accounts to allow disbursements as to the administrator had charged them, had no reference to this debt which was due from an adult who had ceased to be a member of the household or family years before the writing was signed, and who had received from his father, in his lifetime, the same character of support and education provided in the writing for his brothers and sisters. *Preston v. Davis*, 102 Va. 178, 45 S. E. 865.

(d) Interest on Balance Due.

In *Jones v. Williams*, 2 Call 102, it was said that the executor should be allowed interest upon the balance due him, on his administrative account, because it is natural justice that he who has the use of another man's money should pay interest for it. Cited in *Miller v. Beverley*, 4 Hen. & M. 416.

(e) Payments by Executor Out of Individual Funds.

An executor having exhausted the personal estate in payment of debts, and being largely in advance to the estate for payment of debts which bind the heirs, is entitled to stand in the place of creditors whose debts he has paid, and charge the real estate. And the real estate in the hands of the

devisees is liable in proportion to its value at the death of the testator. *Gaw v. Huffman*, 12 Gratt. 628.

Ex parte accounts of executors or administrators are not evidence at all of overpayments by them, or that the claims stated in such accounts were debts justly due by the deceased, and chargeable upon his real assets. If an executor or administrator, after exhausting the assets which properly come into his hands, pays debts of the decedent out of his own estate, he can only claim to be substituted to the rights of the creditor, and must prove his demand by the same kind of evidence that would be demanded of the original creditor. *Leavell v. Smith*, 99 Va. 374, 38 S. E. 202.

The payment of the debts of his decedent, which were created before the war, by an administrator, out of his own funds collected from debts due him prior to the war, in Greenbrier county, in the years 1862 and 1863, at the instance and request of the widow and heirs, and with a view to save the real estate from being sold during the war (the personalty being exhausted), in confederate treasury notes, is a valid payment or advancement, for which the administrator is entitled to be reimbursed out of the real estate descended. *Surber v. Kent*, 5 W. Va. 96.

Where an executor as surety for the testator pays debts out of his own funds, he is entitled only to his rateable share of the assets to repay his advances; and by crediting himself with the full amount of such debts he commits an error to the prejudice of the other creditors having unpaid debts of equal dignity. *McCormick v. Wright*, 79 Va. 524.

Where an administrator as surety for a distributee pays a judgment against the distributee, he is entitled to set off in equity the amount so paid, against the distributive share of the distributee, and the distributee is not a competent witness to testify concerning the

judgment, the executor being dead. *Boyd v. Townes*, 79 Va. 118.

Upon a bill filed by an administrator to recover advances by him to pay specialty debts against the intestate, the account of the administrator, settled ex parte before auditors, and reported and recorded, is not evidence against the heirs. *Street v. Street*, 11 Leigh 498.

An executor has no power to borrow money and charge the estate of his testator with it, unless such power is conferred by the will. Legatees can not be charged with money so borrowed without their consent and approval, and a subsequent recognition thereof and promise to pay is without consideration and ineffectual. *Robertson v. Breckinridge*, 98 Va. 569, 37 S. E. 8.

(f) Compensation.

aa. Right to Compensation.

(aa) General Consideration.

An executor or administrator is entitled to a reasonable compensation for his services. *Dromgoole v. Smith*, 78 Va. 665; *Nimmo v. Com.*, 4 Hen. & M. 57, 4 Am. Dec. 488; *Shepherd v. Hammond*, 3 W. Va. 484. An executor is entitled to compensation for his risk, trouble and expenses. *Hipkins v. Bernard*, 2 Hen. & M. 21.

A personal representative who, within six months after the end of any one year of his service as such, has fully explained to the parties entitled to the money received in such year, verbally and by informal written statements, the amount so received together with the sources from which it came, and the amount disbursed, including charges of administration, and has actually paid to such parties all they are entitled to receive on account of such money, is entitled to compensation for his services for such year, in respect to the interest so settled for and unpaid. *Van Winkle v. Blackford*, 54 W. Va. 621, 46 S. E. 589. See also, *Taverner v. Robinson*, 2 Rob. 280; *Hipkins v. Bernard*, 4 Munf. 83.

Executors living more than two years after the passage of the act of February 16, 1825, and not settling their accounts, are not to be allowed commissions. *Boyd v. Boyd*, 3 Gratt. 114.

Where Same Party Executor and Trustee.—Where property, real and personal, has been devised and bequeathed to a trustee to invest in interest-bearing bonds, and pay the interest and dividends thereon to three persons during their joint lives and to the survivors and survivor of them during their lives and the life of the survivor, and the remainder in fee is given to a third person—none of said legatees and devisees being under disability—the remainderman may sell his estate in remainder to the three life tenants and thereby terminate the trust created by the will, without the assent of the trustee, and the trustee will be compelled to pay and deliver the estate to the purchasers. The appellant being both executor of the will and trustee thereunder, and having been fully compensated for his services, is not entitled to a commission of five per cent. on the whole estate, as trustee, in addition to what he received as executor. *Thom v. Thom*, 95 Va. 413, 28 S. E. 583.

Coexecutors and Coadministrators.—

Where one of two executors performs all the labor of the administration, he may be allowed all the compensation; and the legatees can not object to such allowance. *Claycomb v. Claycomb*, 10 Gratt. 589.

Where, in the settlement of a joint administration, one executor or administrator gets credit with the estate for what another is entitled to receive, he holds such amount as trustee for the latter, and may in equity be required to account for it. *Huff v. Thrash*, 75 Va. 546.

Where Executor Is a Legatee.—

Commissions will not be allowed to an executor who is also a legatee. *Jones v. Williams*, 2 Call 102.

Employment of Agents or Attorneys.

—Where an executor or administrator employs an agent or attorney to perform services which he ought to perform himself, he will not ordinarily be allowed compensation for such services in addition to the amount paid such agent or attorney. An executor therefore will not be allowed commissions or money collected by an attorney where he might have made the collection himself. *Carter v. Cutting*, 5 Munf. 223. See also, ante, "Expenses of Administration," IV, L, 5, b, (4), bb.

But where a testator died in Virginia owning land in another state, where he had no agent, it was held, that his executor in Virginia could recover payment made to an agent employed by him to attend to such lands. *Crouch v. Davis*, 23 Gratt. 62.

Right of Stranger to Have Compensation.

—A agreed, in 1859, to buy up and compromise claims against the estate of an intestate in consideration that he should have a certain part of the real estate of the decedent, supposed to contain thirty-nine acres, which he took into possession, at a certain price per acre. On a refusal of the administratrix, with whom he had made the agreement, to make a deed for the certain real estate, he filed a bill, in 1867, to have so much set off to him at the agreed price per acre, as would reimburse him for the sum paid out in liquidation of debts against the estate of the decedent, alleging also trouble and expense in time and money in gathering the debts. The court below decreed a sale of real estate of decedent to satisfy a vendor's lien, and to pay A the amount of the sum disbursed by him with interest from the time of payment; and that as compensation for his time, trouble and expense in gathering up and paying off the claims, he would not be charged with rents and profits on the land, which he had taken into possession, from 1859 to April 1st, 1868. Held, that inasmuch as A had paid off the

debts, and thus relieved the administratrix from the trouble of so doing, that it was equitable he should have whatever commission could have been allowed her in such case; and as the law would allow her as much as ten per cent. in case of extra trouble, that A ought to receive that amount on the amount paid out by him, in addition to legal interest from the time he gave up the land. *Shepherd v. Hammond*, 3 W. Va. 484.

(bb) What Law Governs.

The compensation of an executor or administrator is governed by the law in force when the services were rendered, not by the law in force when he was appointed or when he made his settlement. *Turner v. Turner*, 1 Gratt. 11.

(cc) Presumption as to Payment.

Where the record does not show the allowance of such compensation, it can not be presumed to have been made. *Dromgoole v. Smith*, 78 Va. 665.

bb. Commissions Allowed.**(aa) In General.**

Under the statute an administrator is entitled to "any reasonable expenses incurred by him as such; and also, except in cases in which it is otherwise provided, a reasonable compensation in the form of a commission on receipts or otherwise." The usual mode of compensation to the fiduciary for service is by a commission on the receipts, but where that affords no basis, some other process is allowable, but generally a per centum greater or less on receipts will answer all purposes. If a small commission is not just, the commissioner or probate court can increase it. *Kester v. Lyon*, 40 W. Va. 161, 20 S. E. 933; *Estill v. McClintic*, 11 W. Va. 399.

There is no law which prescribes what commissions shall be allowed an executor, trustee or other fiduciary. The allowance or refusal of commissions rests in the sound discretion of the court under the circumstances of

the case. *Boyd v. Oglesby*, 23 Gratt. 674, 689; *Lovett v. Thomas*, 81 Va. 245; *Whitehead v. Whitehead*, 85 Va. 870, 9 S. E. 10.

(bb) On What Property Allowed.

aaa. Receipts in General.

In Virginia and West Virginia commissions are generally allowed on the amount of the receipts of the executor or administrator, not on the amount of his disbursements. *Farneyhough v. Dickerson*, 2 Rob. 582; *Estill v. McClintic*, 11 W. Va. 399; *Hipkins v. Bernard*, 2 Hen. & M. 21; *Sheppard v. Starke*, 3 Munf. 29. See also, *Fitzgerald v. Jones*, 1 Munf. 150.

"The usual mode of compensation to the fiduciary for service is by a commission on receipts, but where that affords no basis some other process is allowable, but generally a per centum, greater or less, on receipts will answer all purposes. If a small commission is not just, the commissioner or probate court can increase it." *Kester v. Lyon*, 40 W. Va. 161, 20 S. E. 933.

But in a given case an administrator, who was also the surviving and managing partner of a firm consisting of himself, the decedent and another, out of the firm fund for a series of years advanced large sums to himself as administrator. These annually went into the account of receipts which exceeded the disbursements, and he received commission thereon. These sums also exceeded the decedent's share of the profits of the business, and at the year's end the excess was carried back into firm accounts, and interest was charged on these overpayments. Held, that neither commission nor interest should be allowed on such overpayments. *Frazier v. Frazier*, 77 Va. 775.

Money Received during War.—A personal representative will be entitled to his commissions upon money received by him during the war, though he did not settle his accounts until after the war. *Moses v. Hurt*, 25 Gratt. 795.

Money Found in House.—An execu-

tor is entitled to commissions on money found in the house and disbursed by him for the use of the family, or invested in bank stock. *Hipkins v. Bernard*, 4 Munf. 83.

bbb. Disbursements.

Commissions have in some instances been allowed on disbursements. *Boyd v. Oglesby*, 23 Gratt. 674. See also, *Hipkins v. Bernard*, 4 Munf. 83.

ccc. Uncollectible Claims.

Commissions ought not to be allowed to an executor on uncollectible debts. If he is entitled to anything for services as to them, it must be specific compensation. *Kester v. Lyon*, 40 W. Va. 161, 20 S. E. 933.

ddd. Proceeds of Sale of Assets.

An executor is entitled to a commission on sales of crops made by him upon the lands of his testator, the proceeds thereof being lawfully received and accounted for by him. *Hipkins v. Bernard*, 4 Munf. 83.

Where grain or other perishable property, which by law the executor is directed to sell, is divided in kind among the legatees, the executor is entitled to a commission upon the appraised value. *Claycomb v. Claycomb*, 10 Gratt. 589.

eee. Debts Due by Executor to Estate.

As a general rule, an executor is not entitled to a commission on the amount of debt due from him to the testator, and credited to the estate in the executorial account. *Farneyhough v. Dickerson*, 2 Rob. 582. See *Hipkins v. Bernard*, 4 Munf. 83, overruling 2 Hen. & M. 21.

fff. Legacies and Distributive Shares.

An executor should be allowed a commission for the delivery of bonds to the legatees, though the same were not converted. *Farneyhough v. Dickerson*, 2 Rob. 582.

An executor may be allowed a commission for turning bonds, or other debts payable to his testator, into mortgages and delivering the same to the

legatees, although no money is actually received by him. *Hipkins v. Bernard*, 4 Munf. 83, overruling *Hipkins v. Bernard*, 2 Hen. & M. 21.

Where the condition of the estate does not require a sale of the slaves, and they are divided among the legatees or distributees, the executor is not entitled to a commission on their appraised value. *Claycomb v. Claycomb*, 10 Gratt. 589.

egg. Partition of Real Estate Devised with Power to Executor to Sell.

An executor is not entitled to commissions on the value of real estate devised to the testator's children, though the executor is given a power of sale for the interest of all concerned, and the children, by agreement among themselves, make partition by conveyances to each other, the executor joining in the deeds. *Buxton v. Shaffer*, 43 W. Va. 296, 27 S. E. 319.

(cc) Rate of Commission.

The amount of commissions to be allowed an executor or administrator is not fixed by law, and though five per cent. on receipts is generally allowed, yet this allowance may be increased, and the court of probate is the most competent tribunal to make the allowance; and the appellate court will be disinclined to disturb the allowance, especially after a long acquiescence in it by the distributees of the estate. *Boyd v. Oglesby*, 23 Gratt. 674. See also, *Whitehead v. Whitehead*, 85 Va. 870, 9 S. E. 10; *Gregory v. Parker*, 87 Va. 451, 12 S. E. 801; foot-note to *Strother v. Hull*, 23 Gratt. 652.

It has been held, that an executor is entitled to compensation for his risk, trouble and expenses; and that should be fixed at a commission of five per cent. upon actual receipts, and no more, as a general rule. *Hipkins v. Bernard*, 2 Hen. & M. 21.

In a given case, a commission of five per cent. on the moneys received by the executor was allowed him, in lieu of all expenses; such commission to be

deducted from the balance due the estate at the end of each year. *Sheppard v. Starke*, 3 Munf. 29. See also, *Fitzgerald v. Jones*, 1 Munf. 150.

Five per cent. is a reasonable commission to allow an administrator on sales and collections. *Taliaferro v. Minor*, 2 Call 190.

A commission of more than five per cent. on the amount of sales and collections ought not to be allowed an executor, except under peculiar circumstances. *Triplett v. Jameson*, 2 Munf. 242.

An ordinary commission allowed an executor is five per cent. on his receipts, but under peculiar circumstances he may be allowed more. *Hoke v. Hoke*, 12 W. Va. 427.

Although a testator directs that his executor shall be handsomely paid for his services, the executor will only be allowed the usual commission, unless there has been extraordinary trouble in the administration. *Waddy v. Hawkins*, 4 Leigh 458.

An executor may reasonably be allowed a commission of ten per cent. on money received by him, where the debts are very small and numerous and the debtors much scattered. *Cavendish v. Fleming*, 3 Munf. 198; *Gregory v. Parker*, 87 Va. 451, 12 S. E. 801.

Under circumstances of extraordinary trouble attendant on the administration, an administrator was allowed a commission of ten per cent. on all specie received by him, and invested, reinvested and paid out on account of the estate, and also in full satisfaction of trouble and services in the settlement of the estate, such commission to be received but once on the same sum of money; and a commission of five per cent. was allowed on the value of paper money when received, and the same on the value thereof when paid out. *McCall v. Peachy*, 3 Munf. 288.

Where a commissioner allows an administrator a commission of more than five per cent. in a case where com-

missions are properly allowable, and no exception is filed to the commissioner's report in the court below, the allowance of such larger commission can not be objected to for the first time in the appellate court. But if the administrator fails to settle his accounts in the time required by statute, and is nevertheless allowed a commission during the time of such failure, it may be objected to in the appellate court, though no exception is taken in the court below. *Estill v. McClintic*, 11 W. Va. 399.

cc Allowance in Addition to Commissions.

Although, under peculiar circumstances, an allowance may be made to executors in addition to commissions given to attorneys for collecting debts confined to them, such additional commissions should not be allowed where the executors might conveniently collect the debt themselves. *Carter v. Cutting*, 5 Munf. 223.

(g) Forfeiture of Right to Compensation by Failure to File Inventory of Accounts.

Under the former statute, an executor or administrator, however meritorious his administration, was not entitled to commissions if he failed to settle and return his accounts of administration according to the statute. *Wood v. Garnett*, 6 Leigh 271; *Turner v. Turner*, 1 Gratt. 11; *Morris v. Morris*, 4 Gratt. 293; *Nelson v. Page*, 7 Gratt. 160; *Chapman v. Shepherd*, 24 Gratt. 377.

A and B qualified as administrators of an estate in 1821. A died in 1823, and B qualified as his administrator, and died in 1829, no account having been rendered on the first estate. Held, that A was entitled to his commissions under the act of February 16, 1825, but that B was not. *Turner v. Turner*, 1 Gratt. 11.

Where an executor died within two years after the passage of the act of February 16, 1825, requiring executors

and administrators to settle their accounts every two years or forfeit their commissions, his administrator was held to be entitled to his commissions, although the account was not settled until after the lapse of two years. *Boyd v. Boyd*, 3 Gratt. 112.

An executor who has failed to comply with the requirements of § 7, ch. 87, of the West Virginia Code, so far as the same requires him to lay his account of receipts for any year, within six months after its expiration, before a commissioner, is entitled to no compensation for his services during such year. *McGlaughlin v. McGlaughlin*, 43 W. Va. 226, 27 S. E. 378.

Under the statute providing that a personal representative, who fails to lay before the proper commissioner a statement of his receipts for any year for six months after the expiration thereof shall forfeit his compensation, but the court may nevertheless in its discretion allow him compensation, such discretion is not arbitrary, but must be reasonably exercised upon the circumstances of the case, and is subject to review upon appeal. It is incumbent upon a delinquent fiduciary, praying the court to exercise its discretion in his favor, to give a reasonable excuse for his delay; otherwise compensation ought not to be allowed him. *Trevelyan v. Lofft*, 83 Va. 141, 1 S. E. 901; *Brent v. Clevinger*, 78 Va. 12.

Failure of personal representative to settle his accounts does not necessarily work forfeiture of commissions. To refuse, or to allow them, rests with the court under the circumstances of each case. And where, under Va. Code, 1873, ch. 128, § 7, he yearly laid his accounts before the commissioner of accounts, the failure of that officer to audit, state, and report them, can not lose him his commissions. *Lovett v. Thomas*, 81 Va. 245.

Partial payments made by an executor to legatees from time to time on account, although it afterwards appears

on a settlement of his accounts that such payments exceed the amount to which some of the legatees were entitled, does not constitute such a settlement of the executor's account as to take the demand for commissions out of the operation of the statute. *Nelson v. Page*, 7 Gratt. 160.

Where an administrator fails to settle his accounts in the time required by the statute, but is nevertheless allowed a commission during the time of such failure, though no exception is taken thereto in the court below, it may be objected to in the appellate court. *Estill v. McClintic*, 11 W. Va. 399.

Under Va. Code, 1887, § 2679, which provides for the allowance of compensation to a fiduciary in some cases where he fails to settle his accounts within the time specified therefor, there was no error in allowing compensation to an executor who, by mistake, settled his account before the commissioner of the county instead of the circuit court, where he qualified. *Moorman v. Crockett*, 90 Va. 185, 17 S. E. 875.

Where an executor by mistake failed to settle his accounts before the commissioner of the proper court, and the whole matter was gone into in a subsequent proceeding, it was held proper to allow him compensation though the accounts were not settled in time. *Moorman v. Crockett*, 90 Va. 185, 17 S. E. 875.

The statute providing that, unless fiduciaries settle ex parte accounts within a prescribed period, they shall forfeit their commissions, does not apply where the estate is being administered by the court. *Fauber v. Gentry*, 89 Va. 312, 15 S. E. 899.

Where it is provided by statute that unless an executor shall furnish a statement within a certain time of all the money he has received or become chargeable with or has disbursed, he shall forfeit all compensation, the burden of proving that the executor has

furnished such statement within the required time is on the executor. *Knight v. Watts*, 26 W. Va. 175.

Excuse for Failure to Account.—Though executors have not kept their accounts properly, yet having been probably charged with as much as they are justly responsible for, they are entitled to the usual commission of five per cent. on their receipts and disbursements. *Kee v. Kee*, 2 Gratt. 116.

A personal representative is entitled to his commissions on money received by him during the war, though he does not settle his accounts until after the war. *Moses v. Hurt*, 25 Gratt. 795.

An administrator who resided during the Civil War in the midst of active hostilities, where nearly all business was suspended, was held to be entitled to commissions notwithstanding his failure to settle his accounts annually. *Brent v. Clevinger*, 78 Va. 12.

c. Necessity of Vouchers for Payments.

Where an executor delivered up the estate generally and the management thereof of one of the residuary legatees, for his benefit and that of his co-legatees, and nine years and ten months elapsed before he was summoned to render an account, the greater part of his executorship having been during the Revolutionary War, and the settlement taking place after his death, it was held unreasonable rigor to exact vouchers for money items in his account which appeared probably just, though not supported by proof. *Fitzgerald v. Jones*, 1 Munf. 150.

An item should be allowed in an administration account, upon the oath of the defendant, where it is of such a nature that the expense probably must have been incurred, or that perhaps a voucher for it could not have been procured; for example, mourning for the widow, services performed by a negro carpenter, and the like. *McCall v. Peachy*, 3 Munf. 288.

Where an administrator's account, audited by commissioners of the county court, is controverted in a court of chancery and referred to a commissioner, the vouchers of the administrator must be procured, if required, and submitted to the examination, not only of the commissioner, but of all parties interested. *Street v. Street*, 11 Leigh 498.

In a suit by an assignee of a residuary legatee against the administrator's estate for a settlement of accounts, it must be presumed that money collected by the administrator, after receipts of the residuary legatees had been given in full settlement of their interests, was embraced in such receipts. *Tate v. Jones*, 98 W. Va. 544, 36 S. E. 984.

Upon a bill by legatees for a new settlement of an executor's account, where an ex parte settlement has taken place before commissioners appointed by the court, the executor may be required to produce his vouchers, unless he declares on oath, or otherwise proves, that they were deposited with the clerk of such court at or after the examination of the account by the commissioners, and have not since come into his possession. *McCall v. Peachy*, 3 Munf. 288.

Presumption as to Existence.—

Vouchers, which can not be produced on the new settlement, upon a bill to surcharge and falsify a former settlement, may be presumed to have existed; and in every case the onus probandi is thrown on the adverse party; and this rule should be strictly adhered to, when there has been a great lapse of time. *Janney v. Campbell*, 14 W. Va. 122; *Burwell v. Anderson*, 3 Leigh 348.

Waiver.—Where infants sue in equity by a prochein ami to compel an administrator to settle his accounts as such administrator of an estate in which they are interested as distributees, and such prochein ami employs an attorney to represent their interests, such attorney can not bind said infants

by an agreement signed by himself or by another attorney authorized by him to waive proof of the vouchers and accounts presented by said administrator in the settlement of his administration accounts, or to allow commissions to such administrator which are not allowed by statute. *Crotty v. Eagle*, 35 W. Va. 143, 13 S. E. 59.

d. Exceptions and Objections.

Where, before the report of commissioners appointed to set apart certain property to legatees, the administrator had distributed the property, it was held, that this fact did not prevent the legatees from excepting to the report. *Morris v. Garland*, 78 Va. 215.

If an heir, in consideration of concessions made him by the other heirs and administratrix, agrees not to object to payment by her of just claims presented by another heir, though barred by the statute of limitations, he will be estopped from excepting to her account on the ground that she improperly paid such claims. *Radford v. Fowlkes*, 85 Va. 820, 8 S. E. 817.

Any person interested in the settlement of an executor's account may object to its being allowed and recorded, and, if such objection be overruled, may appeal to a superior court. *Triplet v. Jameson*, 2 Munf. 242.

e. Hearing and Reference.

(1) Scope.

When a commissioner is stating accounts between executors and the estate of their testator, if one of them, who had for collection the evidence of debts due the estate, which might have been collected by him, be dead, his representative can not object to his estates being charged with those debts, unless the means be furnished of charging the surviving executor therewith. In such case, the private account of each executor, with the testator in his lifetime, and with his coexecutors, and all other accounts that are necessary to make a just settlement of the matters in controversy, ought to be taken, if

requested, though not specifically put in issue in the cause. *Carter v. Cutting*, 5 Munf. 223.

Where an administrator appears before a commissioner appointed for the purpose of making a settlement of his accounts, he may be required to include the settlement of his accounts as agent for the intestate during her lifetime, although he has not been notified that he will be called upon to settle his accounts as such agent: *Trevelyan v. Lofft*, 83 Va. 141, 1 S. E. 901.

(2) Basis of Settlement Where Further Account Ordered.

Where a commissioner settles the accounts of an executrix under a decree, and reports a balance due, and the report is confirmed, another commissioner, afterwards ordered to take an account of further receipts and disbursements, should make that balance the basis of his settlement. *Nelson v. Kownslar*, 79 Va. 468.

(3) Evidence.

(a) Burden of Proof.

Burden of Proof to Show Items Incorrect.—It seems that the burden of proving that the items of an *ex parte* settlement are incorrect rests on the party who would impugn them. *Nimmo v. Com.*, 4 Hen. & M. 57, 4 Am. Dec. 488.

Burden to Show Inability to Recover Items Not Sued upon.—Where a large number of debts were due the deceased, many by persons living out of the state, and the executor has not brought suit to recover those reported good or doubtful from persons living in the state, the burden is on him to show that they could not be recovered. *Crouch v. Davis*, 23 Gratt. 62.

Burden to Show Inability to Invest Items for Which Credit Is Claimed.—Where an administrator claims credit for confederate currency which belonged to the decedent's estate and perished on his hands, the burden rests on him to prove that he could

not have invested it. *Dromgoole v. Smith*, 78 Va. 665.

To Show Absence of Fault in Failing to Collect Items.—Where, in a suit to settle up a decedent's estate and to charge his personal and real estate with the payment of all his debts, the administrator has reported certain debts as solvent or doubtful, he must show that his failure to collect them is not due to his fault. *Estill v. McClintic*, 11 W. Va. 399.

(b) Admissibility.

Where an administrator fails to render an account of crops, rents and hires which have come into his hands, proof of the estimated net annual value may be resorted to for the purpose of charging him. *Wills v. Dunn*, 5 Gratt. 384.

Parol Testimony.—Where in a suit by a legatee for an account of the administration, the vouchers or official copies of them are produced, the plaintiff may nevertheless controvert by parol testimony the articles intended to be justified by them. An article ought to be allowed, on the oath of the defendant, if it is of such a nature that the expense probably must have been incurred, or that perhaps a voucher for it could not have been procured. *McCall v. Peachy*, 3 Munf. 288.

(4) Report of Commissioner.

Presentation of Claims.

Proof of Claims before Commissioner.—After a decree for a general accounting in a creditor's suit, the administrator of the deceased debtor has no right to have the commissioner report debts against his decedent's estate. It is his duty to represent the estate, and not those having adverse interests. The creditor, or someone who is authorized to represent him, should lay his claim before the commissioner, in order that it may be reported. *Conrad v. Fuller*, 98 Va. 16, 34 S. E. 893.

Recommitment of Report.—Where, in a suit by distributees against an ad-

ministrator for an accounting, the accounts are referred, and a report is returned before the defendant's evidence is filed, and the defendant files a sufficient excuse for not taking his evidence earlier, and asks for a recommitment of the report, the report should be recommitment, though the testimony may sustain the defendant as to the subject of controversy. *Thomas v. Dawson*, 9 Gratt. 531. See also, *Wyllie v. Venable*, 4 Munf. 370.

f. Order or Decree.

(1) Conditions Precedent to Decree.

Upon a bill by an executor against the devisees and legatees for a settlement of his administration account, and to compel the devisees to convey a tract of land sold by the plaintiff with their consent, the purchaser being a party defendant, it is error to decree a balance against the executor, without directing such conveyance to be made by the devisees, although the purchaser has failed to answer; it appearing that he has paid the purchase money, and that the devisees, by their answers, have declared their willingness to make the conveyance. *Machir v. Machir*, 6 Munf. 265.

(2) Form and Requisites.

When for Balance Due on Account.

—A decree and execution against an executor or administrator for a balance due on his administration accounts should not be against the goods and chattels of the decedent in his hands to be administered, but against his own goods and chattels. *Barr v. Barr*, 2 Hen. & M. 26; *Moore v. Ferguson*, 2 Munf. 421.

A decree against an executor or administrator for a balance due on his administration account ought not to be "that he pay the same out of the estate in his hands to be administered," but as his own proper debt. *Sheppard v. Starke*, 3 Munf. 29.

A creditor filed a bill against an executor for an account of assets, and against the legatees for contribution,

and there was a dispute between the executor and the legatees as to whether he should pay the creditor without contribution from them. Held, that the bill might be dismissed as to the legatees, and, if it appeared that the executor had paid them enough to satisfy the debt, he should be decreed to pay it out of his own goods, and left to his remedy at law against the legatees. *Sampson v. Payne*, 5 Munf. 176.

(3) Currency in Which Payable.

In settling the account of a personal representative who acted during the war, the balance found against him should be reduced to its value in gold; and the decree against him should be for the amount due reduced to its value in gold, to be paid in gold or its equivalent in United States currency. *Moses v. Hart*, 25 Gratt. 795.

(4) Validity.

In a suit by an administrator *de bonis non* against the representative of the first administrator for a settlement of the first administrator's accounts of administration, it is irregular to decree payment to the administrator *de bonis non*, but where the distributees are parties to the suit and do not complain, so that the payment to the administrator *de bonis non* would be a valid discharge to the representative of the first administrator, the decree will not be reversed for such irregularity. *Morris v. Morris*, 4 Gratt. 293.

(5) Operation and Effect.

A decree in one creditor's suit for an account operates a suspension of all other pending suits of creditors; and they must come in under the decree. *Stephenson v. Taverners*, 9 Gratt. 398.

g. Conclusiveness and Effect of Settlement.

(1) Does Not Bar Right to Surcharge and Falsify.

There is no statutory bar to surcharging and falsifying an account of an executor. *Bruce v. Bickerton*, 18 W. Va. 342.

(2) Agreement by Distributees to Adopt as Correct.

Where the administrator and distributee of an estate made a hotchpot statement, showing the condition of the estate and its administration from the time of decedent's death to the time of the statement, and agreed to adopt it as a correct statement of their relation to the estate, it is binding on them, and a subsequent accounting by the administrator should date therefrom, and be based thereon, and not from the decedent's death. *Kent v. Kent*, 2 Va. Dec. 674.

(3) When Settled before Duly Appointed Commissioners.

An administration account settled before commissioners appointed by the court in which the executor or administrator qualified, and certified "to have been returned to court, and being examined, to have been allowed, and ordered to be recorded," is admissible on the plea of fully administered, as prima facie evidence of the several items therein, without producing also copies of the inventory and appraisal of the testator's or intestate's estate. But the adverse party may surcharge and falsify such account, if he can. *Atwell v. Milton*, 4 Hen. & M. 253.

(4) Settlement in Cause in Which Heirs Are Not Parties.

An administration account settled in a cause in which the heirs are not parties is not prima facie evidence as against the heirs. *Robertson v. Wright*, 17 Gratt. 534.

(5) Decree in Partition Suit as Rendering Res Adjudicata.

In a suit by an heir of an intestate for the partition of the intestate's land, where the bill does not make the administrator a party, or does not contain matter touching him, he can not, by appearing before the commissioner and settling his account, make himself a party, or bring the matter of the administration into the cause, so as to

render the settlement and decree confirming it res judicata. *Bland v. Stewart*, 35 W. Va. 518, 14 S. E. 215.

(6) No Evidence of Advances Alleged.

Under Va. Code, 1887, ch. 121, § 2699, an executor's account as confirmed is not evidence of alleged advances made by the executor, in an action therefor against the heirs. *Leavell v. Smith*, 99 Va. 374, 38 S. E. 202.

(7) When Binding on Purchasers.

If a report of the accounts of a personal representative and of the debts and demands against the decedent's estate has been filed in the office of the court wherein the order conferring his authority was made, as required by the statute (Va. Code, 1873, ch. 128), a subsequent purchaser may reasonably be required to take notice of it. *Easley v. Barksdale*, 75 Va. 274.

(8) Ex Parte Settlements.

The intermediate or partial settlements which are ordinarily required to be made in the course of the administration of a decedent's estate are prima facie evidence of the correctness of the accounts, so that the burden of proof is on any one who seeks to impeach them, but they are not conclusive on persons who were not present or represented. *Leake v. Leake*, 75 Va. 792; *Newton v. Poole*, 12 Leigh 112; *Shearman v. Christian*, 9 Leigh 571; *Burwell v. Anderson*, 3 Leigh 348; *McCall v. Peachy*, 3 Munf. 288; *Cavendish v. Fleming*, 3 Munf. 198; *Mountjoy v. Lowry*, 4 Hen. & M. 428; *Kyles v. Kyles*, 25 W. Va. 376.

Ex parte settlements of accounts by personal representatives, are prima facie evidence of their correctness, but they are not conclusive. And this is an established rule by express statutory provision. *Scott v. Porter*, 99 Va. 553, 39 S. E. 220; *Leavell v. Smith*, 99 Va. 374, 38 S. E. 202; *Robinett v. Robinett*, 92 Va. 124, 22 S. E. 856; *Hurt v. West*, 87 Va. 78, 12 S. E. 141; *Radford v. Fowlkes*, 85 Va. 820, 8 S. E. 817; *Carter v. Edmonds*, 80 Va. 58; *Wim-*

bish v. Rawlins, 76 Va. 48; Robertson v. Wright, 17 Gratt. 534; Wyllie v. Venable, 4 Munf. 369; Atwell v. Milton, 4 Hen. & M. 253; Nimmo v. Com., 4 Hen. & M. 57, 4 Am. Dec. 488; Anderson v. Fox, 2 Hen. & M. 245; Van Winkle v. Blackford, 33 W. Va. 573, 11 S. E. 26; Seabright v. Seabright, 28 W. Va. 412; Leach v. Buckner, 19 W. Va. 36; Bruce v. Bickerton, 18 W. Va. 342.

Such accounts regularly settled, as provided by law, are to be taken as prima facie correct, and, except as to errors apparent on their face, can be impeached only on specific grounds of surcharge and falsification. Blackwell v. Bragg, 78 Va. 529.

In a suit to surcharge the final settlement of defendant as executor of his father's estate, the burden is on defendant to prove a claim adverse to the estate. Scott v. Porter, 99 Va. 553, 39 S. E. 220, 7 Va. Law Reg. 557.

Where, in answer to a bill to surcharge the ex parte settlement of an executor, the defendant claims that the testator, just before his death, made a gift to him of a large number of bonds and notes, the burden rests on the defendant to show this to be the fact. Seabright v. Seabright, 28 W. Va. 412.

The burden of overcoming by proof the presumption of correctness which the law attaches to ex parte settlements rests on those who seek to surcharge or falsify them. Wimbish v. Rawlins, 76 Va. 48; Dearing v. Selvey, 50 W. Va. 4, 40 S. E. 478.

Upon a bill to surcharge and falsify the ex parte accounts of an administrator which have been duly confirmed by the county court, the ex parte accounts should be treated as correct and conclusive as to all matters included therein, except so far as shown by evidence to be incorrect. Robinett v. Robinett, 92 Va. 124, 22 S. E. 856.

Ex parte accounts of executors or administrators are not evidence at all of overpayments by them, or that the claims stated in such accounts were

debts justly due by the deceased, and chargeable upon his real assets. If an executor or administrator, after exhausting the assets which properly come into his hands, pays debts of the decedent out of his own estate, he can only claim to be substituted to the rights of the creditor, and must prove his demand by the same kind of evidence that would be demanded of the original creditor. Leavell v. Smith, 99 Va. 374, 38 S. E. 202.

The overruling of a demurrer to a bill by an executor against devisees to recover a balance claimed on ex parte accounts by the executor "regularly and properly settled before the commissioner of accounts and confirmed" does not decide that such ex parte settlement establishes the demand of the complainant. Leavell v. Smith, 99 Va. 374, 38 S. E. 202.

The fact that the exparte settlement of a personal representative shows the payment of certain debts against his decedent's estate, does not raise a presumption of the payment of all other debts of the decedent entitled to priority of satisfaction over those paid. Smith v. Moore, 102 Va. 260, 46 S. E. 326.

Where, in the ex parte settlement of an administrator's accounts, a balance is found against him and included in the settlement as the proceeds of an ante-war bond on solvent parties, which he collected during the war and did not pay out, when he might have done so, and such amount is equal to or greater than such balance so found against him, he is liable for the full amount of such balance and is not entitled to have it sealed. Hix v. Hix, 25 W. Va. 481.

Ex parte settlements of the executor are presumed to be correct, and the burden of proving them otherwise rests on those who seek to surcharge or falsify them. Wimbish v. Rawlins, 76 Va. 48.

Ex parte settlement, upon the face of which no error is apparent, is prima

facie correct; and the burden of proof is on the plaintiff, in attacking any item in such settlement, to show that it is improper. *Dearing v. Selvey*, 50 W. Va. 4, 40 S. E. 478.

The settlement of an administration account under an ex parte order of the court which granted administration is prima facie evidence in favor of the administrator against creditors of the decedent. *Shearman v. Christian*, 9 Leigh 571.

It seems that charges appearing to be just and legal in an ex parte settlement of the administration account by commissioners appointed by the court which granted the administration, and passed by such court (the commissioners having reported that vouchers were produced to justify such charges), are to be received as prima facie evidence in favor of the executor or administrator. *Nimmo v. Com.*, 4 Hen. & M. 57, 4 Am. Dec. 488.

Ex parte settlement of accounts have nothing to do with the operation of the statute of limitations, nor have they any sort of analogy to stated accounts between individuals. Whatever efficacy they may have as evidence rests exclusively upon the long-established practice and usage of the country, and upon the supposed integrity of the tribunal appointed by law for the adjustment of such matters. *Leake v. Leake*, 75 Va. 792.

(9) Persons Concluded.

In a creditors' suit against an administrator, to which the distributees were not parties, a master stated and reported an account of the sums collected by the administrator, which report was confirmed. A distributee afterwards filed a bill against the administrator and his sureties for an account of sums previously collected by him and for payment of the whole. Held, that the confirmation of the former report did not preclude the commissioner appointed in this proceeding from showing that certain

sums had been collected prior to the former investigation, which were not included in the report thereof. *Hurt v. West*, 87 Va. 78, 12 S. E. 141.

A settlement of an executor's administration account, certified by commissioners, on a date subsequent to his death, and not appearing to have been made in his lifetime with notice to himself or after his death with notice to his executor, is erroneous, and ought not to be received as the ground of a decree against his estate. *Boyd v. Kaufmans*, 6 Munf. 45.

If the testator's widow, who was one of the executors, devises her estate to her daughter on condition that she abide by such settlement of her husband's estate as the surviving executors shall make, and the surviving executors make the settlement, the daughter will be bound by it. *Cary v. Macon*, 4 Call 605.

Where a creditors' bill has been filed against the administrator de bonis non, devisees and legatees, and a decree for an account has been made in the cause, no other creditor of the estate can maintain a separate suit in another court for the satisfaction of his debt. And in the bill shows that he had knowledge of the decree for an account in the first suit, his suit will be dismissed upon demurrer to the bill. *Kent v. Cloyd*, 30 Gratt. 555.

(10) Matters Concluded.

An executor's account, rendered on oath, is prima facie evidence of the sums received by him for the estate of his testator, and of the times when received. *Cavendish v. Fleming*, 3 Munf. 198.

A settlement of the accounts of an executor or administrator, made on an ex parte order of the court, is to be regarded as prima facie evidence of the matters contained therein. *Mountoy v. Lowry*, 4 Hen. & M. 428; *Cavendish v. Fleming*, 3 Munf. 198.

Where exceptions have been taken to an administrator's account, because,

among other things, of payments made to unpreferred creditors, and the account is confirmed, and an appeal therefrom taken to the court of appeals, where the decision of the lower court is affirmed, a bill in equity against the administrator by a party to the former proceeding, charging devastation on account of said payments, can not be sustained, although the validity of the payments was not, in fact, questioned in the court of appeals. *Findlay v. Trigg*, 83 Va. 539, 3 S. E. 142.

A lien given to secure the debt due from an executor or administrator or intestate, is of course discharged when the debt is actually paid to the creditors or legatees of the creditor; but the introducing the debt into an administration account, as a charge to the executor or administrator, is not sufficient to discharge the lien, either as against creditors, legatees or distributees of the creditor, or as against the sureties of the executor or administrator. *Utterback v. Cooper*, 28 Gratt. 233.

The rule that where a party relies on an account furnished by his adversary, and claims the benefit of credits, he is bound to take it altogether and admit the debits also unless he can surcharge and falsify it by proof, is not applicable to an executor's account, nor to any case where there is a trust or confidence. *Robertson v. Archer*, 5 Rand. 319.

It is the well-established rule that ex parte settlements of administration accounts by commissioners appointed by the court which granted probate or administration, and passed by such court, are to be received prima facie as evidence in favor of the executor or administrator, subject however to be impugned, surcharged and falsified by the opposite party. *Newton v. Poole*, 12 Leigh 112, 142.

An administration account settled before commissioners appointed by the court in which the executor or admin-

istrator qualified, and certified "to have been returned to court, and being examined, to have been allowed, and ordered to be recorded," is admissible on the plea of fully administered, as prima facie evidence of the several items therein, without producing also copies of the inventory and appraisement of the estate of the testator or intestate. But the adverse party may surcharge and falsify such account, if he can. *Atwell v. Milton*, 4 Hen. & M. 253; *Mountjoy v. Lowry*, 4 Hen. & M. 428.

In an action brought by distributees against an administrator for an amount due on a settlement, it was held, that the administrator was entitled to a credit inadvertently omitted on the settlement. *Kyles v. Kyle*, 25 W. Va. 376.

h. Opening and Setting Aside Settlement.

(1) Right to Open and Set Aside.

Failure of Succeeding Administrators to Return Inventory of Former Appraisement.—The heir of a first administrator filed a bill to surcharge and falsify settlements made by the second and third administrators, charging that they had never made any appraisements or returned any inventory of the property that came into their hands. It appeared that the first administrator never made such appraisement, or returned the inventory. Held, that as it is not usual for succeeding administrators to make and return an inventory of such appraisement, if there was a loss to the estate caused thereby, it was the fault of the first administrator, and furnished no ground for relief against the subsequent administrators. *Green v. Thompson*, 84 Va. 376, 5 S. E. 507.

Separate Distributees Not Mixed with General Administration Account.

—The settled accounts of an administrator can not be surcharged and falsified because no separate distributees were mixed with the general administration account, where the accounts

show what was received by the administrator, what paid out, and to whom, so that no one could fail to understand from the settlement the true state of the accounts. *Green v. Thompson*, 84 Va. 376, 5 S. E. 507.

Failure to Charge Interest on Balances.—Although there may be circumstances which ought to exempt an executor from being charged with the payment of interest on balances in his hands, yet, in general, he is chargeable therewith; and if, in an ex parte settlement of his account, he is not so charged by the commissioners, it is ground to surcharge and falsify his account. *Burwell v. Anderson*, 3 Leigh 348.

Failure to Pay Debts Rateably.—Where it appears from the face of a settlement that the executor has paid in full some debts and left unpaid in part or whole other debts of equal dignity, such settlement stands impeached per se. *McCormick v. Wright*, 79 Va. 524.

(2) Proceedings to Open and Set Aside.

(a) Jurisdiction.

The ex parte settlement of an administrator is only prima facie correct. Any person interested may file a bill to surcharge and falsify the account so settled, and, fraud being alleged, it is immaterial that the settlement was had in Ohio, and the suit brought in West Virginia, where some of the parties in interest and the administrator live, the Ohio administration being ancillary. *Leach v. Buckner*, 19 W. Va. 36.

(b) Grounds for Relief.

aa. In General.

On a bill impeaching a settled account, the right of the complainant to relief depends on his success in showing errors against him in the settlement, and when the court directs the account to be taken, the commissioner, in executing the order of account, should confine himself to a settlement of those errors, the sum of which is

the proper measure of relief. *Shugart v. Thompson*, 10 Leigh 434.

The doctrine of surcharge and falsification applies only to settlements of the accounts of fiduciaries made by a commissioner of accounts or a master commissioner, to which all the persons interested are made parties by due notice. *Hurt v. West*, 87 Va. 78, 12 S. E. 141.

bb. Presence of Legatees at Settlement as Affecting Right.

The presence of the legatees at the settlement of an executor's accounts, to which they did not object, and which were afterwards returned to the court, approved and recorded, will not prevent such legatees from afterwards bringing a suit to surcharge and falsify the accounts so settled. *Garrett v. Carr*, 3 Leigh 407.

cc. Confirmation of Erroneous Disallowance of Credit by County Court.

The fact that, upon an ex parte settlement of an administrator's accounts before a commissioner under W. Va. Code, 1887, ch. 87, § 22, the county court has erroneously disallowed a credit, and that, on appeal, the circuit court has confirmed the action of the county court, does not constitute a bar to an original bill in chancery by the administrator to correct the error of the county court. *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. 26.

dd. Limitations and Laches.

(aa) What Constitutes and Effect.

In General.—Long acquiescence in the settlement of a decedent's estate will be a bar in equity to an investigation of its propriety. *Hudson v. Hudson*, 3 Rand. 117.

Six Years after Final Settlement.

A testator by his last will and testament, appointed two executors who qualified, and entered upon their duties, and made the first settlement of their accounts on the 13th of December, 1883, and the second settlement on the 16th of June, 1888. After the death of

one of the executors, distributee under said will, at October rules, 1894, filed her bill to surcharge and falsify said accounts. Held, that the relief prayed should be denied on account of the laches of the plaintiff. *Hays v. Freshwater*, 47 W. Va. 217, 34 S. E. 831.

Where an administrator has settled an account of his transactions under a decree of court, and the settlement has been confirmed, showing a balance due the administrator, which has been paid by the complainants, and no exception was taken or objection made to the decree of confirmation for six years, the court will refuse, upon petition filed by them for the purpose, to review or reverse the decree, it being a final decree as to the administrator. *Bradley v. Bradley*, 83 Va. 76, 1 S. E. 477.

Delay of Ten Years.—Although a decree confirming a commissioner's report settling an administrator's account, in a suit to which he was not a party, and the bill in which contained no matter touching such accounts of his administration, is not binding on the parties to the suit, yet, where such parties, having actual knowledge of the settlement, wait ten years, during which time important papers in regard to the matters of the account are lost, such delay will bar a suit by them to surcharge and falsify the settlement, and compel another accounting. *Bland v. Stewart*, 35 W. Va. 518, 14 S. E. 215.

Delay of Eighteen Years after First and Sixteen Years after Final Settlement.—Where an executor died in 1867, five years after full settlements with his testator's heirs and distributees, all of whom were then of age, a bill filed by those parties, eighteen years after his first settlement and sixteen years after his final, full and recorded settlement, to surcharge and falsify his executorial transactions, will not be entertained. *Gibboney v. Kent*, 82 Va. 383, 4 S. E. 610.

Seventeen Years after Accounts Closed.—A bill will not lie to surcharge

and falsify ex parte settlements of administration accounts, about twenty-five years after the death of the administrator whose acts are complained of, and seventeen years after his accounts were closed by subsequent administrators especially where it appears that the heirs had knowledge of how the estate was being administered. *Green v. Thompson*, 84 Va. 376, 5 S. E. 507.

(bb) Elements Preventing Bar by Limitations or Laches.

Sole Distributee Deceased's Father.—The fact that deceased died in 1868, and the bill was not filed until 1885, does not constitute laches, when it appears that the sole distributee was deceased's father; that the proceedings under the creditors' bill were not terminated until 1879; that the distributee died shortly thereafter, having appointed his wife, an aged lady, his executrix; that she lived until 1885 when the plaintiff brought the bill as administrator de bonis non with the will annexed. *Hurt v. West*, 87 Va. 78, 12 S. E. 141.

Report Repeatedly Made and Confirmed.—In 1859, an executor settled his accounts, showing a balance due the estate by him. The executor died in 1860, and an administrator de bonis non with the will annexed was appointed. In 1875, in a creditors' suit against the executor's estate, such claim was reported favorably, as a just debt owing by the executor's estate; and thereafter the same report was repeatedly made and confirmed by the court. Held, there was no laches in asserting said claim. *Green v. Griffin*, 1 Va. Dec. 858.

Minority of Complainants.—A testator left the residuum of his estate to his four children, one of whom died shortly after the testator, leaving a number of children. An administrator with the will annexed rendered an account of the administration, showing a considerable balance due the testator's estate. He further adminis-

tered, but died without returning any account of the administration. The youngest of the grandchildren, five years after coming of age and twenty-seven years after administration was taken on the estate, united with his brothers and sisters in a bill to surcharge the rendered account of the administrator, and to have a full settlement of his administration of the estate of their grandfather, claiming their father's share of the ascertained balance. Held, that the claim was not barred by the statute of limitations or by lapse of time. *Toler v. Toler*, 2 Pat. & H. 71.

Delay for Eight Years.—The delay of legatees for eight years to institute a suit to surcharge and falsify the settled accounts of an executor is not sufficient ground for refusing relief, especially where one of the complainants was an infant when the settlement was in progress, though probably of full age when it was returned to the court and recorded. *Handly v. Snodgrass*, 9 Leigh 484.

(c) Bill and Answer.

aa. Form, Requisites and Sufficiency.

Must Particularize Errors.—A bill to surcharge and falsify a settlement of an administrator's account must particularize errors; if the answer of the administrator disclose nothing improper and there is no proof of the specification, the bill must be dismissed. *Radford v. Fowlkes*, 85 Va. 820, 8 S. E. 817. See also, *Garrett v. Carr*, 3 Leigh 407.

Executors, whose accounts have been settled, approved and recorded, may object to a bill filed by devisees which, without specifying any error in their settled accounts, calls upon them to render an account of their action. *Corbin v. Mills*, 18 Gratt. 438.

On a bill by an heir to surcharge and falsify ex parte settlements of a deceased administrator, regularly made and approved many years before, such reports are prima facie correct, and

mere general charges of error are not sufficient to authorize the relief asked, especially where an injunction is asked for, which interferes with the administration and enjoyment of the deceased administrator's estate. *Green v. Thompson*, 84 Va. 376, 5 S. E. 507.

Right to Supplement by Specifications of Additional Items.—If the plaintiff does not wish to be confined to those items of surcharge and falsification named in the bill and the errors on the face of the ex parte settlement, he ought properly to file with the commissioner a written specification of any additional items of surcharge or falsification, on which he proposes to rely, so as to give the personal representative information as to all the items of the ex parte settlement, which it is proposed to surcharge or falsify. The personal representative need file no written denial of these grounds of objection alleged there by the plaintiff; but they should be regarded by the commissioners as denied by him, unless he admits their justice. In like manner the personal representative should be permitted by a written statement to surcharge or falsify the ex parte settlement, and it should be regarded, just as the written specification of errors filed with the commissioner by the plaintiff is regarded. *Seabright v. Seabright*, 28 W. Va. 412.

Allegations Where Suit Brought before Legacy Due.—A bill to surcharge and falsify an ex parte settlement, made by an executor, may be brought by a legatee, before his legacy is payable, only when the difficulties of surcharging and falsifying the settlement would be greatly increased were the suit delayed till the legacy was payable; and the bill, in such case, must allege facts showing that such difficulties would be so increased by such delay. *Rowland v. Rowland*, 11 W. Va. 262.

Amendments.—A bill alleged matters as grounds for impeaching and setting aside an account, and all of

those matters were denied by the answer; but an order of accounts being made, proofs were adduced which, though they did not sustain the specific objections taken in the bill, ascertained that the settlement might be justly surcharged in other respects. Held, that though, according to the strictest and most formal practice, the plaintiff might be required to amend his bill and urge therein the objections to the settlement, shown by the evidence, yet it was competent to the court to dispense with this proceeding and permit the plaintiff to proceed in respect to the objection shown by the evidence in like manner as if they had been noticed by the bill. *Shugart v. Thompson*, 10 Leigh 434.

bb. Parties.

Necessary Parties Generally.—Where an administrator files a bill to surcharge and falsify the report of the commissioner of accounts, upon an ex parte settlement of his account, under W. Va. Code, 1887, ch. 87, all parties interested in the settlement of the administration accounts are necessary parties to the suit. *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. 26.

Party Not Entitled to Relief.—One who is not entitled to any relief against an executor or administrator can not maintain a bill to surcharge and falsify the ex parte settlement of such fiduciary. *Dearing v. Selvey*, 50 W. Va. 4, 40 S. E. 478.

Creditors.—Creditors of a testator may intervene by petition, and be made parties to a suit brought by the legatees and devisees for the purpose of surcharging and falsifying the accounts of the executors. *Smith v. Britton*, 2 Pat. & H. 124.

Sureties.—The sureties of an administrator of a surety of an administrator are not entitled to have a resettlement of the administration accounts of this last-mentioned administrator upon his intestate's estate, which have been settled in a suit by creditors and distrib-

utees of said intestate against his administrator and sureties, before the sureties asking for a settlement of the accounts are made parties defendants in the cause. *Cookus v. Peyton*, 1 Gratt. 431.

(d) Evidence.

aa. Competency and Admissibility.

Upon a bill to surcharge and falsify an executor's account, though the plaintiff is required to specify the items of surcharge and falsification, yet it is always competent for him to show that the account is erroneous on its face, and, without controverting the items, to show that they have been so arranged as to produce results injurious to him. *Garrett v. Carr*, 3 Leigh 407.

bb. Presumption and Burden of Proof.

As to Correctness of Account.—The intermediate or partial settlements which are required to be made in the case of the administration of a decedent's estate are prima facie evidence of the correctness of the accounts, so that the burden of proof is on any one who seeks to impeach them, but they are not conclusive on persons who are not present or represented. See ante, "Conclusiveness and Effect of Settlement," IV, L, 5, g.

Existence of Vouchers.—Upon a bill to surcharge and falsify an administrator's former settlement, vouchers which can not be produced on the new settlement may be presumed to have existed, especially where there has been great lapse of time. *Campbell v. White*, 14 W. Va. 122.

Where an ex parte settlement of an administration account has taken place before commissioners appointed by the court in which the executor or administrator qualified, if the legatees afterwards bring a suit in chancery for a new examination and settlement of such account, the vouchers in support thereof, if they are not ostensible, should be presumed to have existed, and the onus probandi is thrown on

the adverse party. *McCall v. Peachy*, 3 Munf. 288.

cc. Questions of Fact.

Where an executor has been allowed a credit on his final settlement under a purported agreement with the testator, and the other heirs sue to set aside the settlement, the questions whether the agreement was genuine, and whether the defendant has complied with its terms, are for a jury. *Scott v. Porter*, 99 Va. 553, 39 S. E. 220.

dd. Proof of Averments.

Ex parte settlements of administration accounts, returned, approved and recorded, are deemed prima facie correct, and a bill to surcharge and falsify must specify wherein they are erroneous, and the specifications must be sustained by evidence, especially where an injunction is awarded that interferes with the administration of the deceased administrator's estate. *Green v. Thompson*, 84 Va. 376, 5 S. E. 507.

(e) Order or Decree.

When creditors of the testator intervene by petition, and are made parties to a suit brought by the legatees and devisees for the purpose of surcharging and falsifying the accounts of the executor, the original parties can only recover what is left after the creditors are satisfied. *Smith v. Britton*, 2 Pat. & H. 124.

Where an executor's account has been settled by commissioners appointed by the court before which the will was proved, it is not of course to be again referred to a commissioner on a bill to surcharge and falsify, but some evidence should be exhibited to that effect, or something improper in the account should be disclosed in the answer; otherwise such order of account ought not to be made, but the bill should be dismissed. *Wyllie v. Venable*, 4 Munf. 370.

(f) Exceptions and Objections.

On a bill to surcharge and falsify an executor's account, the legatees as well as the executor being defendants,

if the plaintiff direct the cause to be set for hearing, after the executor has answered but before the process against the legatees has been served, and the cause be heard on the merits, he can not afterwards object to the want of proper parties, or that the decision was premature. *Wyllie v. Venable*, 4 Munf. 370.

Where a bill is filed surcharging and falsifying an administrator's account, and the cause is referred to a commissioner for the purpose of having the account corrected, and it is discovered that the administrator has failed to charge himself with an item properly chargeable against him, and the bill does not notice such item, but there is a thorough investigation before the commissioner as to whether such item is properly chargeable, and the administrator takes evidence tending to show that he is not chargeable with the item, and does not complain of surprise, or insist upon any specification in writing, or claim the benefit of an explanation by affidavit or answer, an exception to the report charging him with such item should be overruled. *McGuire v. Wright*, 18 W. Va. 507.

(3) Effect of Setting Aside Settlements.

An ex parte settlement of an executor's accounts before a county court is only prima facie evidence of a due administration of the assets. To the extent to which it is surcharged or falsified, the settlement becomes valueless even as evidence, and the liability of the executor is precisely the same as if the settlement had never been made. *Leake v. Leake*, 75 Va. 792.

i. Review.

An executor's account was settled by commissioners under an order of the court of probate, and some of the legatees filed exceptions to the account. The court overruled the exceptions, ordered the amount to be recorded, and adjudged that the exceptors should pay the executor's costs.

Held, that this was a final proceeding or order, within the meaning of the statute, acts, 1830-31, ch. 11, § 30, p. 50. *Farneyhough v. Dickerson*, 2 Rob. 582.

A personal representative who has filed the inventories and made his annual statements of account as required by ch. 87 of the West Virginia Code can not be called on to restate such accounts in equity, unless the accounts already rendered by him are, for some sufficient reason, surcharged and falsified. *Hale v. White*, 47 W. Va. 700, 35 S. E. 884.

Where, in a general creditors' suit against the executors and devisees of a deceased indorser of notes, it was ordered that a commissioner should settle the accounts of the executor, which was done, and the settlement approved and confirmed in 1883, the decree settling the accounts will not be reheard in 1897. *Tidball v. Shenandoah Nat. Bank*, 98 Va. 768, 37 S. E. 318.

After two references to commissioners appointed by the county court to settle an administration account, and one reference to a commissioner of the high court of chancery, no exception for want of credits will be allowed in the appellate court which was not made at one of such examinations. *Jones v. Watson*, 3 Call 253.

An administrator qualified as such in 1785, his administration terminated in 1794, and some years afterwards he died, having never settled his administration account. The distributee, who was an infant in 1785, filed his bill in 1819 against the representative of the administrator for an account, who professed total ignorance as to the accounts, except what might be learned from the books and papers of the administrator, but submitted in the answer to account. Held, that after an account had been taken and a decree made upon it, the objection on the ground of laches would not avail in the appellate court. *Wills v. Dunn*, 5 Gratt. 384.

An item of \$21, paid by executors for services rendered by a clerk, being allowed by commissioners, the same was excepted to by legatees, upon the ground that what the clerk did ought to have been done by the executors, and therefore that he should be paid out of their commissions. The record contained no evidence on the subject, except that the date of the item was a few days after the date of a large credit for sales at public auction, which furnished some ground for the inference that the clerk was employed during those sales. Held, that the court of probate did not err in overruling the exception. *Farneyhough v. Dickerson*, 2 Rob. 582.

Where the accounts have been discussed, for a long time, in the court of chancery before and after the appeal, and have become intricate from the manner of stating them, if a bill of review be applied for to the last decree of the court of chancery, purporting to be made, in conformity to the decree of the court of appeals, and leave to file the bill be refused, the court of appeals will correct what is erroneous in the report of the commissioner, acting under its own decree, and affirm the residue, in order to prevent further delay, although the affirmance may possibly be injurious in some instances. *Ambler v. Macon*, 4 Call 605.

Though the bill does not surcharge and falsify the accounts of the executor settled before the commissioners, yet where there are errors on the face of these accounts, and they do not purport to be final or to embrace all the transactions of the executor, it is proper to refer the accounts to a commissioner to be settled and adjusted. If any charge against the executor which was not in his settled accounts is produced before the commissioner, the administrators of the executor may make any explanation thereof or defense thereto by their affidavit, which will have the effect of an answer. If no objection is made by the defendants

before the commissioner to the proceeding, and a fair and full investigation is had, no objection to the proceeding can be of avail before the appellate court. *Chapman v. Shepherd*, 24 Gratt. 377.

M. ADMINISTRATION BOND.

1. Necessity for Executing.

a. In General.

It seems that an executor as well as an administrator must enter into a bond, from which he is in no case exempt, although an executor may at the request of the testator be excused from giving security. 3 Min. Inst. 2 Ed. 365. See post, "Effect of Testamentary Request for Dispensing with Bond," IV, M, 1, c; "Effect of Testamentary Request Dispensing with Security," IV, M, 1, d, (2).

The law requires a bond, with certain conditions, to be executed before an executor is allowed to qualify as such, and where such bond, with sureties, has in fact been executed, and contains severable conditions not required by law, the obligors will not be heard to say that they acted under legal duress. The doctrine of legal duress applicable to contracts extorted by officers under color of their office has no application to bonds required by law. *Yost v. Ramey*, 103 Va. 117, 48 S. E. 862. See generally, the title DURESS, vol. 4, p. 841.

b. Where Estate Committed to Sheriff or Sergeant.

A sheriff or sergeant to whom an estate is committed for administration is not required to give a bond in addition to his official bond already given. Va. Code, 1887, § 2645; *Hutcheson v. Priddy*, 12 Gratt. 85; *Dabney v. Smith*, 5 Leigh 13.

c. Effect of Testamentary Request Dispensing with Bond.

Where personal property is by the will left in the control of an executrix, to whom individually the interest and profits are given for life, and the property is to go to another, and the will

directs, that no bond shall be required of the executrix, the remainderman has such an interest, as would authorize him, under the statute, to move the court to require a bond of the executrix under the will. But the court will not, at the instance of the remainderman, require the executrix to give such bond unless it appears that she is wasting or attempting to waste the personal property. *Amiss v. Williamson*, 17 W. Va. 673.

d. Security.

(1) In General.

A testator appointed his wife and son executrix and executor of his will, expressing his confidence in them and directing that they should be permitted to qualify without giving security. Some years afterwards, he added a codicil by which he said: "I further appoint J. H. executor to the within will, with my wife and son." Held, that J. H. was not entitled to qualify without giving security. *Fairfax v. Fairfax*, 7 Gratt. 36.

(2) Effect of Testamentary Request Dispensing with Security.

In Virginia and West Virginia no distinction is made between executors and administrators in the matter of requiring security, unless the testator directs that the executor shall not be required to give security, in which case the court should not require it of him, unless, upon complaint of some person interested, or from its own knowledge, it thinks security ought to be required. Va. Code, 1887, p. 2642; W. Va. Code, 1899, ch. 85, par. 7, p. 730; *Bryce v. Stevenson*, 2 Rand. 438; *Fairfax v. Fairfax*, 7 Gratt. 36; *Amiss v. Williamson*, 17 W. Va. 673.

(3) Requiring Bond before Institution of Suit.

Where a suit in equity to reduce into possession the assets of the testator is brought by an executor, who has been permitted to qualify without giving security, the court may, in its discretion, require security before it will lend

the executor its aid. *Bryce v. Stevenson*, 2 Rand. 438.

(4) Effect of Failure to Give Bond.

A sale of a slave belonging to the estate of a testator, by a person named as one of the executors, but who, at the time of such sale, had not qualified, and afterwards died, without having qualified, by giving bond and security, is void against the executor who did qualify; notwithstanding such sale was made for valuable consideration, and at the time when there was no qualified executors. *Monroe v. James*, 4 Munf. 194.

2. Requiring New or Additional Bond.

a. Under Statute Authorizing on Complaint.

Under the statute, 1 Rev. Va. Code, ch. 140, § 41, p. 385, authorizing the court which granted the letters of probate or administration, upon complaint of any person interested in the estate, when it shall appear that the securities given by the executor or administrator have become insufficient, either to require of the executor or administrator other good security for the performance of his duties, or to revoke his powers, the other good security authorized to be required is not to be in lieu of, or by way of substitution for the former security, but in addition thereto; and the former securities are not thereby exonerated. *Atkinson v. Christian*, 3 Gratt. 448.

b. For Sale of Real Estate.

Where real estate is sold under an order of court, the executor or administrator may be required to give a new or additional bond to secure the proper application of the proceeds of the sale. *Corbell v. Zeluff*, 12 Gratt. 226.

c. Effect of Order of Appellate Court.

The order of an appellate court requiring other good security from an executor or an administrator should be directory only, to the court that originally granted the probate or administration; the latter court alone having authority to receive the additional

bond and security. *Atkinson v. Christian*, 3 Gratt. 448.

d. Determining Amount of Additional Security.

In determining the amount of additional security to be required, regard ought to be had to the value of the estate remaining unadministered, including any accessions thereto beyond the original estimate thereof, and to the extent of the available security still furnished by the original bond. *Atkinson v. Christian*, 3 Gratt. 448.

e. Liability of Sureties.

A new bond executed by administrators by the express provisions of the statute, relates back to the time of their qualification and binds the obligors therein for the faithful discharge of the duties of such administrators from that time as effectually as if the bond had been then executed. *Lingle v. Cook*, 32 Gratt. 262. See post, "Liabilities on Administration Bonds," IV, M, 7, e.

On Old Bond.—Where the defendants in an action of debt on an administration bond, relying upon a new bond entered into upon a petition filed by them in the county court whereby they were discharged from liability, pleaded such record in bar, it was held, that the plaintiff was entitled to judgment, because the record only recited that the motion for a new bond was granted, and did not state that the new bond was ever entered into. *Robinson v. Williamson*, 12 Leigh 93.

3. Form, Requisites and Validity.

a. Conformity to Statute.

An administration bond must conform to the requisites of the statute. *Roberts v. Colvin*, 3 Gratt. 358. See also, *Morrow v. Peyton*, 8 Leigh 54.

Presumption.—The presumption is that the official bond of an executor and his sureties was in the usual form. *Reherd v. Long*, 77 Va. 839.

b. Formal and Necessary Parties.

(1) Obligor.

A will was offered for probate in the

proper court, proved by one of the three subscribing witnesses and ordered to be certified. At the next term of the court, the executors refused to act; the widow relinquished her right to administer, and administration with the will annexed was committed to a person who executed his official bond in the proper form. Held, that the bond was valid, and bound the administrator and his sureties for his default. *Gibson v. Beckham*, 16 Gratt. 321.

(2) Obligee.

Bonds of executors and administrators were formerly payable to the justices of the county court. *Cowling v. Justices*, 6 Rand. 349; *Franklin v. Depriest*, 13 Gratt. 257. But this rule has been changed, and such bonds are now payable to the commonwealth. Va. Code, 1887, § 177.

Where the official bond of an executor was made payable to four justices, one of whom was not a member of the court at the time, it was held, that the surety, having executed the bond, was estopped from pleading that it was not his bond because so executed. *Franklin v. Depriest*, 13 Gratt. 257, and foot-note. See also, *Gibson v. Beckham*, 16 Gratt. 321. And see the title ESTOPPEL, ante, p. 191.

c. Signing.

The official bond of an executor contained in the penal part the names of the executor and several sureties, and there was no blank for the name of the other; but it was signed and sealed by all those whose names were in the penal part, and also by another person. Held, that it was the bond of the person who executed it, though his name did not appear in the penal part. *Luster v. Middlecoff*, 8 Gratt. 54, 56 Am. Dec. 129.

By Attorney.—Under a power of attorney, authorizing a person to execute an administration bond for the person giving the power, the attorney may be allowed to execute the bond accordingly. *McCandlish v. Hopkins*, 6 Call 208.

Where an attorney in fact is authorized to sign his principal's name, as surety for an executor, to the "bond required by the court" of the executor, and he signs the name to such bond, which contains some provisions not required by law, which conditions are severable and void, this is not in excess of the attorney's powers, and his principal is bound. *Yost v. Ramey*, 103 Va. 117, 48 S. E. 862.

d. Conditions, Special Provisions and Penalty.

See generally, the title BONDS, vol. 2, p. 507.

(1) Construction.

See generally, the title INTERPRETATION AND CONSTRUCTION.

Though the condition of a bond does not use the word "pay" but only "deliver," yet the word deliver will cover the general as well as the special legacies. *Murphy v. Carter*, 23 Gratt. 477.

(2) Presumption as to Form.

In the absence of evidence directly to the contrary, it must be presumed that the official bond of the executor and his sureties was in the usual form, with a condition "for the faithful discharge by him of the duties of his trust." *Reherd v. Long*, 77 Va. 839.

(3) Effect of Omission of Names.

The official bond of an executor, in the penalty of which the names of the obligees are not inserted, and in the condition of which the name of the executor and of the court to which he was to return the account of his transactions are blank, is materially defective and no judgment can be rendered on it at law. *Cowling v. Justices*, 6 Rand. 349.

(4) Effect of Inserting or Omitting Unauthorized Conditions.

In *Gibson v. Beckham*, 16 Gratt. 321, it was held, that where a court or officer has authority or capacity to take a bond and makes a mistake by omitting some condition prescribed, or inserting a condition not authorized or illegal, unless the statute by express

words, or necessary implication, makes it wholly void, the bond is not void; and it may be sued on, as far as the conditions are good, as a statutory bond. Allen, P., speaking for the court, said: "*Morrow v. Peyton*, 8 Leigh 54, does decide the broad proposition that a bond not conforming to the requisitions of the statute was void as to all purposes. The case, even supposing it should be recognized as a binding authority, would not affect materially the present case. For here the grant was to an administrator c. t. a., and the bond is such as the law requires in such case. In *Morrow v. Peyton*, after the death of an executor who 'had qualified, administration was committed to an administrator d. b. n. c. t. a., but the bond was in the form prescribed for administration d. b. n. of an intestate, instead of an administration d. b. n. c. t. a. The form of the bond adopted did contain a condition for the benefit of creditors; and creditors were suing; but the court in the decree says that the administration bond was void on the authority of *Frazier v. Frazier*, and the securities were not bound by it. Tucker, P., towards the conclusion of his opinion, merely remarks on that branch of the case, that the bond was void on the same authority. The great question in that case was whether, when two administrators execute a joint administration bond, one is surety for the other. Upon this proposition the three judges differed, each delivering a separate opinion—Brockenbrough and Tucker holding the affirmative; Brooke, the negative. On the other parts of the case the other judges concurred with Tucker. We have seen all that he said on the question under consideration, and it is clear that he was misled from a hasty consideration of the case of *Frazier v. Frazier* (2 Leigh 642, 647). It certainly did not decide that the bond was void or invalid for any purpose provided for in the condition. But the decision and opinion of Green, J.,

was carefully restricted to the case of the legatee suing, and for whom no provision had been made. Had not the court in *Morrow v. Peyton* been misled by this mistake in the effect of the decision in *Frazier v. Frazier*, I do not for a moment suppose they would have decided that such a bond was void entirely and the sureties not bound by it. * * * It is manifest, therefore, that this court, in *Morrow v. Peyton*, intended to place their decisions on this point upon the authority of *Frazier v. Frazier* alone, supposing, through inadvertence, and because the novel and interesting question as to the liability of the executors under the joint bond had diverted attention from the minor questions arising on the record, that *Frazier v. Frazier* ruled this branch of the case. I do not, therefore, regard *Morrow v. Peyton* as an authority on this proposition." See also, *State v. Purcell*, 31 W. Va. 44, 67, 5 S. E. 301, 313.

(5) Provisions for the Benefit of Creditors.

Where an administration bond does not conform to the requisitions of the statute and contains no provision for the benefit of creditors, no decree can be rendered in their favor against the sureties therein. *Roberts v. Colvin*, 3 Gratt. 358.

(6) Amount of Penalty.

By the 21st and 35th sections of the statute, 1 Rev. Va. Code, ch. 104, it was intended that the court granting administration on an estate, or admitting an executor to qualify as such, should have a discretion in regard to the amount of the security. And the general practice of requiring the security in double the estimated value of the estate, is a proper exercise of that discretion. *Atkinson v. Christian*, 3 Gratt. 448. See Va. Code, 1887, § 2641; W. Va. Code, 1899, ch. 85, § 6, p. 730.

A bond with surety taken from an administrator with the will annexed with condition not in the form pre-

scribed by law for the official bond of an administrator with the will annexed, but in the form prescribed for an administrator and not exactly conforming even to that, is not a good statutory bond, and no suit, either at law or in equity, can be maintained against the surety for the benefit or at the relation of a legatee. *Frazier v. Frazier*, 2 Leigh 642.

c. Effect.

Joint Administration Bond.—In *Morrow v. Peyton*, 8 Leigh 54, it was held, that where two administrators executed a joint administration bond each is to be regarded as the surety for the other, and if one commits a devastation the other is chargeable for his act as surety. In *Caskie v. Harrison*, 76 Va. 85, 93, it is said: "The doctrine laid down in that case (*Morrow v. Peyton*, 8 Leigh 54) has been again and again recognized by this court. *Boyd v. Boyd*, 3 Gratt. 112; *Cox v. Thomas*, 9 Gratt. 312, 319." See also, *Peale v. Hickle*, 9 Gratt. 437, 444; *Sands v. Durham*, 99 Va. 263, 267, 38 S. E. 145; *Boyd v. Boyd*, 3 Gratt. 112.

Doing Away with Necessity for Giving Security on Obtaining Injunction.—An executor or administrator, having given security for his administration is not generally required to give security on obtaining injunctions. Va. Code, 1887, § 3442; *Wilson v. Wilson*, 1 Hen. & M. 16; *Lomax v. Picot*, 2 Rand. 247; *Shearman v. Christian*, 1 Rand. 393; *State v. Johnson*, 28 W. Va. 56. Nor is he required to give security upon taking an appeal in a suit in which he is interested in his official capacity. It is otherwise where he is interested personally. See the titles APPEAL AND ERROR, vol. 1, p. 418; INJUNCTIONS.

4. Property within Contemplation of Bond.

a. As Dependent on Terms of Bond.

Though the condition of the bond does not use the word "pay" but only "deliver," yet this last word will cover

the general as well as the specific legacies. *Murphy v. Carter*, 23 Gratt. 477.

b. Proceeds of Sale under Power in Will.

Under the former provisions of the statute concerning executor's bonds, 1 Rev. Va. Code, 1819, p. 379, § 21, the sureties of an executor were not responsible for the proceeds of land sold by him under a power in the testator's will. *Burnett v. Harwell*, 3 Leigh 89; *Jones v. Hobson*, 2 Rand. 483; *Boyd v. Boyd*, 3 Gratt. 114; *Strother v. Hull*, 23 Gratt. 652; *Toler v. Toler*, 2 Pat. & H. 71. But it is otherwise under the present statute. *Reherd v. Long*, 77 Va. 839; Va. Code, 1887, §§ 2641, 2664.

A testator died in 1836. By his will he gave certain specific and general legacies and then directed that certain land and his personal property should be sold, which with debts due should be a fund for the payment of his debts. An administrator with the will annexed qualified and executed a bond with sureties, the condition of which only bound them for the faithful administration of the personal estate, and that he should "deliver all the legacies contained and specified in said will." He sold the land and paid debts out of the general fund, but upon a settlement of his accounts was largely in arrear. Held, that the sureties were not liable for the due administration of the land. *Murphy v. Carter*, 23 Gratt. 477. See also, *Baylor v. Dejarnette*, 13 Gratt. 152.

c. Rents and Profits of Real Estate.

The official bond of an executrix only binding the obligors for the due administration of the personal estate, the sureties are to no extent responsible for the rents and profits of the real estate. *Hutcherson v. Pigg*, 8 Gratt. 220. See, however, Va. Code, 1887, §§ 2641, 2664.

d. Interest.

A testator died in 1851, leaving several infant children. By his will he directed that, on the marriage of his

eldest daughter, she should have possession of the home property, if she would keep the younger children with her and take care of them. The will also directed the executor to manage the estate until January 1, 1861, when it should all be divided equally among his children. The husband of the eldest daughter became administrator c. t. a., and took possession, but did not invest the money or settle his accounts. Held, that the sureties of such administrator were responsible for the amount of his accounts with interest up to January 1, 1861. *Strother v. Hull*, 23 Gratt. 652.

e. Proceeds of Insurance Policy.

A house was insured against fire as being leased property, held for a term of ninety-nine years renewable forever; but it was in fact held by the assured in fee simple. After the death of the assured, it was destroyed by fire. Held, that the money due for the loss belonged to the heirs of the assured, and his administrator having received it, the sureties of the administrator are not responsible therefor. *Harrison v. Harrison*, 4 Leigh 371.

f. Foreign Assets.

The sureties of an administrator are responsible for assets of the intestate, which were situated, at his death, in another state, but afterwards brought to Virginia, and there treated and held as assets by the administrator. *Andrews v. Avory*, 14 Gratt. 229, 73 Am. Dec. 355.

g. Property Held in Other Capacities.

(1) As Commissioner.

The sureties of an administrator are discharged from liability for the proceeds of the sale of certain property of the intestate, but not required for the payment of debts, when such property is taken out of the hands of the administrator, and by a valid decree placed in his hands "as commissioner," to be sold and the proceeds divided among the distributees. *Andrews v. Avory*, 14 Gratt. 229, 73 Am. Dec. 355.

See also, *Odell v. Howle*, 77 Va. 361; *Dillard v. Dillard*, 77 Va. 820.

(2) As Partner.

Where, upon the death of one of two partners, the other, who qualified as the executor of his estate, is insolvent at the time the partnership business is, or by law ought to be, wound up, the sureties in the executorial bond are not liable for the interest of the deceased in the partnership. It is the duty of the surviving partner to wind up the partnership, and until that is done there is no ascertained debt to the estate. *Hooper v. Hooper*, 32 W. Va. 526, 9 S. E. 937.

Where a surviving partner is also executor of the estate of his deceased co-partner, and has funds in his hands not needed to pay the firm debts, he will be presumed to hold such funds as executor, and his sureties will be liable if he misappropriates the same. *Caskie v. Harrison*, 76 Va. 85.

(3) As Residuary Legatee.

Where an executor, to whom a residuary legacy is bequeathed, consumes it, leaving the testator's debts unpaid, his sureties are liable for the amount thereof, before real estate devised by the will can be subjected. *Edmunds v. Scott*, 78 Va. 720.

(4) As Devisee Charged with Payment of Legacy.

A testator by his will gave his plantation, certain slaves and personal property to his wife for her life, and directed that his wife purchase and deliver to his granddaughter a negro girl of the value of about £50. He appointed his wife executrix, and she qualified and gave the proper bond. The whole personal estate, other than specific legacies, was exhausted in the payment of the debts. The widow accepted the property given her by the will, and took possession of the whole of it. Held, that she was liable personally as legatee, not as executrix, for the payment of the legacy to the granddaughter, and that the sureties in

her executorial bond were in no wise liable therefor. *Arrington v. Cheatham*, 2 Rob. 492.

(5) As Guardian.

See post, "Release, Discharge or Exoneration," IV, M, 9, c, (5). See also, the title GUARDIAN AND WARD.

h. Lands Devised by Executor.

Under the statute against fraudulent devisees, an action of debt lies on an executor's bond, for a creditor claiming a debt from the executor's estate, arising from a breach of the condition by the executor in his lifetime, against the executor's devisees, to have satisfaction out of the lands devised. *Manns v. Flinn*, 10 Leigh 93. See also, Va. Code, 1887, § 2667.

5. Functions and Acts Covered by Bond.

Where the estate of one decedent is indebted to that of another, and the same person is administrator of both, and waste assets of the debtor estate, which he was bound, but has failed, to pay over to the creditor estate, the sureties for his due administration of the creditor estate are liable for such default and devastavit. *Morrow v. Peyton*, 8 Leigh 54.

An administrator sold the plaintiff ten shares of bank stock upon which the decedent had borrowed money from the bank and had given his notes. The plaintiff paid the full price of the stock on the administrators undertaking to pay the notes. The administrator paid one note, but did not pay the other, and the bank retained the amount out of the dividends on the shares. Held, that the sureties of the administrator were not liable for his failure to perform his undertaking since he had no authority to make the contract in his official capacity. *Childress v. Morris*, 23 Gratt. 802.

A personal decree against an administrator was recovered by a creditor of the decedent. The administrator appealed, giving an appeal bond with surety, and the decree was af-

firmed. An arrangement was made between the creditor and the surety in the appeal bond, by which the decree was transferred to the surety, who made a part of the amount due thereon by execution against the administrator, and then brought an action on the administration bond, in the name of the creditor as relator, against the surety therein bound, in which action a judgment was recovered for the balance due on the affirmed decree, being less than the amount of damages incurred by the appeal. Held, that, as the surety in the administration bond was only liable for the assets coming to the hands of the administrator, his liability could not be affected by any result of such appeal. *Brown v. Glascock*, 1 Rob. 461.

Payment of Attorney's Fees for Services Rendered Executor.—If a court in a suit administering assets of a decedent, allow an attorney fees for services rendered the executor or administrator in the administration, and direct payment by him out of a balance of assets found by the decree to be in his hands, it is a valid demand against the sureties in his bond. *Crim v. England*, 46 W. Va. 480, 33 S. E. 310.

6. Breach of Bond.

a. Failure to Return Proper Inventory.

An executor or administrator omitting to insert in the inventory certain credits belonging to the estate of the testator or intestate is not, on that account, to be charged with more than shall be proved to have been received by him, or to have been lost by his negligence. *McCall v. Peachy*, 3 Munf. 288.

b. Maladministration.

Where there are several successive administrations upon the same estate, and debts due the estate might have been collected by each of the personal representatives of said estate by the use of due and reasonable diligence, but was collected by none of them, and

was lost by the negligence of each and all of them; while all of them are liable for said debts, their relative liability is in the inverse order of their qualifications as such personal representatives. *Lacy v. Stamper*, 27 Gratt. 42.

But the land and personal property and debts being made one common fund by the testator, it was not maladministration by the administrator to use the proceeds of the land in the payment of debts. *Murphy v. Carter*, 23 Gratt. 477.

c. Failure to Pay Legacies.

A testator by his will gave certain property to his wife for her life, and directed that at her death, his executors should sell it and divide the proceeds among his children. After the death of the widow, the executor took possession of the property and sold it, but did not pay over the proceeds. Held, that the sureties in his official bond were responsible for his failure to pay over the proceeds of the sale. *Almond v. Mason*, 9 Gratt. 700. See *Thornton v. Fitzhugh*, 4 Leigh 209.

The executor of an executor, instead of paying the assets of the first estate to the legatees of the first testator, distributed them among the legatees of the second testator. Held, that the sureties of the first executor were responsible for the amount so distributed. *Aylett v. King*, 11 Leigh 486.

d. Failure to Take Proper Security upon Making Sales.

The executors offer land for sale at public auction, which is cried out to P., a solvent and responsible person, who, before anything is done in execution of the contract, permits E. to take his purchase, and E. gives his bond with a surety for the purchase money; both E. and his surety being then in good credit, and considered fully able to pay the amount. Before all the purchase money falls due, E. and his surety fail, E. having paid but one of

his bonds; and the executors file a bill to subject the land in the hands of a purchaser from E. After long delay the land is subjected and sold, but after applying the proceeds of sale there remains a large balance of purchase money due from E. Held, that the pecuniary standing of E. having been such at the time of the sale, that if the land had been cried out to him, the executors would have been well justified in executing the contract, and there being no mala fides on the part of the executors, they are not to be held liable for the balance of the purchase money. *Elliott v. Carter*, 9 Gratt. 541.

e. Devastavit by Infant.

In 1856 an infant qualified as one of the administrators of a decedent. He paid out for just debts all the assets that came to his hands, but did not apportion them rateably. In 1858 he turned over every thing in his hands to his coadministrator and left the state. In 1877 a bill was filed charging him with devastavit. He pleaded infancy and the bar of the statute of limitations. Held that, being an infant and innocent of fraud or tort, he was not liable for the alleged devastavit, and the lapse of the period of limitation would bar the claim against him if he was otherwise liable. *Saum v. Coffelt*, 79 Va. 510.

7. Action on Bond.

a. Jurisdiction.

If a decree be pronounced, by a superior court of chancery, against an executor, in a suit brought against him and his securities; but without charging, or exonerating them by such decree; and the executor remove out of the commonwealth, without satisfying the same; a second suit may be brought against him and them, in the superior court of chancery of any other district, in which the securities reside, to get satisfaction from them. *Crutcher v. Crutcher*, 4 Munf. 457.

b. Necessity of Preliminary Judgment or Decree.

Prior to statutory enactment, it was necessary, after a judgment against an executor or administrator in his official capacity, to establish a devastavit, by means of a second suit and judgment *de bonis propriis*, before an action could be maintained against the sureties in the administration bond. *Hairs-ton v. Hughes*, 3 Munf. 568; *Catlett v. Carter*, 2 Munf. 24; *Gordon v. Justices of Frederick*, 1 Munf. 1; *Braxton v. Winslow*, 4 Call 308. See also, *Call v. Ruffin*, 1 Call 333; *Taylor v. Stewart*, 5 Call 520; *Allen v. Cunningham*, 3 Leigh 395.

To sustain an action under the statute, on the bond of administrators against them and their sureties, it is necessary to have previously obtained a judgment against them as such, on which execution issued, and was returned unsatisfied; and these facts must be proved to the jury by proper evidence. *State v. Hudkins*, 34 W. Va. 370, 12 S. E. 495.

Upon the death of an administrator, after he has recovered a judgment against the administratrix of another estate for a debt due the plaintiff's intestate, and after a *fi. fa.* issued thereon has been returned *nulla bona*, the administrator *de bonis non*, in order to put the administration bond in suit, need not bring *sci. fa.* or action of debt on the judgment recovered by the first administrator. *Allen v. Cunningham*, 3 Leigh 395.

After a judgment against an executor or administrator *de bonis testatoris* or *intestati*, and a return of *nulla bona*, on execution, an action against him alone, on his administration bond could always be maintained without any previous suit suggesting a devastavit. *Meade v. Brooking*, 3 Munf. 548.

Although in the case of a creditor, the demand must be established against the executor before a suit can be brought on the administration bond, yet in the case of a legatee, a suit in

equity may be brought upon it in the first instance, because the decree can be made so as to operate against the executor in the first instance, and an account of the assets can be taken at once. *Taliaferro v. Thornton*, 6 Call 21.

The sureties of an executor or administrator can not be sued in equity until a devastavit is fixed upon the principal in a previous suit against him, except in cases where from some inevitable necessity a creditor is obliged to come into equity in the first instance against the principal; and then to prevent a circuity of actions, the sureties should be made parties. *Bachelder v. Elliott*, 1 Hen. & M. 10.

What Constitutes a Devastavit.—See generally, the title WASTE.

Paying debts of inferior dignity is not a devastavit, if the executor retains sufficient assets to pay those of higher rank. *Braxton v. Claiborne*, 4 Call 308.

Sufficiency of Return.—Where a *fi. fa.* on a judgment against an administrator was returned "no unadministered or unincumbered effects found," it was held, that this was a sufficient return to entitle the plaintiff to an action on the administration bond. *Allen v. Cunningham*, 3 Leigh 395.

But a judgment against an executor or administrator as such, with a return on the execution "that he has removed out of the state," is not sufficient evidence of a devastavit, to ground an action on the bond given for the performance of his duty. *Turner v. Chinn*, 1 Hen. & M. 52.

Proof of Return Necessary.—Under the W. Va. Code, 1887, ch. 85, § 23, providing that, "where an execution on a judgment or decree against a personal representative is returned without being satisfied, there may be forthwith brought and prosecuted an action against the obligor in any bond given by such personal representative for the faithful discharge of his duties," proof of the issue of the execution and of

its return unsatisfied is essential to a recovery on the bond. *State v. Hudkins*, 34 W. Va. 370, 12 S. E. 495.

c. Time within Which Action Must Be Brought.

The statute itself prescribes the time within which an action may be brought against the sureties on an executor's bond, which is ten years after the right to bring the same shall have first accrued. And it further provides, that the right of action of a person obtaining an execution against an executor, or to whom payment or delivery of estate in the hands of the executor shall be ordered by a court acting upon his account, shall be deemed to have first accrued from the return day of such execution, or from the time of the right to require payment or delivery upon such order, whichever shall happen first. Va. Code, 1887, § 2921; W. Va. Code, 1899, ch. 104, § 7, p. 777; *Robertson v. Gillenwaters*, 85 Va. 116, 7 S. E. 371; *Morrison v. Lavell*, 81 Va. 519; *Ashby v. Bell*, 80 Va. 811; *McCormick v. Wright*, 79 Va. 524; *Sharpe v. Rockwood*, 78 Va. 24; *Leake v. Leake*, 75 Va. 792; *Tilson v. Davis*, 32 Gratt. 92; *Franklin v. Depriest*, 13 Gratt. 257; *Hoge v. Vintroux*, 21 W. Va. 1.

Conclusiveness of Verdict in Preliminary Suit.—"Though the preliminary suit is necessary, yet the verdict and judgment rendered therein will not be conclusive evidence to entitle the plaintiff to a judgment against either the personal representative or the sureties in the bond. It serves to fix the amount of the claim; but with the return of nulla bona on the execution, it makes only a prima facie case of devastavit against the executor or administrator, subject to be rebutted by any evidence or pleas which might have constituted a good defense in an action suggesting a devastavit." *Barton's Law Pr.* (2d Ed.) 169. See also, *Bush v. Beale*, 1 Gratt. 229.

Upon the settlement of an administrator's accounts, the widow of the in-

testate took from the administrator a bond for the balance due her from the estate. More than ten years afterwards, she brought suit against the sureties of the administrator, he having died insolvent. Held, that, whether the bond was received as a satisfaction of her interest in the estate, or only as an acknowledgment that so much was due her, the sureties were not liable, since, from the moment the bond was delivered, a right of action accrued to her, which was barred by the statute of limitations. *Tilson v. Davis*, 32 Gratt. 92.

d. Right of Action and Grounds Therefor.

Under the statute against fraudulent devises, an action of debt lies on an executor's bond, for a creditor claiming a debt from the executor's estate, arising from a breach of the condition by the executor in his lifetime, against the executor's devisees, to have satisfaction out of the land devised. *Manns v. Flinn*, 10 Leigh 93.

Under the provisions of 1 Rev. Code, ch. 104, § 21, an action can not be maintained on an executor's bond, at the relation of an assignee of a legatee of a decree for a legacy; such action can only be maintained at the relation of the person who has the legal right to the debt. *Burnett v. Harwell*, 3 Leigh 89.

e. Liabilities on Administration Bonds
(1) General Nature and Extent of Liabilities.

Where the court has power to take a bond, the liability of the obligors is ascertained from the bond itself, and not from the order of the court reciting the fact of its execution. *Caskie v. Harrison*, 76 Va. 85.

Where a testator desired security only for the protection of a particular legacy by bond with penalty prescribed in the will, but the order of court and the bond were in the usual form without noticing the testator's desire, the bond will render the executor and his bondsmen liable to the extent of the

full penalty of the bond, for any failure of the executor faithfully to discharge the duties of his office. *Sharpe v. Rockwood*, 78 Va. 24.

(2) Liabilities on Joint Bonds.

Where two or more executors or administrators execute a joint bond they are to be considered as standing in the relation to each other of principal and surety, each being considered as principal as to his own acts and surety as to the transactions of his companion. *Morrow v. Peyton*, 8 Leigh 54; *Boyd v. Boyd*, 3 Gratt 114; *Cox v. Thomas*, 9 Gratt. 312; *Caskie v. Harrison*, 76 Va. 85; *McCormick v. Wright*, 79 Va. 524; *Hooper v. Hooper*, 29 W. Va. 276, 1 S. E. 280. Compare *Gibson v. Beckham*, 16 Gratt. 321; *State v. Purcell*, 31 W. Va. 44, 67, 5 S. E. 301.

It is well settled that one administrator can not be charged with the wrong of his companion, or be made further liable than for the assets which came to his hands. *Frazer v. Beville*, 11 Gratt. 15, citing *Morrow v. Peyton*, 8 Leigh 54.

Thus, where there are two or more executors or administrators, each has a several right to receive the assets of the estate, and he alone is consequently liable for what is so received. As a general rule, therefore, one executor can not be charged with a devastavit of his companion any further than he is shown to have been knowing and assenting at the time to the devastavit. Merely permitting his coexecutor to possess the assets without knowing further and concurring in the misapplication does not render him responsible for the receipts of his coexecutors. *Caskie v. Harrison*, 76 Va. 85; *Frazer v. Beville*, 11 Gratt. 9.

"But when one of the executors actually or tacitly assents to a misapplication of the assets by the other, or knowing of an intended misapplication of the assets, he fails to interfere, and loss occurs, when by the exercise of reasonable diligence he might have

prevented it, he thereby renders himself responsible as a principal debtor for such default. *Caskie v. Harrison*, 76 Va. 85. In that case the ruling of Lord Langdale in *Williams v. Nixon*, 3 Beavan 472, was referred to where he said: "There can be no doubt that if an executor knows that the moneys received by his coexecutor are not applied according to the trusts of the will, and stands by and acquiesces in it without doing anything on his part to procure the due execution of the trusts of of the will, in respect of the negligence, he himself will be charged with the loss." See the authorities in 2 Lead. Cases in Eq. (Ed. 1877), p. 1, 1794, et seq." *McCormick v. Wright*, 79 Va. 524.

f. The Pleadings.

(1) Declaration.

(a) Parties.

aa. Plaintiffs.

"The action of debt may be maintained upon bonds executed by fiduciaries, such as executors, administrators, guardians, committees, trustees and receivers, which are all made payable to the commonwealth and conditioned for the faithful performance of their several duties by the various officers who execute them. The suit is brought in the name of the commonwealth at the relation of the claimant; but the relator must be the party having the legal right to the debt." *Barton's Law Pr.* (2d Ed.) 166. See also, *Allen v. Cunningham*, 3 Leigh 395.

In an action upon the official bond of an executor against himself and his sureties for a devastavit, upon the plea of conditions performed, the execution which issued on the decree de bonis testatoris directed the sheriff to levy the debt of the goods and chattels of B. executor of L., instead of the goods and chattels of L. in the hands of B. to be administered. Held, that this was an error of form and not of substance, and the execution having been returned "no assets in the executor's hands," and

no motion having been made to quash it, it must be regarded in the suit as an execution against the executor as such, and not in his own right. *Beal v. Botetourt Justices*, 10 Gratt. 278.

The administrator of A. recovered judgment against the administratrix of B. for a debt due A., and sued out a *fi. fa.* thereon, which was returned *nulla bona*. The administrator of A. then died and administration de bonis non of A.'s estate was granted. Held, that the action of debt on the administration bond of B.'s administratrix lies at the relation of the administrator de bonis non of A., and not at the relation of the first administrator of A., upon the construction of the statute, 1 Rev. Va. Code, ch. 104, § 63. *Allen v. Cunningham*, 3 Leigh 395.

Under 1 Rev. Va. Code, ch. 104, § 21, an action can not be maintained on an executor's bond, at the relation of an assignee of a legatee of a decree for a legacy; such action can only be maintained at the relation of the person who has the legal right to the debt. *Burnett v. Harwell*, 3 Leigh 89.

In an action on the official bond of an executor against one of his sureties to recover the amount of a decree against the executor rendered in favor of the trustee of a woman, the trustee is the proper relator in the action. *Calahan v. Depriest*, 13 Gratt. 274.

Creditors of Decedent.—A creditor of a decedent, who has obtained a decree de bonis testatoris against the executor, on which an execution has issued, and has been returned *nulla bona*, may maintain an action against the executor, and his sureties, on the executorial bond. *Bush v. Beale*, 1 Gratt. 229; *Braxton v. Winslow*, 4 Call 308.

The statute, 1 Rev. Va. Code, ch. 104, § 63, p. 390, authorizing suits on executorial bonds by judgment creditors, applies to creditors by decree as well as those by judgment. *Bush v. Beale*, 1 Gratt. 229. It is expressly so provided

by Va. Code, 1887, § 2658; W. Va. Code, 1899, ch. 85, § 23, p. 732.

bb. Defendant.

In a suit in equity by the legatees against the personal representatives of the sheriff, of his deputy, and of his official sureties, to obtain an accounting of an estate administered by the sheriff's deputy, and to recover a balance due, it was not necessary to make the heirs of the sheriff and the deputy parties, to ascertain whether any real estate descended to them, before charging the sureties. *Dabney v. Smith*, 5 Leigh 13.

All the sureties in the official bond of an executrix should be parties to a suit by legatees for distribution, or a sufficient reason should be shown for failing to make them parties, before a decree is made against one of them. *Hutcherson v. Pigg*, 8 Gratt. 220. See also, *Hedrick v. Hopkins*, 8 W. Va. 167.

(b) Allegations.

aa. Setting Out Official Character of Oblige.

An official bond, when the ground of an action, ought to be laid in the declaration to have been made to the obligee in his official character. The declaration should also manifest in what right the plaintiff sues. *Cabell v. Hardwick*, 1 Call 345.

bb. Sufficiency and Amount of Assets and Devastavit.

In an action on an administration bond, the declaration must aver that assets sufficient to pay the debt came to the executor's hands, or the amount of assets that came to his hands, and the devastavit thereof; and if the declaration contains no such averment, it is bad on general demurrer. *Burnett v. Harwell*, 3 Leigh 89.

cc. As to Breach of Bond.

In a suit on an administration bond, it is error to give judgment for the plaintiff, where no breach of the condition of the bond is stated in the complaint, and there is no assignment of

breaches in any other part of the record. *Ward v. Fairfax Justices*, 4 Munf. 494.

dd. Variance.

Where a declaration on an executorial bond alleges the recovery of a judgment *de bonis testatoris* against the executor, and an execution issued thereon, with return of *nulla bona*, the declaration is not supported by the introduction of a judgment against the executor *de bonis propriis*, and where judgment in such a case is rendered against an obligor in the bond, upon such evidence by the court in lieu of a jury, the appellate court will reverse the judgment and dismiss the case without remanding it for a new trial. *Crumbacker v. Seabright*, 15 W. Va. 590.

In a suit upon an administration bond, if the declaration does not show that the plaintiffs sue as justices of the court, it is a fatal variance, and the administration bond can not be given in evidence. *Cabell v. Hardwick*, 1 Call 345. See *Lewis v. Adams*, 6 Leigh 320, 330; *Gordon v. Justices of Frederick*, 1 Munf. 8; *Taylor v. Stewart*, 5 Call 520.

(2) Pleas.

In an action on the official bond of an executor against the executor and his sureties for a *devastavit*, a plea that the execution, on which the action was based, issued irregularly and unlawfully after the expiration of more than a year and a day from the time of the decree, without any previous proceeding by way of *scire facias* or otherwise to authorize the same, presents an immaterial issue. *Beale v. Botetourt Justices*, 10 Gratt. 278.

g. Evidence.

(1) Presumption and Burden of Proof.

A decree against an executor, finding a sum of money in his hands from assets, is *prima facie* evidence against the sureties in his bond. *Crim v. England*, 46 W. Va. 480, 33 S. E. 310.

A verdict and judgment against an

executor or administrator are not conclusive evidence against his surety; nor are they conclusive even against the party against whom they are rendered, unless they are pleaded as an estoppel. *Craddock v. Turner*, 6 Leigh 118.

(2) Competency and Admissibility.

Parol Evidence.—In an action for a *devastavit* by a creditor of a testator against the executor and his sureties, the settled account of the executor was introduced, which showed a credit to the executor of money paid a legatee. The executor proposed to show by parol proof that the legatee paid was not the legatee of his testator, but of a person of whom his testator was executor, and that his testator had received sufficient assets to pay the legacy, but had not done it. Held, that the fact of such a legacy and that the executor's testator was the executor should be proved by the will and the record of his qualification, and that parol evidence was inadmissible for such purpose. *Miller v. Catlett*, 10 Gratt. 477.

(3) Sufficiency.

A creditor of a decedent obtained a judgment against the administrators, and brought an action of debt upon the administration bond. He proved at the trial that one of the administrators, under an agreement with the surviving partner of the decedent, had sold partnership effects to the amount of \$408.76. There was no evidence that the amount of debts due from the partnership was ever ascertained, or that any settlement of the partnership transactions had ever been made, but it was proved that the administrator had exhibited to a witness a statement of partnership debts which he had paid, amounting to about \$200, thus leaving a balance of \$200 unaccounted for by him, one-half of which balance exceeded the amount of the judgment. Held, that the administrator was liable on his bond. *Wayt v. Peck*, 9 Leigh 434.

(4) Allegata and Probata.

A declaration on an executorial bond which alleges the recovery of a judgment *de bonis testatoris* against an executor and an execution issued thereon, with return of *nulla bona*, is not sustained by the introduction of a judgment against the executor *de bonis propriis*. *Crumbacker v. Seabright*, 15 W. Va. 590.

h. Verdict.

Where the defendant, in an action of debt on an administration bond, pleads that he has fully administered the goods that have come into his hands, and the plaintiff replies the defendant had more than enough to satisfy the judgments in the plea mentioned, the verdict should ascertain the value of the assets unadministered. *Booth v. Armstrong*, 2 Wash. 301.

i. Judgment.

Form.—Where a decree is granted against an executor *de bonis testatoris*, when it should have been *de bonis propriis*, a surety can not take advantage of the error. *Franklin v. Depriest*, 13 Gratt. 257.

When Sufficiency of Assets Fixed as to Sureties by Judgment on Bond.—A personal decree was made against an administratrix in favor of the distributee of an estate, of which her intestate was administrator, without an account or admission of assets by her, which upon appeal was for this cause reversed. Previous to the appeal, in an action on the administration bond, a judgment was recovered against her sureties for the amount of the decree; and upon the appeal by the administratrix, the sureties filed a bill to enjoin the judgment against them, on the ground of errors in the decree as against the estate of the intestate of the administratrix; and in their bill they charge that the administratrix had distributed a large estate among the distributees of her intestate; and they prayed that, if the decree against the administratrix should be affirmed, these

distributees should be compelled to relieve them. Held, that though the personal decree against the administratrix should be reversed for want of proper evidence of assets in her hands, yet as it was affirmed as against the estate of her intestate, that, as to the sureties, the sufficiency of the assets not being denied in their will was determined by the judgment against them. *Wills v. Dunn*, 5 Gratt. 384.

Equitable Relief against Judgment.

In a suit on an administration bond for the benefit of distributees, two of whom were the administrators, judgment was rendered for the whole amount of the inventory against the executors of the sureties alone. On a bill to enjoin this judgment, it appeared by the *ex parte* settlement of the administrators in a county court that a considerable part of the estate had been *bona fide* disbursed by them, and partly to some of the distributees. Held, that relief should be granted, although no defense had been made at law. *Wall v. Gressom*, 4 Munf. 110.

Where an executor has confessed judgment in an action against him on his official bond, he can not be relieved in equity against such judgment on the ground that he has fully administered the assets of the estate. *Worsham v. McKenzie*, 1 Hen. & M. 342.

8. Remedy in Equity.

General Consideration.—A bill in equity was filed in favor of legatees against the personal representatives of a deceased executor and the sureties and representatives of deceased sureties of such executor, seeking a discovery of assets and calling for settlement of the accounts of the deceased executor, charging a variety of acts of maladministration and that he had died insolvent, and claiming to subject the defendants to the payment of whatever should appear to be due. The defendants demurred to the bill, on the ground that the remedy for the devastavit, if any, was at law and not

in equity. The demurrer was overruled by the unanimous opinion of the court. After pointing out the form, condition, and legal effect of the bond required by the laws of Virginia, and adverting to the difficulty of the courts at law in establishing a devastavit in a suit upon the bond against the sureties under the local procedure, the court said: "But widely different is the mode of proceeding in a court of equity. Wherever a case occurs, over which it has jurisdiction, it may at once convene all the parties, however remotely concerned in interest; and pending the same suit, and by a proceeding forming a part thereof, may ascertain the fact whether the devastavit has been committed or not; and if it shall appear by that procedure that a devastavit has been committed, then, and not before, will it subject the securities, although they have all along been held in court for their own benefit, to attend to investigations in which they were so materially interested. There is, however, no difference in this respect between courts of law and courts of equity, except in the forms of their proceedings, and the ability which is thereby afforded to courts of equity to give relief in some cases where courts of law could not." *Spottswood v. Dandridge*, 4 Munf. 289.

Establishment of Demand as Condition Precedent.—Although in the case of a creditor the demands must be established against the executor before a suit can be brought on the administration bond, yet in the case of the legatee, a suit in equity may be brought upon it in the first instance, because decree can be made so as to operate against the executor in the first instance, and an account of the assets can be taken at once. *Taliaferro v. Thornton*, 6 Call 21. Compare *Spottswood v. Dandridge*, 4 Munf. 289; *Bachelder v. Elliott*, 1 Hen. & M. 10.

Decree.—Where the settled accounts of an administrator show that assets sufficient to pay all of the intestate's

debts came into his hands, it is not premature to decree against his sureties without first taking accounts in the suit on the bond. *Morrison v. Lavell*, 81 Va. 519.

Where a suit is brought against an executor and his sureties, and the executor confesses assets, a decree may be entered immediately against the executor, with liberty to the creditors to proceed against the sureties by motion, if necessary. *Jones v. Hobson*, 2 Rand. 483.

In a bill by a creditor against an administrator and his sureties, charging a devastavit by the administrator, and the liability of his sureties for it, though some of the sureties insist in their answer that under the circumstances one of the sureties is liable to the others, if they are liable to the plaintiff, though there is a decree for the plaintiff, and though it appears from the proofs that the devastavit was occasioned by a payment of a debt of inferior dignity to the surety sought to be charged, yet it is not a proper case for a decree between the codefendants. *Allen v. Morgan*, 8 Gratt. 60.

9. Rights and Liabilities of Sureties.

a. Payment by Surety as Constituting Debt.

Costs.—Where a surety on an administrator's bond pays costs decreed against her principal, such payment becomes a debt due her from the administrator, and bears interest as any other debt against him. *Garland v. Garland*, 2 Va. Dec. 351.

b. Establishing Fact of Suretyship.

The entry in a "fiduciary book," in which Va. Code, 1849, ch. 132, § 1, and Code, 1860, ch. 132, § 1, required the clerk of the court to keep a record of personal representatives and their sureties, is, in the absence of the bond and other records, which were lost during the war, sufficient to show the fact of the suretyship of the persons named therein. *Hinton and Richard-*

son, JJ., dissenting. *Timberlake v. Jennings*, 1 Va. Dec. 741.

c. Scope of Liability and Duration.

(1) Limited by Terms of Bond.

The liability of a surety in the bond of an administrator or executor is limited by the terms of its covenants, and can not be extended by implication. *Hooper v. Hooper*, 32 W. Va. 526, 9 S. E. 937.

The securities for an executor and administrator can not be sued in equity until a devastavit is fixed upon the principal, in a previous suit against him, except in cases where, from some inevitable necessity, a creditor is obliged to come into equity, in the first instance, against the principal; and then, to prevent a circuitry of actions, the securities should be made parties. *Bachelder v. Elliott*, 1 Hen. & M. 10.

Where an executor dies without any personal representative, a court of equity may, at the suit of a legatee, and without any previous suit having been brought against the executor to convict him of a devastavit, convene the securities of the executor, or their representatives, and the persons who would be interested in any estate which the executor may have left, and make the securities liable for any misapplication or wasting of the assets which may be established in the progress of such chancery suit. *Spottswood v. Dandridge*, 4 Munf. 289.

(2) Effect of New Bond and Securities.

Indemnification of Sureties on Old Bond.—Where administrators are required to give a new bond with other sureties, the second bond relates back to the time of their qualification; and if, between the giving of the two bonds, any cause of action has arisen against the sureties on the earlier bond, the sureties on the later one are bound to indemnify them. *Lingle v. Cook*, 32 Gratt. 262. See ante, "Requiring New or Additional Bond," IV, M, 2.

In a proceeding to contest the probate of a will, an appeal was taken from the judgment of the county court to the circuit court. The executor was immediately appointed curator, under Code, 1860, ch. 122, § 24, and in qualifying as such gave bond with the same sureties as those on his executorial bond. After a dismissal of the appeal, he failed to settle his accounts as such fiduciary and was required, on the motion of his sureties, to give new bonds with new sureties both as curator and as executor, under chapter 132 of the West Virginia Code of 1860. Held, that the second bond as curator was a nullity, his functions as curator having ceased at the dismissal of the appeal; that the sureties in the first curatorial bond were responsible for any devastavit before the money and personal property were paid and made over to him in his executorial capacity; and, that the sureties in the second executorial bond were liable for any devastavit committed by him as executor, the sureties in the first executorial bond being thereby saved harmless. *Perry v. Campbell*, 10 W. Va. 228. See post, "Release, Discharge or Exoneration," IV, M, 9, c. (5).

(3) Proceeds of Land Sold under Authority of Will.

Under the former provisions of the statute concerning executor's bonds, 1 Rev. Va. Code, ch. 104, § 21, the sureties of an executor were not responsible for the proceeds of land sold by him under a power in the testator's will. *Burnett v. Harwell*, 3 Leigh 89.

A testator died in 1836. By his will he gave certain specific and general legacies, and then directed that certain land, and his personal property should be sold, which, with debts due, should be a fund for the payment of his debts. An administrator c. t. a. qualified and executed a bond with sureties, the condition of which only bound them for the faithful administration of the personal estate, and that he should "de-

liver all the legacies contained and specified in said will." He sold the land, and out of the general fund paid debts; but upon a settlement of his accounts was largely in arrear. Held, the sureties were not liable for the due administration of the land. *Murphy v. Carter*, 23 Gratt. 477.

(4) Devastavit Where Principal Is Administrator of Debtor and Creditor Estates.

Where the estate of one decedent is indebted to that of another, and the same person is administrator of both, and wastes assets of the debtor estate, which he was bound, but has failed, to pay over to the creditor estate, the sureties for his due administration of the creditor estate are liable for such default and devastavit. *Morrow v. Peyton*, 8 Leigh 54; *Smith v. Gregory*, 26 Gratt. 248, 261, 265; *Caskie v. Harrison*, 76 Va. 85; *Septoe v. Harvey*, 17 Gratt. 289, 311.

But the sureties for the due administration of the debtor's estate are also liable for such waste. *Morrow v. Peyton*, 8 Leigh 54, 76, 77, 78; *Smith v. Gregory*, 26 Gratt. 260. This rule also holds good where a person is acting in the dual character of administrator and guardian. *Smith v. Gregory*, 26 Gratt. 248; *Morrow v. Peyton*, 8 Leigh 54.

(5) Release, Discharge or Exoneration.

(a) Discharge of Principal.

Where a court, during the same term, appoints an administrator, removes him and reappoints him with additional administrators, the sureties on the first bond of such administrator are not responsible for a devastavit of the administrators. *Lingle v. Cook*, 32 Gratt. 262.

(b) Effect of New Bond Being Given.

The "other good security" authorized to be required by 1 Rev. Va. Code, ch. 104, § 41, is not in lieu of the former security, but in addition thereto, and the former securities are not thereby exonerated. *Atkinson v. Christian*, 3

Gratt. 448. See ante, "Requiring New or Additional Bond," IV, M, 2.

In an action of debt on an administration bond, the sureties, relying upon a new bond entered into upon a petition filed by them in the county court, whereby they were discharged from liability, pleaded such record in bar. Held, that the plaintiff was entitled to judgment, because the record only recited that the motion for a new bond was granted, and did not state that the new bond was ever entered into. *Robinson v. Williamson*, 12 Leigh 93.

(c) Payment of Distributees by Note of Principal.

An administrator, being indebted to an insane distributee of his intestate's estate, gave the committee of such distributee his bond for such distributee's share of the estate, and took a receipt reciting that the note of the administrator had been received for the amount of such indebtedness, and the administrator, in a subsequent ex parte settlement of his accounts, was credited with such amount. Held, that the sureties in his administration bond, on his insolvency, without payment thereof, were liable for such amount, and that the bond would not be deemed a payment. *Hoge v. Vintroux*, 21 W. Va. 1; *Sampson v. Goochland Justices*, 5 Gratt. 240, 257.

(d) Retention of Property by Executor or Administrator in Other Capacity.

If a decree of court takes property out of the hands of an administrator and places it in his hands as commissioner of the court, the sureties of the administrator are thereby as completely discharged from liability as they would have been if the administrator and commissioner were different persons, and the former had delivered the property to the latter under the said decree. *Odell v. Howle*, 77 Va. 361; *Andrews v. Avory*, 14 Gratt. 229. See also, *Dillard v. Dillard*, 77 Va. 820, 73 Am. Dec. 355.

If an administratrix settles her account as such, in which a balance is found due to the estate of the intestate, and then she qualifies as guardian of the infant children of the intestate, and receives their distributive shares into her hands, the sureties in the administration bond are absolved from the claim of the distributees, and the sureties in the guardian's bond are bound to them. *Myers v. Wade*, 6 Rand. 444.

"The law is well settled that where an executor or administrator having assets in his hands, becomes the guardian of the legatee or distributee he may elect to hold the share of such legatee or distributee in his character of guardian; and thus while he charges his sureties in the guardian bond he exonerates those in the administration bond. And it is equally well settled, that in order thus to shift the responsibility from one class of sureties to the other, some distinct act or declaration is necessary on the part of the executor or administrator, indicative of his intention to hold the fund in his character of guardian. *Myers v. Wade*, 6 Rand. 444; *Swope v. Chambers*, 2 Gratt. 319; *Alston v. Munf*, 1 Brock. R. 266, 278; note 6." *Smith v. Gregory*, 26 Gratt. 248. As to the necessity of some act showing such transfer, see also, *Williams v. Sloan*, 75 Va. 137.

An executor who has wasted the assets can not, upon his subsequent qualification as guardian relieve his sureties upon his executorial bond by electing to transfer his liability as executor to his account as guardian. *Smith v. Gregory*, 26 Gratt. 248; *Utterback v. Cooper*, 28 Gratt. 233; *Caskie v. Harrison*, 76 Va. 85.

"This doctrine has of course no application to a case in which the surviving partner, being also executor, has the assets actually in hand, which, not being needed for partnership debts, ought to be paid to himself as executor. In *Morrow v. Peyton*, 8 Leigh 54, this court held, that where the estate of one

intestate is indebted to the estate of another intestate, and the same person is the administrator of both, and wastes the assets which he ought to have paid over to the creditor estate, the sureties for the due administration of the creditor estate are liable for the misapplication." *Caskie v. Harrison*, 76 Va. 85.

"A fiduciary can not transfer his mere indebtedness in one capacity to himself in another capacity, so as to exonerate his securities in the one and throw the burden upon his securities in the other. To make the transfer valid it must consist of something more than a naked liability; it must be substantial assets, if made by an insolvent fiduciary. * * * But if the fiduciary is solvent and able to pay over the funds, all that is necessary is for him, when he is ordered to pay it over, or when the law would authorize him to pay it over to a third person holding the fiduciary character, to make his election and manifest it by some act, direction or admission." *Board of Education v. Cain*, 28 W. Va. 758; *Gilmer v. Baker*, 24 W. Va. 92.

(e) Laches in Prosecuting Action against Principal.

In *Roberts v. Colvin*, 3 Gratt. 358, it is held, that the lapse of time during which the ward was prosecuting a claim against the administratrix of the guardian furnishes no ground for the exoneration of the surety; the statute of limitations not applying to the case. But in *Morris v. Duke*, 2 Pat. & H. 462, citing and distinguishing *Roberts v. Colvin*, 3 Gratt. 358, and *Cookus v. Peyton*, 1 Gratt. 431, it was held, that pendency of a suit by those entitled to the estate against the administrator and his sureties, to which such person is no party, is no excuse for their laches in prosecuting their claim against him.

(f) Death—Joint Obligation.

If a bond be made joint, without fraud or mistake, equity will not charge the executor of the surety, who was

discharged at law, by his death, in the lifetime of the principal. Aliter, if the lending had been to both. *Harrison v. Field*, 2 Wash. 136.

Proceedings to Enforce Exoneration.—A surety, whose principal is dead, may file a bill quia timet against the creditor and the executor of the debtor, to compel the latter to pay the debt so as to exonerate the surety from responsibility. He may enforce for his exoneration any lien of the creditor on the estate of his principal, and may bring any suit in equity which the creditor could bring, for a settlement of the administration account on the estate of the deceased, and for the administration of the assets, whether legal or equitable; but the creditor must be a party that he may receive the money when it is recovered. *Stephenson v. Taverners*, 9 Gratt. 398.

(6) Liability of Sureties of Public Administrator after Expiration of Office.

Where the administration of a decedent's estate was committed to a sheriff under the statute, and the administration was conducted by his deputy, it was held that both the sheriff and his sureties were responsible for the administration of the deputy after, as well as before, the expiration of the sheriff's office. *Dabney v. Smith*, 3 Leigh 13. See ante, "Appointment, Qualification and Tenure of Office," II.

d. Conditions Precedent to Proceedings against Sureties.

Fixing Devastavit.—The sureties of an executor or administrator can not be sued in equity until a devastavit is fixed upon the principal in a previous suit against him, except in cases where, from some inevitable necessity a creditor is obliged to come into equity, in the first instance, against the principal; and then, to prevent a circuity of actions, the sureties should be made parties. *Bachelder v. Elliott*, 1 Hen. &

M. 10. See also, ante, "Scope of Liability and Duration," IV, M, 9, c.

It seems, that the executor or administrator must be convicted of a devastavit, by a verdict in a second suit, finding that "he has wasted the assets," or "has eloiigned, disposed of, and converted the same to his own use," before an action can be sustained against the sureties. *Catlett v. Carter*, 2 Munf. 24.

A verdict and judgment against an executor or administrator are not conclusive evidence against his surety; nor are they conclusive even against the party against whom they are rendered, unless they are pleaded as an estoppel. *Henrico Justices v. Turner*, 6 Leigh 116.

Before the act of February 7th, 1814, "concerning executors and administrators" (Sess. Acts of 1813, ch. 13, p. 40), a decree in chancery against an executor or administrator, directing him to pay a debt of his testator, or intestate, out of the assets in his hands to be administered, with a fieri facias and return of nulla bona, was not sufficient evidence of a devastavit to authorize an action against the securities in the administration bond; but it was necessary to bring a previous suit against the executor or administrator, suggesting the devastavit. *Gordon v. Justices of Frederick*, 1 Munf. 1; *Meade v. Brooking*, 3 Munf. 548; *Catlett v. Carter*, 2 Munf. 24; *Moore v. Ferguson*, 2 Munf. 421.

Order of Reference.—Where a plaintiff had the right to sue in equity because the administrator had failed to make the settlements required by law, had wasted the assets and become insolvent, making a resort to his sureties necessary, and having the right to sue, upon the confession of assets sufficient to pay the debt demanded, it was held, that an order of reference was wholly unnecessary, but decree could go at once. *Thompson v. Nowlin*, 51 W. Va. 346, 41 S. E. 178, citing *Hale v. White*, 47 W. Va. 700, 35 S. E. 884.

Where There Is an Allegation of No Estate.—Where bill alleges that principal has no estate, and the allegation is not denied, but is proven, it is not error to decree at once against the estate of the surety. *Jones v. Degge*, 84 Va. 685, 5 S. E. 799; *Penn v. Ingles*, 82 Va. 65.

10. Proceedings by Sureties.

A surety in a bond having paid to the creditor the amount of a judgment against him thereupon, may file a bill in equity (without having made a motion or brought any action at law) against the administrator and heirs of the principal obligor; for the purpose of establishing his demand; of having an account of the personal and real estates; and of being permitted to stand in the place of the obligee in the bond, so as to be paid out of the real estate in default of the personal. *Tinsley v. Oliver*, 5 Munf. 419.

N. RESORT TO COURT FOR DIRECTION AND ADVICE.

If an executor or administrator with the will annexed is embarrassed in the performance of his duty, on account of doubt, as to the true meaning of the will, he has a right to file a bill, asking the court to construe the will in advance of his action on his own construction, so as to avoid the hazard of litigation. But if he is seeking merely the construction of a clause in the will, which, in the actual condition of the estate as shown by his bill, is not a present embarrassment to him in the performance of his duties, and probably never will be, the court ought to dismiss his bill on demurrer. *Rexroad v. Wells*, 13 W. Va. 812. See also, *Young v. Cabell*, 27 Gratt. 761.

The executor or administrator may apply, by a proper proceeding, to a court of equity for its aid and relief, when he finds the affairs of his testator or intestate so much involved that he can not safely administer the estate except under the direction of the court. In such case it is competent

for him to institute a suit against the creditors of the estate, generally, for the purpose of having all their claims adjusted, and a final decree settling the order and payment of the assets. The court will also lend its aid and relief, in a proper case, under such special circumstances as show that injustice will be done to the personal representative, or injury result to the estate, if such aid and relief be refused. *Hanna v. Galford*, 55 W. Va. 160, 47 S. E. 359.

An administrator with the will annexed having in his possession slaves of his testator and being in doubt whether they are emancipated by the will, may come into equity, making the legatees and next of kin of the testator parties, and ask the court to construe the will. And in this suit, the court, being of opinion that the slaves are emancipated by the will, may decree in their favor, and direct that they be freed. *Osborne v. Taylor*, 12 Gratt. 117.

O. ACTIONS BY OR AGAINST PERSONAL REPRESENTATIVES.

See generally, the title ACTIONS, vol. 1, p. 122.

1. Actions by Executors or Administrators.

a. Jurisdiction and Venue.

A devisee of nearly all the estate of a principal debtor, gave a bond to indemnify the estate of the surety against the debt; in which bond one of the executors of the surety bound himself, in his individual character, as surety for the said devisee. The creditor, afterwards, obtained a judgment, in the federal court, against the said executors; one of whom, the same who was co-obligor in the bond of indemnity, paid off the judgment. The bond being in the possession of one of the obligees, who resided out of the state, and refused to let them have it, the executors brought a suit in chancery, against the devisees, the plaintiffs and defendant being all citizens and residents of this

state, to recover of him the money so paid; and the court's jurisdiction was sustained. *Cabell v. Megginson*, 6 Munf. 202.

b. Capacity and Right to Sue.

(1) General Consideration.

The executor or administrator is the proper representative of the personal estate of a decedent, and generally all suits in relation thereto should be brought by him. *Richardson v. Donehoo*, 16 W. Va. 685.

Qualification a Condition Precedent.—"To sue or be sued he must have qualified within the state where the suit is brought; nor can he (unless he has qualified here) even sue jointly with one who has qualified within the state." *Barton's Law Pr.* (2d Ed.) 244; *Watson v. Pack*, 3 W. Va. 154.

Joinder.—An administration granted in another state does not give the administrator appointed there a right to sue jointly with an administrator appointed in Virginia. *Dickinson v. McCraw*, 4 Rand. 158. See post, "Foreign Executors and Administrators," VIII.

The representatives of two deceased persons can not be joined in the same action, although the undertaking of the testators might have been joint and several. *Grymes v. Pendleton*, 4 Call 130.

Joint Administration—Consent of Coexecutor.—If one of two executors take a bond to himself as executor of the testator, without mentioning the other, his executor may sue upon it, notwithstanding the other executor survived him, and acted as such, and gave no assent to the institution of the suit. *Pulliam v. Johnson*, 4 Munf. 71.

An administrator not having settled his accounts nor paid the debts of the estate, but squandered the fund, and being insolvent, may be sued in chancery, and it is proper in such suit, to save a multiplicity of suits to join his sureties. *Thompson v. Nowlin*, 51 W. Va. 346, 41 S. E. 178; *Hale v. White*, 47 W. Va. 700, 35 S. E. 884; *Beverly v. Rhodes*, 86 Va. 415, 10 S. E. 572.

Concerning Partnership Affairs.—

The personal representative of a deceased partner, as a general rule, is the only person who has the right to sue the surviving partner for an account of the partnership affairs; but, under special circumstances, a distributee, legatee or creditor of the decedent may file a bill against the personal representative of the decedent and the surviving partner. *Conrad v. Fuller*, 98 Va. 16, 34 S. E. 893, 5 Va. Law Reg. 686.

Suit on Bond Where He Is an Obligor.—Where an administrator is one of the obligors in a bond for the payment of a sum of money to the decedent, he can not maintain an action against his co-obligors to enforce the payment of the money. *Rodes v. Rodes*, 24 Gratt. 256.

On Bond Executed to Deceased Executor.—An administrator may declare in the debet and detinet on a bond executed to himself as such, and his executor or administrator has the right to bring an action upon it. *Bowden v. Taggart*, 3 Munf. 513.

On Bond Payable to Himself.—A decree authorized an executor to lend money belonging to his testator's estate on real estate as security, to take bonds in his own name as executor, the interest to be paid semi-annually, and the principal when he should require, and to hold and account therefor as executor. Held, that he was entitled to sue on the bonds without any further order of the court directing him to collect the money. *Cabell v. Cox*, 27 Gratt. 182.

Joinder of Heirs.—An administrator and heir of a decedent can not maintain an action in equity for money alleged to be due the decedent's estate. *Graveley v. Gravely*, 84 Va. 145, 4 S. E. 218.

(2) Particular Grounds.

Injury to Testator by Malfeasance.—

Quære: Whether an action upon the case lies in favor of an executor of a person injured by the malfeasance in

office of the clerk of a court. *Monroe v. Webb*, 4 Munf. 73.

To Recover Balances Due Individually from Estate.—Under Va. Code, § 2668, declaring that a devisee may be sued in equity by any creditor to whom a claim is due, for which the estate is liable, or for which the devisee is liable, in respect to the estate, an executor was entitled to maintain a bill against devisees in which it was alleged that on the settlement of his accounts a sum was found due him from the estate, and that no assets remained in his hands. *Leavell v. Smith*, 99 Va. 374, 38 S. E. 202.

Guardian of Decedent's Wife for Estate of Latter.—It seems that the executor or administrator of a husband, who had survived his wife, but had never taken administration on her estate, may sue the guardian of the wife for her estate committed to him. *Templeman v. Fauntleroy*, 3 Rand. 434.

(3) Particular Actions or Proceedings.

Debt on Replevin Bond.—See generally, the title DEBT, THE ACTION OF, vol. 4, p. 269; FORTHCOMING AND DELIVERY BONDS.

Executors may maintain an action of debt upon a three months' replevy bond payable to their testator. *Booker v. M'Roberts*, 1 Call 243.

Foreclosure of Mortgage.—The executors of the mortgagee of slaves, and not the heir, should bring the bill to foreclose, and, if there be no executors or administrators, it should be suggested, and the children of the mortgagee should be made parties. *Harrison v. Harrison*, 1 Call 419.

Suit against Legatees for Contribution.—If without fraud or collusion, a decree be rendered, by a court of competent jurisdiction, against an executor, he may bring his suit in equity against the legatees, for contribution to satisfy such decree, without paying the money himself; and without having appealed to a superior court, though requested and advised to do so. *Bower v. Glendening*, 4 Munf. 219.

Unlawful Detainer.—A, of New York, the owner of a tract of one hundred and eighty-five and one-half acre of land in X county, by a sufficient writing, constituted D, a resident of said county, his attorney in fact, to sell and convey the same. D. sold and conveyed the land to B, who, being unable to pay for it, reconveyed it to D, attorney in fact for A. After the death of A, D conveyed the land to C, executor of the last will and testament of A, his heirs and assigns. Held, that C, executor of A, could maintain an action of unlawful detainer for said land; the will, if any, not having been reprobated in X county of this state, and the words "executor of the last will and testament of A," in said deed of D being merely descriptio personarum. *Bulkley v. Sims*, 48 W. Va. 104, 35 S. E. 971.

Writ of Error.—It is a general rule, that no person can bring a writ of error, who is not a party or privy to the record; but the right to bring the writ of error in case of the death of the party, against whom the judgment was rendered, will be in the personal representative without a revival of the judgment, because the personal representative stands in the shoes of the deceased, and the same rights, as his intestate had, with reference to the judgment. *Phares v. Saunders*, 18 W. Va. 336.

(4) Right to Sue in Representative or Individual Capacity.

A testator, shortly before his death, gave his wife certain bank notes to hold until he should get well. After his death, she refused to deliver them to the executor. Held, that the cause of action not having occurred until the death of the testator, the executor was entitled to sue for the money in his own name or as executor. *Lawson v. Lawson*, 16 Gratt. 230, 80 Am. Dec. 702. See also, *Vanderwerken v. Glenn*, 85 Va. 9, 6 S. E. 806.

In *Spooner v. Hilbish*, 92 Va. 338, 23

S. E. 751, it is said: "The plaintiff being both a creditor and the personal representative of the debtor, he might have brought the suit in his own right as creditor and made himself in his fiduciary character a party defendant. *Rodes v. Rodes*, 24 Gratt. 256; *Boothe v. Kinsey*, 8 Gratt. 560. He chose to bring the suit in his dual character of creditor and personal representative, as was done in *Shields v. Anderson*, 3 Leigh 729. In this there was no error, and certainly not under the allegations of the bill. See *Spoon v. Smith*, 36 S. C. 588, 15 S. E. 801, and *Werts v. Spearman*, 22 S. C. 217."

Failure of Administrator to Sue—Right of Creditors.—Where the personal representative of a decedent has failed to institute the suit prescribed by W. Va. Code, 1868, ch. 87, § 7, to ascertain outstanding claims, any creditor may prosecute that action after the expiration of six months from the qualification of such personal representative, whether he has obtained judgment on his claim or not. *Broderick v. Broderick*, 28 W. Va. 378.

(5) Revivor of Actions.

See generally, the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2.

Upon the death of a surviving executor, it was held competent and proper to revive the suit in the name of the administrator de bonis non of the testator, he being invested by law with the right to prosecute it. *Bell v. Humphrey*, 8 W. Va. 5.

A proceeding having been instituted under the 9th section of the act of February 23, 1835, Sess. Acts, p. 82, in relation to the Upper Appomattox Company, for the purpose of recovering damages to land occasioned by the improvement of the company. The jury returned their verdict ascertaining the damages; and the company filed exceptions, and obtained a continuance of the cause; and then the plaintiff died. Held, the proceeding may be

revived by the proper party against the company. The administrator, and not the heirs of the plaintiff, is the proper party to revive the proceeding. *Upper Appomattox Co. v. Hardings*, 11 Gratt. 1.

(6) Averment and Proof of Representative Capacity.

Where one sues as executor or administrator, or in other representative character, there need be no proof of his appointment or authority, unless a plea denies it. A plea to the merits admits the right of the plaintiff to sue as he does. *McDonald v. Cole*, 46 W. Va. 186, 32 S. E. 1033.

"The defense makes the point that, under the plea of non assumpsit, it rested on the plaintiff to prove that he had been legally appointed administrator. This position can not be sustained. There is a plea distinctively called in the books on common law pleading, a plea of "ne unques executor" (or "administrator")—"never executor." It must be used where it is intended to deny the right of the person to sue as executor or administrator, else his capacity to sue as such is admitted." *McDonald v. Cole*, 46 W. Va. 186, 32 S. E. 1033.

Allegation of Representative Character.—In a bill in equity by an executor, as such, he ought to describe himself as the executor of his testator. *Capehart v. Hale*, 6 W. Va. 547.

Necessity of Profert or Production of Letters.—Where an administrator brings a suit, he is not bound to produce the evidence of his administration, unless notified that it will be required. *Hughes v. Clayton*, 3 Call 554.

c. Effect of Action on Limitation against Claims.

See post, "Limitations and Laches," IV, O, 3.

When an administrator or executor sues in equity to convene the creditors of the estate and administer its assets for the benefit of all the creditors, the statute of limitation stops running

against their debts at the commencement of the suit for the purposes of that case. *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544.

d. Bill, Declaration and Subsequent Pleadings.

(1) Mode of Describing Personal Representative.

In a bill in equity preferred by an executor, as such, he ought to describe himself as the executor of his testator. *Capehart v. Hale*, 6 W. Va. 547.

Where a declaration commenced in the name of the plaintiff as executor of the testator, but charged that the defendant was indebted to the plaintiff and promised to pay the plaintiff, it was held, on demurrer, that the allegations should be construed as referring to the plaintiff in his character of executor. *Lawson v. Lawson*, 16 Gratt. 230, 80 Am. Dec. 702.

Upon an obligation to A by the name of executor of B, the action should be brought by A in his individual character, and he ought regularly to declare in the debet and detinet; but though the declaration be in the detinet only, it will not be held bad for this cause. The allegation of the debet is such mere matter of form, that the omission will be disregarded even on special demurrer. *Bailey v. Beckwith*, 7 Leigh 604.

(2) Allegations as to Nonpayment of Debt.

In an action by a surviving executor for a debt due to the testator in his lifetime, if the declaration charge that the debt was not paid to the plaintiff, without charging, also, that it was not paid to the testator, nor to either of the coexecutors, the defect is fatal, and not cured by verdict. *Buckner v. Blair*, 2 Munf. 336.

(3) Parties.

To the bill of an executor to obtain specific execution of a contract for the sale of land, the heir, upon whom the legal title descended, or the devisee to whom by the will it was given, should

be a party. It should not, by the bill, be left in doubt, whether the title of the decedent passed to a party to the suit, or not. *Capehart v. Hale*, 6 W. Va. 547.

An administrator of a husband and also of the wife sued in equity in both characters to recover a fund, it being doubtful whether the right thereto was in his or her estate. Held, that the bill was not demurrable for misjoinder of parties. *Brent v. Washington*, 18 Gratt. 526.

It is a misjoinder of parties for the administrator and heirs of a decedent to unite as plaintiff in a suit to collect money due the estate; the administrator alone should bring such suit. *Graveley v. Graveley*, 84 Va. 145, 4 S. E. 218.

Where a foreign administrator and a domestic administrator both come into a cause by petition to assert the same demand in the name of the decedent, the domestic administrator is the proper party to represent the estate. *Crumlish v. Shenandoah Val. R. Co.*, 40 W. Va. 627, 22 S. E. 90.

Defects or Objections Cured by Verdict.—Where an administrator declares in trespass for breaking his close and taking away slaves belonging to the estate of the intestate, it will be intended after verdict, that the plaintiff was in possession thereof for the purpose of finishing the crop, by virtue of the act of assembly. *Moore v. Dawney*, 3 Hen. & M. 127.

(4) Multifariousness.

Testator willed a special fund to his widow for life, remainder to two daughters, and to their children if they died before the widow. The husbands of the two daughters, as the executors, gave separate bonds. The daughters and one executor predeceased the widow. The other executor and his only child sued administrator and children, and joined testator's widow as defendant, the bill alleging that deceased executor had misappropriated

the general and special fund left by testator, and asked for an accounting and an allowance of the claims against the executor's estate. Held, the bill was not multifarious. *Brown v. Buckner*, 86 Va. 612, 10 S. E. 882.

A was administrator of a husband and wife, and it being doubtful whether the right of a fund was in the estate of the husband or the wife, he sued for it in equity in both characters. It was held, that the bill was not demurrable for misjoinder of parties. *Brent v. Washington*, 18 Gratt. 526.

(5) Amendment.

See generally, the title AMENDMENTS, vol. 1, p. 316.

Where an executor has a claim against the estate of his testator, depending on a quantum meruit only, he may exhibit a bill in equity against his coexecutors and legatees, to have such claim established and fixed at a certain sum. In such case, he ought to state the claim with reasonable certainty, by setting forth his own estimate of his service; but, should he fail to do so, his bill ought not to be dismissed, but leave to amend it should be granted on motion. *Baker v. Baker*, 3 Munf. 222.

Where there are two administrators, their relations inter se are fiduciary and they may be held to account, each by the other, in a court of equity touching transactions between themselves connected with the administration of the trust. This equitable jurisdiction extends to cases of account between tenants in common, joint tenants, partners, and by analogy between executors and administrators, who have a joint and entire interest in the effects of the testator or intestate. *Huff v. Thrash*, 75 Va. 546.

e. Pleas and Issues.

The plaintiff as administrator of his intestate brought his action in assumpsit against the defendant, who pleaded nonassumpsit. Held, that by pleading to the merits, the defendants admitted the character in which the

plaintiff sued, and that if the defendant proposed to require proof of the qualification he must do so by a special plea of ne unques executor (or administrator). *McDonald v. Cole*, 46 W. Va. 186, 32 S. E. 1033.

It is not sufficient to aver in a plea that the defendant was not executor at the time the suit was brought. In order to make a good plea of ne unques executor it must be averred that the defendant never was executor of the last will and testament of the deceased, and that he never administered any of the goods and chattels which were of the deceased at the time of his death, as executor of the last will of the deceased. *Lively v. Ballard*, 2 W. Va. 496.

f. Evidence.

Promise by Executor on Assumpsit of Testator.—In an action upon a promise by a testator, a promise by his executor can not be given in evidence to establish the demand. *Quarles v. Littlepage*, 2 Hen. & M. 401, 2 Am. Dec. 637.

In a suit by a personal representative of the testator to recover for chattels converted by a legatee for life, the personal property of the assessor would not be admissible to show the value of the personal estate of the testator or the legatee for life. *Bartlett v. Patton*, 33 W. Va. 71, 10 S. E. 21.

g. Decree.

A bill by an executor to administer the assets of his testator for the payment of debts states that a person named claims a debt against the estate on a specific demand, and such person is made a formal party, but does not prove his claim or appear. A decree is made allowing certain debts, but not his debts, and subjecting the estate's land to their payment. Held, that he is concluded by the decree. *Trail v. Trail* (W. Va.), 49 S. E. 431.

A decree in a suit by an executor against devisees to convene creditors and administer the assets for their

payment, made on a report of debts by a commissioner, which decrees debts against the estate, and subjects its lands to their payment, is appealable, and must be appealed from within two years. *Trail v. Trail* (W. Va.), 49 S. E. 431. See generally, the title APPEAL AND ERROR, vol. 1, p. 418.

h. Injunction.

See generally, the title INJUNCTIONS.

An injunction in favour of an executor or administrator on the ground of a deficiency of assets, should not be perpetual; but only until assets shall come to his hands to satisfy the judgment, or any part thereof; reserving to the creditor liberty to show such assets by a scire facias at law. *Haydon v. Goode*, 4 Hen. & M. 460.

2. Actions against Executors or Administrators.

a. Jurisdiction.

(1) Territorial Jurisdiction.

As a general rule, an executor or administrator can not be sued in his official capacity, at law or in equity, in the courts of any state other than that in which he received his appointment. See post, "Foreign Executors and Administrators," VIII.

(2) Equity Jurisdiction.

In General.—A bill by residuary distributees against the executor, the widow, and a third person, which alleges that the executor is unfaithful to his trust, and that he is controlled by a desire to unfairly protect and promote the interests of the other defendants, to the injury of the plaintiffs, and that his relations with the plaintiffs are such that they dare not confer with him, lest any information they might impart would be used to their disadvantage, and that, controlled by these influences, he will make no effort to require the other defendants to account for money possessed by the decedent at his death, and which it is distinctly charged they took and appropriated to their own use, states a case for equitable relief, not-

withstanding interrogatories were propounded which the defendants were justified in declining to answer as incriminating. *Dulany v. Smith*, 97 Va. 130, 33 S. E. 533.

Mere Pretext of Want of Discovery.

—Where the bill shows that the estate is solvent and the assets superabundant, the mere pretext of the want of discovery will not give equitable jurisdiction against a personal representative who is not shown to have neglected any of the statutory requirements relating to his duties as such representative, to the injury of the plaintiff. *Hale v. White*, 47 W. Va. 700, 35 S. E. 884.

Suit for Accounting and Payment of Claim.

—Equity has jurisdiction of a suit by a creditor at large of a decedent against his personal representatives, for an accounting, for the payment of the complainant's claim, and for general relief. *Beverly v. Rhodes*, 86 Va. 415, 10 S. E. 572.

Demand Purely Legal.—When a creditor of a person deceased has a remedy against his executor or administrator at common law, he can not sue in chancery to establish his demand. *Bachelder v. Elliott*, 1 Hen. & M. 10; *Hale v. White*, 47 W. Va. 700, 35 S. E. 884.

Bill by Single Creditor.—Equity has no jurisdiction of a suit by a single creditor of a decedent suing only for himself alone against the administrator and his surety in his administration bond upon a legal demand, where the administrator has made settlements required by law, unless the bill seeks to surcharge or falsify such account; but where the bill seeks to surcharge or falsify, equity has jurisdiction. *Thompson v. Mann*, 53 W. Va. 432, 44 S. E. 246.

(3) Jurisdiction at Law and Equity.

A creditor, having obtained a judgment against an executor as such, and sued out a *fi. fa. de bonis testatoris*, which proved ineffectual, may either

resort to his action at law to establish a devastavit, or file a bill in equity against the executor and legatees, for an account of assets, and proportional contribution to pay the debt. See *Burnley v. Lambert*, 1 Wash. 312. In such case, if there be a dispute between the executor and legatees, whether, under the circumstances, he ought not to pay the debt without any contribution from them, and if some of them be not made parties, the court may with propriety dismiss the bill as to the legatee, but, if it appear that the executor has delivered over to them property of the testator, which would have been sufficient to pay the debt, he ought to be decreed to pay it *de bonis propriis*, and left to his remedy against them. *Sampson v. Payne*, 5 Munf. 176.

In Virginia, under § 13, ch. 144, Va. Code, 1860, an action at law upon an unsettled account with a partnership can be maintained against the personal representative of a deceased partner; but this statute is permissive and the creditor may still proceed in equity, which is generally a more convenient and complete remedy. *Glacbrook v. Harveys*, 1 Va. Dec. 265.

b. Time to Sue and Limitations.

Although the statute allows a personal representative twelve months after qualification to pay legacies and distributive shares, it seems that no restriction is placed by the statute upon the time within which an action may be brought against a personal representative. See note, 5 Va. Law Reg. 876. See, however, *Harris v. Orr*, 42 W. Va. 745, 26 S. E. 455. See post, "Limitations and Laches," IV, O, 3.

c. Liability and Capacity to Be Sued.

(1) General Consideration.

An executor or administrator is the proper representative of the personal estate of a decedent, and generally all suits in relation thereto should be brought against him. *Richardson v. Donehoo*, 16 W. Va. 685.

Qualification a Condition Precedent.—To be sued it seems that he must have qualified within the state where suit is brought. *Watson v. Pack*, 3 W. Va. 154.

(2) In Special Actions or Proceedings.

(a) Trover.

See generally, the title **TROVER AND CONVERSION**.

Trover may be sustained against a personal representative as such, though the goods never came into his hands. *Ferrill v. Brewis*, 25 Gratt. 765.

(b) Detinue.

See generally, the title **DETINUE AND REPLEVIN**, vol. 4, p. 634.

An executor holding slaves in which his testator had only an estate for life, terminable upon his dying without issue living at the time of his death (which event actually took place), may be charged in detinue personally, and not as executor. *Royall v. Eppes*, 2 Munf. 479.

And detinue for property in the possession of an executor, although it was first taken and detained by the testator, is maintainable, and the judgment and process should be against the executor, and not against the estate. *Allen v. Harlan*, 6 Leigh 42, 29 Am. Dec. 205.

But detinue for a chattel lies against an executor as such, provided the chattel actually came into the executor's possession. *Catlett v. Russell*, 6 Leigh 344; *Allen v. Harlan*, 6 Leigh 42, 29 Am. Dec. 205; *Greenlee v. Bailey*, 9 Leigh 526.

Detinue against an executor for property destroyed or converted by his testator, or in the possession of the coexecutor, can not be sustained. *Allen v. Harlan*, 6 Leigh 42, 29 Am. Dec. 205.

(c) Covenant.

See generally, the title **COVENANTS**, vol. 3, p. 741.

An action of covenant respecting real estate will lie against executors, though not expressly bound. *Harrison v. Sampson*, 2 Wash. 155.

In an action against the representatives of a person deceased, on a joint covenant entered into before the act "concerning partitions and joint rights and obligations." (1 Rev. Va. Code, 31), if it appeared from the declaration that one of the joint covenantors survived, it was a radical defect, and not cured by verdict. *Atwell v. Milton*, 4 Hen. & M. 253.

An action can be maintained against an executor for breach of covenant of a lease committed by his testator. *Knotts v. McGregor*, 47 W. Va. 566, 35 S. E. 899.

(d) Garnishment.

See generally, the title **ATTACHMENT AND GARNISHMENT**, vol. 2, p. 70.

As a general rule, the process of garnishment at law does not lie against personal representatives. *Bickle v. Chrisman*, 76 Va. 678; *Whitehead v. Coleman*, 31 Gratt. 784; *Brewer v. Hutton*, 45 W. Va. 106, 30 S. E. 81; *Parker v. Donally*, 4 W. Va. 648. Compare *Vance v. McLaughlin*, 8 Gratt. 289.

Neither an administrator nor a debtor of the estate can be garnished, because it disturbs the proper administration of the estate. *Brewer v. Hutton*, 45 W. Va. 106, 30 S. E. 81.

A judgment creditor garnished a decedent's administratrix and obtained judgment by default de bonis testatoris. The decedent had owed a debt to the debtor of the judgment creditor, but that debtor had assigned it to B., obtained a judgment against the administratrix de bonis testatoris. Held, that the judgment did not bind the administratrix personally because it was de bonis testatoris, and that it did not bind the decedent's estate in her hands, because it is well settled that process on garnishment at law will not lie against a personal representative. *Bickle v. Chrisman*, 76 Va. 678.

(e) Trespass.

See generally, the title **TRESPASS**.

For Mesne Profits.—Trespass for the mesne profits of land, recovered in ejectment against the decedent lies against his executor. *Lee v. Cooke*, Gilmer 331.

(f) Distringas.

No distringas lies against the executors of the old sheriff, to oblige them to sell property taken by him in his lifetime under a writ of fieri facias. *Harrison v. Tomkins*, 1 Call 295.

(g) Motion.

See generally, the title **MOTIONS**.

Replevin Bond—Obligor.—The act of assembly does not give a motion on a three months' replevy bond against executors. *Glassford v. Hackett*, 3 Call 193.

A motion lies against the executor or administrator of a sheriff as well as against the sheriff for clerk's tickets put into his hands for collection. *Lee v. Peachy*, 3 Call 220.

(h) Suit to Contest Validity of Will.

A person acting as executor is not to be made a party in his own right, to a bill filed to contest the validity of the will under which he is acting. *Coaling v. Bryan*, 1 Gratt. 18.

(i) Particular Grounds.

Fraud.—An action on the case for fraud in selling to the plaintiff an unsound slave, which he was induced to purchase by means of a false and fraudulent warranty of soundness, or by means of a fraudulent concealment of the unsoundness of the slave, can not be maintained against the personal representative of the vendor. *Boyles v. Overby*, 11 Gratt. 202.

This case, however, was disapproved in *Lee v. Hill*, 87 Va. 497, 12 S. E. 1052, and the true rule was said to be that, where the cause of action is a tort, unconnected with contract and affecting the person only and not the estate, such, for instance, as assault, libel, slander and the like, the action dies with the person; but, where the action is founded on contract, it is virtually ex contractu, though nominaly

in tort, and, in such case, the action survives.

Claim Originating after Decedent's Death.—A creditor can not maintain a suit to subject the assets of the estate of a decedent to the payment of a claim, originating since his death, by a suit against the personal representative of the estate as such. *Daingerfield v. Smith*, 83 Va. 81, 1 S. E. 599.

d. The Pleadings.

See generally, the title PLEADING.

(1) Bill, Declaration or Petition.

(a) Form and Sufficiency.

In General.—In *Kayser v. Disher*, 9 Leigh 357, 359, the first count in the declaration alleged "that the said defendant executor as aforesaid," by his promissory note, etc., was indebted, etc., to the plaintiff "as legatees;" and being so indebted, in consideration thereof, "he, the said defendant, as executor as aforesaid, promised, etc." This was held, to be distinctly the form of the declaration against an executor in his representative character. *Epes v. Dudley*, 5 Rand. 437; *Bishop v. Harrison*, 2 Leigh 532.

Suit against Personal Representative and Debtor of Estate.—Neither a legatee nor a creditor of a decedent can maintain a suit against his personal representative and another who is a debtor to the estate for the purpose of collecting the debt, except under special circumstances, such as the insolvency of the personal representative; collusion between him and the debtor; the fact that the debtor was a partner of the decedent; or a trustee holding property for, or an agent of, the decedent. A bill which fails to charge these or other special circumstances which will take the case out of the general rule, is bad on demurrer. *Beaty v. Downing*, 96 Va. 451, 31 S. E. 612.

In Trespass for Goods Taken.—In what form the declaration may be drawn, in trespass by an executor against an administrator, for goods

taken away by the intestate from the testator, see *Vaughan v. Winckler*, 4 Munf. 136.

(b) Character or Capacity in Which Sued.

Suit against Administrator, c. t. a.—

An administratrix with the will annexed must be sued in that character, and if sued as administratrix only, without the addition of the words with the will annexed, she may plead it in abatement. *Hunt v. Wilkinson*, 2 Call 49, 1 Am. Dec. 534.

In Actions Ex Delicto.—The plaintiff in his declaration described the defendants as executors, etc. They were the executors under the will of the testator, and as such were managing the hotel in front of which the plaintiff was injured by falling through a cellar hole in the sidewalk, which the defendants had failed to keep properly covered. The defendants demurred to the declaration because it was drawn against them as executors for an action ex delicto. Held, that though they were liable personally, still the words "as executors" were merely descriptive personæ of their relation to the property and their duties to it and were not objectionable. *Belvin v. French*, 84 Va. 81, 3 S. E. 891.

Action for Legacy on Promise to Pay.—

An action at law by a legatee against an executor for a legacy, on the executor's promise to pay it, must be brought against the executor in his individual, not in his representative character; and the judgment in such case must be de bonis propriis. *Kayser v. Disher*, 9 Leigh 357.

(c) Allegations.

Qualification.—A bill in equity, filed by a widow against the administrator of the estate of her husband, charging a failure on the part of the administrator to collect and account for the assets of the estate, and to pay over to her the portion of the personalty of her deceased husband to which she is entitled as his widow, which does not

show when said administrator qualified and gave bond for the performance of his duties, or that a year had elapsed from the time of the qualification of such administrator, is demurrable, and can not be sustained. *Harris v. Orr*, 42 W. Va. 745, 26 S. E. 455.

For Whose Use Suit Prosecuted.—

In a suit by the personal representative of a deceased special commissioner, upon a bond given for a deferred payment of the purchase money of lands sold by him, it is sufficient to aver in the declaration that the suit is for the use of the substituted commissioner; and if the defendant doubt the averment, he can, upon motion, have a rule calling upon such commissioner to avow and prosecute or disavow and dismiss the action. *Triplett v. Goff*, 83 Va. 784, 3 S. E. 525.

Character in Which Claim Due.—

Where the executor of one who had been executor of another, is sued for a debt due by the first executor to the estate of his testator, the pleadings must state distinctly that the claim is against the second executor as representing his testator in his executorial character, in order to entitle the plaintiff to rank as a creditor of the first dignity under the act of assembly. *Shearman v. Christian*, 6 Rand. 393.

Survivorship of Joint Obligor.—In an action against the representatives of one of two joint obligors in a bond, dated in 1783, it is essential to state in the declaration that the obligor survived his companion. *Braxton v. Hilyard*, 2 Munf. 49.

(d) Counts.

aa. Form and Sufficiency.

Where, in a suit against an executor, all the counts in the declaration, are such that an action can not be maintained upon them against the executor as such, the description of him as such may be regarded as surplusage and judgment be rendered against him personally; but, if one of the counts will sustain an action against the executor

as such, then the description can not be rejected, and the action must fail. *Fitzhugh v. Fitzhugh*, 11 Gratt. 300, 62 Am. Dec. 653.

As Determining Admission of Evidence.—The count in an action of assumpsit by an administrator was for money had and received, and the bill of particulars merely stated an account in which the defendant was debtor to the administrator for money received, stating a sum certain. Held, that the count and bill of particulars were not sufficient to admit proof of an admission by the defendant that he had received from a third person a certain sum belonging to the estate of the plaintiff's intestate. *Minor v. Minor*, 8 Gratt. 1.

bb. Joinder of Counts or Causes of Action.

Joinder Promises by Former Executor and Deceased Debtor.—It seems that in assumpsit against an administrator de bonis non counts upon promises made by the executor or a former administrator of the deceased debtor, as such, may be joined with counts on promises by the deceased debtor himself, to save the statute of limitations. But in such case, the counts upon promises of the executor or former administrator must distinctly aver the promises to have been made as executor or administrator; otherwise, they are bad upon general demurrer. *Bishop v. Harrison*, 2 Leigh 532.

It is perfectly clear that in an action against an executor or administrator, counts on promises by the executor, as such and counts on promises by the testator may be joined, and this is the proper mode of declaring against executors or administrators to save the statute of limitations. *Braxton v. Harrison*, 11 Gratt. 30.

Counts in Representative and Individual Capacity.—A declaration against an administrator, containing counts charging him in his representative character, combined with other counts

charging him in his individual character, is bad on general demurrer. But, where all the counts are laid against the defendant as administrator, they will be considered as applying to him in his representative character and therefore good; although the declaration, in some of the counts, omits to state that the claim was for money due from the intestate of the defendant. *Epes v. Dudley*, 5 Rand. 437. See also, *Knotts v. McGregor*, 47 W. Va. 566, 35 S. E. 899.

Promises which charge a man as executor can not be joined with those which charge him personally; because the judgment in the one case would be *de bonis propriis* and in the other *de bonis testatoris*. *Fitzhugh v. Fitzhugh*, 11 Gratt. 300, 62 Am. Dec. 653.

Where in a declaration in *assumpsit* against an executor, there is one count against him in his representative character and others against him in his individual character; this is a misjoinder of actions, fatal on general demurrer. *Kayser v. Disher*, 9 Leigh 357.

The executors of two deceased obligors can not be joined in the same action. *Watkins v. Tate*, 3 Call 521.

(e) Parties.

aa. Necessary Parties Generally.

Personal Representative.—Where an executor has died after partially administering the estate of his decedent, and a suit is brought to recover a claim against said estate simply, no defendant is necessary, except the personal representative. *McGlaughlin v. McGlaughlin*, 43 W. Va. 226, 27 S. E. 378.

Where the estate of a decedent may be affected by a decree, it is error to make such decree without making the personal representative of such decedent a party to the suit in which the decree is rendered. *Owen v. Riley*, 1 Va. Dec. 136.

Coexecutor.—Where land devised to be sold has been sold by one of several executors, all the executors ought

to be made parties to a suit to foreclose a mortgage previously existing upon such land. *Mayo v. Tomkies*, 6 Muni. 520.

A testator directed land to be sold and the proceeds divided in different proportions among several legatees. Both of the executors named in the will united in the sale of the property. One of the legatees assigned his interest in the legacy to a third person, and the assignee brought a suit in equity against one of the executors only. Held, that the other executor should have been made a party, as he was a party to the sale. *Findlay v. Sheffey*, 1 Rand. 73.

In an action to enforce a judgment against a deceased executor's estate, it was not error for the court to refuse to join a surviving coexecutor, whose insolvency was admitted. *Robinett v. Mitchell*, 101 Va. 762, 45 S. E. 287.

Claims against Estate.—Where a bill is filed against one executor to recover a claim against the estate, and another executor qualifies, the second executor ought to be made a party to the suit as soon as it is known that he has qualified. *Eustace v. Gaskins*, 1 Wash. 188.

Legatees as Parties.—An administrator conveyed property to a trustee to secure the sureties in his administration bond. After his death, the trustee sold the property and there was a surplus of the proceeds of sale remaining in his hands after discharging the trust. The creditors of the administrator brought their bill to subject this surplus to the satisfaction of their debts. Held, that the legatees of the intestate were not necessary parties. *Jones v. Lackland*, 2 Gratt. 81. See also, *Waddy v. Sturman*, Jeff. 5.

A sole legatee and devisee can not join as defendants the administrator and an alleged debtor of the estate, on the ground of collusion between them, in a suit to compel a discovery of assets claimed to be held by the debtor in the shape of insurance on the dece-

dent's life, where the bill does not allege that the administrator knew that the debtor had the policy, or that the complainant had ever mentioned it to him or asked him to ascertain under what circumstances the debtor held it, or that, having knowledge of it, he refused to inquire into the matter, or to sue to recover it, or such part of it as the estate might be entitled to. *Beaty v. Downing*, 96 Va. 451, 31 S. E. 612.

Creditors.—A creditor filed a creditors' bill against the executrix of a testator to subject the estate of the testator to the payment of a judgment. It appeared that the creditor had recovered a judgment against the railroad company, upon which execution had issued; that at the instance of the testator he had sued out a suggestion against the testator as a debtor of the company; that the testator had appeared and acknowledged such indebtedness; and that judgment had thereupon been rendered against him. Held, that the railroad company was not a necessary party to the proceeding of the creditor against the estate of the testator. *Shands v. Grove*, 26 Gratt. 652.

bb. In Particular Actions or Proceeding.

(aa) Actions on Negotiable or Common-Law Instruments.

Notes.—A party, claiming to be the owner by assignment of two notes of a testator payable on demand, filed a bill therefor against the executor, but made no exhibit or proof of the assignment, and did not expressly allege by whom the bonds were assigned to him. Held, that it was error to confirm the report of the commissioner to whom the cause was referred, allowing such claim, and directing its payment by the executor, without first making the obligee in the two bonds a party to the cause. *Jameison v. Myles*, 7 W. Va. 311.

(bb) Suit to Set Aside Fraudulent Conveyance.

See generally, the title FRAUDU-

LENT AND VOLUNTARY CONVEYANCES.

In a suit by a creditor, instituted after the death of the debtor, to set aside a deed of land made by him as voluntary and fraudulent, and to subject the land to the payment of his debt, the personal representative of the debtor is a necessary party. *Boggs v. McCoy*, 15 W. Va. 344.

A recovered a personal decree against the sheriff, who as such was administrator of the estate, directing the sheriff to pay him a certain sum out of the funds in his hands belonging to the estate. An execution was issued on the decree, which was returned "no effects." Several persons had endorsed on the execution claims for fees, all but one of which were contested by A. One of the sureties of the sheriff, in his lifetime, with his wife, conveyed a tract of land to his son. A filed a bill against the administrator of the surety and the wife and son of the surety to set aside the deed as fraudulent, and to subject the land to the payment of his debt. Held, that it was not necessary to make the persons claiming an interest in A's debt parties to the bill, nor was it necessary to make the heirs of the surety parties, but that all the other sureties should be brought before the court, and the debt apportioned among them before the land could be subjected to A's debt. *Hall v. James*, 75 Va. 111.

(cc) Action for Waste or Mismanagement.

See generally, the title WASTE.

In a suit against an administrator for a devastavit in the sale of personal property belonging to the testator's estate, it is necessary that all the purchasers from the executor sought to be made liable should be united. *Jones v. Clark*, 25 Gratt. 642.

(dd) Actions against Mercantile Firm.

In a suit against a mercantile firm the executors of the deceased partners ought to be made parties. *Carter v. Currie*, 5 Call 158.

(ee) Suit for Discovery of Assets.

See generally, the title DISCOVERY, vol. 4, p. 656.

After a judgment against an executor, and a return of "no effects," on an execution against the goods and chattels of his testator, a suit in equity may be brought for a discovery of the assets, to which suit the securities of the executor and all other persons, however remotely concerned in interest, against whom a decree can be rendered, ought to be made defendants. *Clarke v. Webb*, 2 Hen. & M. 8.

(ff) For Enforcement of Vendor's Lien.

See generally, the title VENDOR'S LIEN.

"If the legal title has not been conveyed by a decedent, his heirs, or devisees, if the land has been devised, are necessary parties." *Mott v. Carter*, 26 Gratt. 127.

Amendment Adding Parties.—

Where, notwithstanding an objection that the heirs and the vendors should be made parties, the trial court, without requiring this to be done, makes a decree for the sale of the land, the appellate court may amend the decree by directing that the heirs be made parties before the land is sold as amended. *Mott v. Carter*, 26 Gratt. 127.

(gg) Foreclosure Proceedings.

See generally, the title MORTGAGES AND DEEDS OF TRUST.

In a bill to foreclose a mortgage, the devisees of the land mortgaged ought to be parties, and not the executors of the mortgagee. *Graham v. Carter*, 2 Hen. & M. 6.

(hh) Proceeding Merely to Establish Claim.

Where a covenant of warranty has been broken and a part of the claim for damages assigned, and the assignee sues in a court of equity, subsequent to the death of the covenantor, and the relief sought is only the establishment of the claim against the estate, and the bill does not pray for a sale of the testator's real estate, marshaling of the

assets and settlement of the estate, the only necessary and proper parties defendant are the executors of the will. If the devisees and heirs be made parties to the bill with the executors, a demurrer to it should be overruled as to the executors and sustained as to the devisees and heirs and the bill dismissed as to them. *McConaughy v. Bennett*, 50 W. Va. 172, 40 S. E. 540.

(ii) Action on Joint and Several Obligations.

Formerly, the representatives of two deceased persons could not be joined in the same action, although the undertaking was joint and several. *Grymes v. Pendleton*, 4 Call 130; *Watkins v. Tate*, 3 Call 521. But see Va. Code, 1887, secs. 2855, 3211-12.

In a creditors' bill against the administrator and heirs of a decedent to enforce the collection of a debt, secured to the plaintiff by the joint and several obligations of the decedent and another, the administrator and heirs of such decedent have a right to require that the living obligor, though a non-resident, be made a party to the suit, so that in case he should appear his liability for such debt may be ascertained and determined, as between him and the decedent. *White v. Kennedy*, 23 W. Va. 221.

cc. Exceptions and Objections.

See generally, the title EXCEPTIONS, BILL OF.

It is obvious that in the absence of the administrator, there can be no final adjudication of the matters in controversy, and therefore the objection for want of parties may be made for the first time in the appellate court. *Hinton v. Bland*, 81 Va. 588. See also, *Armentrout v. Gibbons*, 25 Gratt. 371.

(f) Multifariousness.

A bill by an administrator, in his fiduciary capacity and as creditor of the estate, to collect a policy on his decedent's life, and to set aside an alleged assignment thereof by decedent during his life, and to subject the proceeds to

the payment of decedent's debts, is not multifarious. *Spooner v. Hilbish*, 92 Va. 333, 23 S. E. 751.

A bill by a creditor of a decedent to settle the estate and the accounts of the administrator, and to charge him with a devastavit, and to have a personal decree against the administrator, and to subject lands owned by the decedent at his death, and to follow such lands into the hands of a grantee of the heirs or devisees, and set aside their conveyances to such third party for fraud or legal ground, is not multifarious. *Turk v. Hevener*, 49 W. Va. 204, 38 S. E. 476.

(2) Answer.

An answer filed in the name of one of three executors, the decree being in favor of the plaintiff, is not to be taken as their joint answer, notwithstanding the clerk in the transcript says they appeared by counsel and filed their answer, and no steps were taken to compel a further answer from them. *Chinn v. Heale*, 1 Munf. 63.

(3) Plea and Subsequent Pleadings.

See generally, the titles DEMURRERS, vol. 4, p. 456; PLEADING.

(a) Right to Plead or Demur.

If a suit in chancery abate by the death of the defendant after answer filed, and the cause set out for hearing, it seems that his executor can not regularly demur to the equity of the bill, or plead any matter which the testator himself might not have pleaded in that stage of the proceedings; but, if no objections be made, and the parties afterwards proceed to take depositions, it will be an implied waiver of any objection to such irregularity. *Pope v. Towles*, 3 Hen. & M. 47.

(b) Special Pleas.

aa. Deed Showing Title to Assets.

Where an executor or administrator wishes to prove by a deed of trust that certain property in his possession is not to be considered assets, he must specially plead the deed, and can not

give it in evidence under a plea of "fully administered" in which it is not mentioned. *Taylor v. Richards*, 3 Munf. 8.

bb. Plene Administravit.

Right to Plead.—In debt on a judgment rendered against an executor on motion, the declaration suggested a devastavit of assets which came into the executor's hands after the judgment. Held, that the executor was not precluded from pleading a special plene administravit and from supporting it by proof. *Ruffin v. Pendleton*, 2 Wash. 184.

Conclusion.—The plea of "fully administered" ought not to conclude to the country. But a defect in this respect is cured by verdict. *Eppes v. Smith*, 4 Munf. 466.

Amendment of Plea.—An executor or administrator ought to be permitted, on his motion, though not attended with an affidavit, to amend his plea by pleading plene administravit, at any time before the trial of a suit against him, provided the court is satisfied that the motion is not made merely for the sake of delay. *Chisholm v. Anthony*, 1 Hen. & M. 27.

(c) Demurrer.

Where a bill by an executor against devisees alleged that in settlement of the executor's accounts a certain sum was found due the executor, and that there were no assets in his hands, wherefore he sought to charge the same to the devisees, a demurrer could not be sustained on the ground that the ex parte settlement before the commissioner was not prima facie evidence of the amount due, since there was nothing on the face of the bill showing that the executor intended to rely on such evidence. *Leavell v. Smith*, 99 Va. 374, 38 S. E. 202.

3. Limitations and Laches.

See generally, the titles JUDGMENTS AND DECREES; LACHES; LIMITATION OF ACTIONS.

a. When Statute Begins to Run.**(1) From Time of Qualification of Representative.**

Administration of the estate of a deceased person was granted upon the supposition that he had died without a will. Afterwards a will was discovered and proved, and administration with the will annexed was granted, the former administration being revoked. Held, that the statute of limitations began to run against the estate from the time of the qualification of the administrator with the will annexed, and not from the time of the former grant of administration. *Manns v. Flinn*, 10 Leigh 93.

The statute of limitations does not begin to run against a claim asserted for a decedent's estate, till the qualification of an executor or administrator of the decedent. *Hansford v. Elliott*, 9 Leigh 79.

Quære, whether the provision of the 17th section of 1 Rev. Va. Code, ch. 128, applies to judgments against a decedent in autre droit, or only to judgments against him in his own right? and whether it is a protection to the heirs or devisees of the decedent as well as his executor or administrator. *Manns v. Flinn*, 10 Leigh 93.

When such an officer of a town as the treasurer of a special public fund dies, and thus dissolves the relation between himself and the town, and his personal representative terminates the trust by delivering up all the securities, books and papers belonging to the office to his successor in the office, together with full information and evidence of the decedent's exact indebtedness to the treasury, so that an action at law could be maintained on this indebtedness against his personal representative, then such representative is entitled to plead the bar of the statute of limitations, beginning to run, at least, from the date of his qualification, and discharge or termination of the trust in the manner above

mentioned. *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. 26.

Where a personal representative, after he has been removed, voluntarily pays a debt due by the default of his decedent as the treasurer of a public fund, after an action on the deceased treasurer's official bond is barred by the statute of limitations, he can not recover the sum so paid from the estate of the decedent either at law or in equity. *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. 26.

An estate was devised to a widow for life or during widowhood, and then to her children. All of the children lived with the widow on the farm, and the eldest son managed the estate until her death, a period of fifteen years. While thus engaged, he persuaded the widow to buy, out of the funds of the estate, an adjoining tract of land, and took the deed to himself. At the death of the widow, the son and another administered on her estate. Held, that though the son was entitled to a reasonable compensation for his services as manager, chargeable against the widow's estate, the statute of limitations barred all recovery for such compensation, except for the five years preceding the death of the widow. *Chancellor v. Ashby*, 2 Pat. & H. 26.

Where an action is brought against an executor or administrator on an account, some items in which bear date more than five years before the death of the testator or intestate, it is not necessary that the court should actually expunge such items, but it is sufficient for the court to direct the jury to disregard them. *Hoskins v. Wright*, 1 Hen. & M. 377.

When a cause of action accrues to the estate of a decedent at the time of his death, and not before, and no one qualifies as administrator until more than five years thereafter, the law conclusively presumes that an administrator qualified on the last day of said five years, and the statute of limitations begins to run in favor of the es-

tate of the decedent from that time, whether or not there is in fact any administrator of the estate. *Western Lunatic Asylum v. Miller*, 29 W. Va. 326, 1 S. E. 740.

Where the characters of administrator and distributee unite in the same person, who holds possession of personal property in the former character for more than five years, his rights as distributee will not be barred by the statute of limitations. *Vaiden v. Bell*, 3 Rand. 448.

Judgments.—A judgment obtained against a testator in his lifetime, and not revived against his personal representative within five years after his qualification, is barred by the statute of limitations. *Peyton v. Carr*, 1 Rand. 436.

The provision in the statute of limitations, that debt or scire facias on judgments against decedents in their lifetime shall not be brought against their representatives after the expiration of five years from the qualification of a representative, and that such judgment shall, after the expiration of five years, be deemed to have been paid and discharged, is a bar to such proceedings, though no assets of the debtor's estate came into the hands of the representative within five years after his qualification. *Tunstall v. Pollard*, 11 Leigh 1.

Virginia Code, 1887, § 2920, provides that the right of action against the estate of any person hereafter dying, which shall have accrued at the time of his death, shall in no case continue longer than five years from the qualification of his personal representative. Held, that where no steps were taken to collect a bond which was due at the time of the obligor's death until nearly seven years had elapsed after his death, and after resident and nonresident administrators had been appointed, the claim was barred. *Kesterson v. Hill* (Va.), 45 S. E. 288.

The provision of the statute of lim-

itations, 1 Rev. Va. Code, ch. 128, limiting actions against administrators on judgments against their intestates, does not include interlocutory decrees, or any decree that does not take the case wholly from the court. *Hill v. Fox*, 10 Leigh 587.

Judgment was recovered against a decedent in his lifetime. After his death, administration was granted upon the supposition of his intestacy. This administration was revoked upon the discovery of his will, and administration with the will annexed was granted. Suit was brought upon the judgment after five years from the void grant of administration, but within five years from the grant of administration with the will annexed. Held, that the five years' limitation prescribed by the statute, 1 Rev. Code, ch. 128, § 17, began to run, not from the void grant of administration, but, from the qualification of the rightful administrator. *Manns v. Flinn*, 10 Leigh 93.

Judgment Quando Acciderint.—A judgment quando acciderint does not come within the operation of the statute of limitations in relation to judgments. *Smith v. Charlton*, 7 Gratt. 425. See also, *Braxton v. Wood*, 4 Gratt. 25.

(2) When Right of Action Accrues.

An administrator who presents a personal demand against his decedent's estate must show that such demand is just and valid, and not barred by the statute of limitations. The statute of limitations does not begin to run until the right of action accrues. *Cann v. Cann*, 40 W. Va. 138, 20 S. E. 910.

(3) Debt Acknowledged in Codicil.

The statute of limitations does not run against a debt acknowledged in a codicil, and there directed by testatrix to be paid by her executor on the death of her sister, till the sister's death. *Perkins v. Seigfried*, 97 Va. 444, 34 S. E. 64.

(4) Claim of devisees for Use of Wife's Lands by Husband.

Where a man who is executor of his

deceased wife remains in possession of her land after her death, the statute of limitations will bar her devisees from recovering from him for the use of land for the period ending five years before suit, since his liability for such use is a personal one, and not as executor. *Baker v. Baker*, 87 Va. 180, 12 S. E. 346.

b. Preventing Bar.

Right of Representative to Present Bar.—A personal representative "may, as in *Bishop v. Harrison*, 2 Leigh 537, where the debt is known to be just and is about to be barred, after the death of the testator or intestate, make a promise to pay, which will prevent the operation of the statute." *Smith v. Pattie*, 81 Va. 654.

Although it is generally true, that an executor or administrator can not create a new cause of action against the estate, yet he may make a valid promise to pay a debt not barred by the statute of limitations, out of the assets of the estate, upon which a suit may be maintained. *Braxton v. Harrison*, 11 Gratt. 30.

Burden of Proof.—If the creditor relies upon a charge in a will to prevent the operation of the statute, it is for him to show that the testator died before his debt was barred. *Tazewell v. Whittle*, 13 Gratt. 329.

c. Effect of Bar of Statute.

Where a testator directs his executors to sell a certain farm, and out of the proceeds to pay, first, the debts of one of his sons on which another of his sons is surety, the executors can not pay any such debt which before payment becomes barred by the statute of limitations, when the statute is relied on by the debtors. *Dunn v. Renick*, 33 W. Va. 476, 10 S. E. 810.

A testator devised a large real and personal estate to his wife and children; charged the portion of one of his sons with the payment of £1,500 sterling towards his debt; directed sundry tracts of land to be sold and the moneys

arising therefrom, as well as from loan office certificates, or otherwise (after payment of his just debts), to be equally divided among his six sons. On a bill brought by one of the creditors of the testator, the statute of limitations being pleaded, and the complainant not having shown that he came within any of the exceptions of the act; it was held, that the statute ought not to operate to prevent a recovery of so much of the specific fund as remained undisposed of, but that it would be a bar to a recovery out of the general fund. *Lewis v. Bacon*, 3 Hen. & M. 89.

d. Revival of Debt Barred.

(1) By Will.

Claimant was testatrix's physician, and while in partnership, terminated in 1880, and while alone from 1880 to 1888, he rendered services for which no bills were ever presented. For claimant's services from 1888 to 1895, when he removed to another city, annual bills were rendered and paid, with the exception of 1894. Testatrix wrote claimant in 1895, when he moved, that it was a shame that the move had been made necessary by her failure to pay what she owed him, and if he would let her have her bill she would pay what she owed him in a short time. It was held, that the letter did not remove the bar of the statute of limitations as to the partnership and individual accounts up to 1888, since it did not refer to such accounts, but only to the unpaid bill of 1894. And the testatrix, who was still indebted to the claimant for services for 1894 and for some subsequent calls, did not remove the bar of the statute as to the old accounts by the provision in her will, made in 1897, giving to claimant, as a mark of esteem and appreciation, \$100 in addition to his fees against her for his services as a physician, since she had reference only to the recent bills, and not to the old ones. *Coles v. Martin*, 99 Va. 223, 37 S. E. 907.

A clause in a will directing all just

debts to be paid will not save a debt which is barred by the statute of limitations. *Braxton v. Wood*, 4 Gratt. 25; *Tazewell v. Whittle*, 13 Gratt. 329; *Baylor v. Dejarnette*, 13 Gratt. 152.

A devise of real estate for the payment of debts will not affect the operation of the statute of limitations upon such debts, whether they are barred at the time of the testator's death or not, unless the contrary intention on the part of the testator plainly appears. *Johnston v. Wilson*, 29 Gratt. 384. In expressing the opinion of the court in this case, Staples, J., says: "In some of the earlier cases (see *Lewis v. Basson*, 3 Hen. & M. 89; *Chandler v. Hill*, 2 Hen. & M. 124; *Brown v. Griffiths*, 6 Munf. 450), it was held, that a devise for the payment of debts had the effect of reviving debts already barred by limitations; but this doctrine has been long since exploded, and it is now held that such a devise does not take a debt out of the operation of the statute. *Burcke v. Jones*, 2 Ves. & Beam. 275; 7 John. Ch. R. 293; *Tazewell v. Whittle*, 13 Gratt. 329; *Baylor v. Dejarnette*, 13 Gratt. 152; 1 Rob. Prac. 346." See Va. Code, 1887, § 2924.

(2) New Promise.

(a) By Testator.

A new promise to remove the bar of the statute of limitations must be determinate and unequivocal; and to imply a promise of payment from a subsequent acknowledgment, such acknowledgment, must be an unqualified admission of a subsisting debt which the party is liable for and willing to pay. *Coles v. Martin*, 99 Va. 223, 37 S. E. 907; *Switzer v. Noffsinger*, 82 Va. 518. See *Bell v. Crawford*, 8 Gratt. 110.

There was nothing in the promises or acts of the defendants as to a settlement of accounts, to prevent the bar of the statute. Some of them had in writing referred to a settlement of R.'s estate; and one had written to one of the plaintiffs desiring and proposing a settlement. *Pendleton v. Whiting*, Wythe 38.

An acknowledgment in writing, to operate as a new promise to remove the bar of the statute of limitations, must be a clear and definite acknowledgment of a precise sum, plainly importing a willingness and liability to pay, not in any wise conditional, or by way of compromise or attempt at settlement. *Stiles v. Laurel Fork Oil & Coal Co.*, 47 W. Va. 838, 35 S. E. 986.

The fact that the creditor has furnished the executor, at his request, with a statement of his debt, to which the executor makes no objection, will not remove the bar of the statute. *Tazewell v. Whittle*, 13 Gratt. 329.

In West Virginia, by statute, an acknowledgment or promise to pay made by a personal representative does not stop the running of the statute of limitations against debts of the decedent. An administrator, by his verbal promise, can no more prolong the validity of a debt of his decedent not yet barred, beyond the limit of the statutory bar, than he can revive a debt already barred; nor has he any option about protecting the estate by interposing the statute of limitations when applicable. *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. 26.

Where an administrator is sole heir and distributee of his intestate, and there are judgments against him individually which attached to the intestate's estate as soon as it descended upon such heir and distributee, and there are debts against the intestate which are barred by the statute of limitations, the administrator can not revive those debts and repeal the bar by any promise in writing or otherwise, but is bound to plead the statute against such debts; and if he refuses or fails to do so, it is the right of the judgment creditor, by reason of his interest in the funds, to interpose the plea. *Smith v. Pattie*, 81 Va. 654.

(b) By Personal Representative.

An executor or administrator can not

make a new promise to pay a debt of his decedent either before or after the debt has been barred by the statute of limitations. *Findley v. Cunningham*, 53 W. Va. 1, 44 S. E. 472; *Seig v. Acord*, 21 Gratt. 365; *Brown v. Rice*, 26 Gratt. 467, 473; *Brown v. Rice*, 76 Va. 629; *Smith v. Pattie*, 81 Va. 654, 663; *Switzer v. Noffsinger*, 82 Va. 518, 524.

Where there are two joint administrators or executors, to one of whom the deceased was indebted in his lifetime, for money loaned so long before the death of the debtor, that at the time of his death it was barred by the statute, the debt can not be revived by the admission of the other administrator or executor that the money had been loaned and was due. *Seig v. Acord*, 21 Gratt. 365.

"No acknowledgment or promise by any personal representative of a decedent or by one of two or more joint contractors, shall charge the estate of such decedent, or charge any other of such contractors in any case, in which, but for such acknowledgment or promise, the decedent's estate or another contractor could have been protected under the sixth section of this chapter." This is literally the same as § 8, ch. 149, Virginia Code of 1849. How was the law before 1849? The great current of authority said that an administrator could not revive a debt already barred. *Wood Lim.*, § 190; note 12 Am. D. 659; *Angell on Lim.*, § 265. I assert what the opinion in *Seig v. Acord*, 21 Gratt. 371, asserts and shows, that such was always law in Virginia. But the law in Virginia, as elsewhere generally, was that an executor could, by a promise to pay, give a new term to a debt not barred. *Conrad v. Harrison*, 2 Leigh 532. To restrain this power to a limited extent, that is, as to realty of a decedent, in 1841, the Virginia legislature passed an act containing the provision, 'no debt shall be protected against the operation of the statute of limitations by this act, nor by any assumpsit of

the executor or administrator, so as to charge the real estate in the possession of the heirs or devisees with the payment thereof.'" *Findley v. Cunningham*, 53 W. Va. 1, 44 S. E. 472.

e. Cessation.

See generally, the title CREDITORS' SUITS, vol. 3, p. 780.

Where a suit in equity is brought by a creditor against the personal representative of a decedent, and also against the heirs at law of the intestate, for the purpose of having the personal assets applied to the discharge of the debt, as far as they will go, and to have the real estate of the intestate sold to pay the residue, and the court takes into its own hands the administration of the assets by referring the cause to a commissioner to take an account of the debts of the intestate, the statute of limitations ceases to run against the creditors, not formal parties to the bill, the bill not being in form a creditors' bill from the date of such decree, in such a case. *Woodyard v. Polsley*, 14 W. Va. 211.

A suit by distributees to ascertain and pay the debts of the estate, and to distribute the surplus, is substantially a creditors' suit; and upon the entry of a decree for account in such suit, time ceases to run against all creditors of the estate. *Norvell v. Little*, 79 Va. 141. See also, *Bank of Old Dominion v. Allen*, 76 Va. 200.

A decree for account of debts against a decedent's estate, rendered in a suit brought by a single creditor, stops the running of the act of limitations against the claims of all creditors who subsequently assert them in that suit. *Robnett v. Mitchell*, 101 Va. 762, 45 S. E. 287.

A suit brought by a single creditor to establish a debt against a decedent's estate becomes a creditor's suit by the entry therein of a decree for an account of debts against the decedent's estate, and the statute of limitations ceases to run from the date of the

decree against all creditors of the decedent who come in under the decree. *Smith v. Moore*, 102 Va. 260, 46 S. E. 326.

f. Duty of Personal Representative to Plead.

The seventeenth section of the statute of limitations, providing that the debt or scire facias on judgments against decedents in their lifetime, shall not be brought against their representatives, after the expiration of five years from the qualification of a representative, and that such judgment shall, after the expiration of five years, be deemed to be paid and discharged, is a bar to a debt or scire facias on such judgments against an administrator of the deceased debtor, though no assets of the debtor's estate came to the hands of the representative within five years after his qualification; and the administrator is bound to plead the statute to actions of the judgment creditors, in favor of other creditors prosecuting claims to which the limitation does not apply. *Tunstall v. Pollard*, 11 Leigh 1.

In *Woodyard v. Polsley*, 14 W. Va. 211, 222, it is said: "It is indeed the duty of the personal representative to rely upon the statute of limitations in behalf of the legatees and distributees and also to protect creditors."

The statute providing that an executor or administrator shall have no credit for a claim which he pays knowing the facts whereby recovery could be prevented, does not require him to plead the statute of limitations to a claim apparently barred, where he knows facts making the statute inapplicable. *Radford v. Fowlkes*, 85 Va. 820, 8 S. E. 817.

The provision of Va. Code, 1873, ch. 128, § 7, that an administrator shall have no credit for a claim which he pays, if he knows facts by which a recovery could be prevented, does not apply to a claim apparently barred, where he knows facts making the stat-

ute inapplicable. *Radford v. Fowlkes*, 85 Va. 820, 8 S. E. 817.

To entitle one joint obligor to recover from his co-obligor money paid by him in excess of his proportion, the payment must have been made upon a debt for which the latter was legally liable at time of the payment, and which the obligor paying was compellable to pay, and not upon a debt that was barred as to the obligor sought to be charged, and who may be, as in the case here, a personal representative, forbidden to pay, under Va. Code, § 2676, without making himself personally liable to extent of such payment. *Turner v. Thom*, 89 Va. 745, 17 S. E. 323.

g. Mode of Taking, or Setting Up and Defenses Thereto.

An administrator may interpose the bar of the statute of limitations by a plea or answer, or by exceptions to the report of the commissioner. *Leith v. Carter*, 83 Va. 889, 5 S. E. 584; *Smith v. Pattie*, 81 Va. 654.

"The same strictness of pleading is not required in equity as at law. It is not common to plead the statute specially or formally in equity; but only to rely upon it in general terms in the answer. The only reason for requiring the defense to be made by plea or answer is that the plaintiff may have an opportunity, if he can, to take the case out of the operation of the statute. *Tazewell v. Whittle*, 13 Gratt. 329." *Coles v. Martin*, 99 Va. 223, 37 S. E. 907.

The defense of the statute of limitations to a claim asserted before a commissioner in chancery may be made by an exception to the commissioner's report. The mere fact that, subsequently, the claimant asserts his claim by a petition filed in the cause, upon which no process issues, does not render it necessary to make the issue of the bar of the statute again. *Coles v. Martin*, 99 Va. 223, 37 S. E. 907.

But the statute of limitations can not

be availed of in a court of equity by demurrer to the bill, for the demurrer does not apprise the plaintiff of the intention of the defendant to rely on the bar of the statute, and affords him no opportunity to reply any facts that might take the claim asserted in the bill out of the operation of the statute. *Hubble v. Poff*, 98 Va. 646, 37 S. E. 277. See also, *Coles v. Martin*, 99 Va. 223, 37 S. E. 907.

The statute of limitations may be relied on before the commissioner, even where it has not been pleaded before the court prior to the order of reference. *Woodyard v. Polsley*, 14 W. Va. 211.

If the statute of limitations has not been specially pleaded in the cause, and has not been relied on before the commissioner, and the commissioner failed to recognize the statute, or disregard it, and no exception was endorsed upon the report for that reason, the appellate court will consider the statute of limitations out of the case, although the report, upon its face shows, that some of the claims allowed by the commissioner were barred by the statute. *Woodyard v. Polsley*, 14 W. Va. 211.

The act of 1792, making it the duty of the court "in an action upon an open account against an executor or administrator to cause to be expunged from such account all items appearing to have been due five years before the death of the testator or intestate," applies to open accounts existing before the act took effect. But the act relates only to open accounts and does not extend to settlements or assumptions; therefore the plaintiff, to take his case out of the act, may give in evidence an assumpsit of the testator or intestate within five years to pay a stated balance. *Brooke v. Shelly*, 4 Hen & M. 266.

Scope of Plea.—The answer of an administrator pleading the statute of limitations to a demand against the es-

tate of his decedent goes to the defense of both the personal and real assets. *Findley v. Cunningham*, 53 W. Va. 1, 44 S. E. 472.

Defenses.—It is no answer to a plea of the statute of limitations in an action of assumpsit against an administrator that the defendant's intestate sold to the plaintiff slaves in payment of the debt declared on, and that the defendant, since the death of his intestate, had, as administrator, sued upon the title alone, without regard to the intestate's indebtedness to the plaintiff, and had recovered the slaves from the plaintiff within five years before the bringing of the action. *Johnson v. Jennings*, 10 Gratt. 1.

h. Estoppel of Heir to Plead Statute of Limitations.

An heir cannot oppose a credit allowed an executrix for debts paid on the ground that at the time of payment they were barred by the statute of limitations, where he had agreed, in consideration of concessions made him by the other heirs and administratrix, not to object to payment by her of any just claims though they might be barred by the statute. *Radford v. Fowlkes*, 85 Va. 820, 8 S. E. 817.

A judgment against the personal representatives of a decedent is not even prima facie evidence of the debt against the heirs of such decedent. And in a suit brought by the plaintiff in such judgment against the heirs to subject the real assets descended, such judgment against the personal representative will not prevent the heirs from relying upon the statute of limitations as a bar to the original cause of action in such suit. *Saddler v. Kennedy*, 26 W. Va. 637.

i. Waiver.

Power of Executor or Administrator to Waive Bar.—A debt which is barred by the statute of limitations at the death of the debtor, cannot be revived by the promise of the personal representative to pay it. *Seig v. Acord*, 21

Gratt. 365; *Brown v. Rice*, 26 Gratt. 467; *Brown v. Rice*, 76 Va. 629; *Smith v. Pattie*, 81 Va. 654; *Switzer v. Noffsinger*, 82 Va. 518; Va. Code, 1887, § 2923.

Admission in Pleading.—An administrator can not, by the acknowledgment in pleading of a debt against his decedent which is barred by the statute of limitations, or in any other way, remove the bar of that statute. *Stiles v. Laurel Fork Oil & Coal Co.*, 47 W. Va. 838, 35 S. E. 986; W. Va. Code, 1899, ch. 104, § 9, p. 777.

Repeated Promises.—On the trial of an issue on the assumpsit of the testator within five years, repeated promises by the executor can not be given in evidence to prevent the operation of the statute of limitations. *Fisher v. Duncan*, 1 Hen. & M. 563, 3 Am. Dec. 605.

j. Laches.

In 1859, G.'s executor settled his accounts, showing a balance due the estate by him. The executor died in 1860, and an administrator d. b. n. c. t. a. of G.'s estate was appointed. In 1875, in a creditors' suit against the executor's estate, such claim was reported favorably, as a just debt owing by the executor's estate; and thereafter the same report was repeatedly made, and confirmed by the court. Held, there was no laches in asserting the claim. *Green v. Griffin*, 1 Va. Dec. 858.

Where, in a suit for the settlement of an estate, it appears that the original plaintiff, the administrator against whom the suit was brought, and the chief cestui que trust are all dead; that the claims as to the first year's transactions arose thirty years ago; that another claim involves the settlement of accounts, running through five years, between parties who have since died; that another involves transactions covering a period of nine years, commencing more than thirty years ago, and that no books, accounts or vouchers

can be produced to substantiate them—the claims will be rejected, as barred by limitations and laches. *Garland v. Garland*, 2 Va. Dec. 351.

Where, on the settlement of an administrator's accounts, a balance found in his hands is ordered to be divided proportionally among creditors, a creditor can not, twenty-one years thereafter, assert his claim in a lien creditors' suit against such administrator, instituted by other creditors of the estate. The lapse of twenty-one years after an order directing an administrator to distribute the assets of the estate among creditors raises a presumption of payment. *White v. Offield*, 90 Va. 336, 18 S. E. 436.

Equitable Relief Generally.—A court of equity will, as a rule, refuse its aid to enforce stale demands, but where the claims are not barred by the statute of limitations, the amount is certain, the transaction is not obscure, and it is not likely that injustice will be done owing to the loss of evidence or the lapse of time, and the claimant has not been guilty of such laches as should deprive him of his rights, the court will grant relief. *Houck v. Dunham*, 92 Va. 211, 23 S. E. 238.

In 1856, an executor filed a bill for a judicial settlement of his accounts as executor of his father's estate. Thereafter, and before the report of the commissioner to whom the account had been referred was returned, the executor's brother, who had filed a claim on a bond against the estate, died, and the executor became administrator of his estate. The commissioner's report was made in 1860, but exceptions thereto were never passed on, and it remained unconfirmed. No further action was taken until 1897, when the executor and nearly all of the original parties to the suit were dead, when a supplemental bill was filed, reciting the existence of the bond, alleging that it remained unpaid, and seeking its satisfaction out of land held under the executor's will,

but failing to allege any excuse for the delay, and the evidence tended to show that the bond had not been paid, though the executor declared in his lifetime that it had been satisfied. Held, that, in the absence of an allegation of fraud or breach of trust, plaintiff was not entitled to relief because of laches. *Covington v. Griffin*, 98 Va. 124, 34 S. E. 974.

Where, on the settlement of an administrator's accounts, a balance found in his hands is ordered to be divided proportionally among creditors, a creditor can not, twenty-one years thereafter assert his claim in a lien creditor's suit against such administrator instituted by other creditors of the estate. *White v. Offield*, 90 Va. 336, 18 S. E. 436.

4. Set-Off, Recoupment and Counter-claim.

See generally, the title SET-OFF, RECOUPMENT AND COUNTER-CLAIM.

In an action on a bond given by distributees to the administrator for an amount due him upon a settlement, the distributees cannot set-off money subsequently received by him as administrator, the claims not being in the same character. *James v. Johnston*, 22 Gratt. 461.

In actions against personal representatives on claims against a decedent, they are entitled to set off claims in decedent's favor against plaintiff. *Stuart v. Peyton*, 97 Va. 796, 34 S. E. 696.

Where the plaintiff was notoriously insolvent, and had been adjudged indebted to a trust in which the decedent had an interest, the decedent's estate being insolvent, the executor should not be refused the right to set off the decedent's interest in the fund against the plaintiff's claim against the estate, because of an agreement by the decedent with his creditors for the benefit, by which he agreed not to draw his dividends from such fund until his indebtedness thereto was extinguished,

since the interests of the creditors are better served by allowing the set-off. *Stuart v. Peyton*, 97 Va. 796, 34 S. E. 696.

In an action of assumpsit by an administrator for a debt due his intestate in his lifetime, the defendant can not set off a debt due him for money paid as surety of the intestate since his death. *Minor v. Minor*, 8 Gratt. 1.

An administrator advertised a sale of the property of his intestate, offering to purchasing creditors a discount of five per cent. The defendant, who was not a creditor, purchased at the sale, and gave his bond for the amount. Upon the plea of payment to an action on this bond it was held that the defendant, not being a creditor ought not to be permitted to offset bonds, due by the intestate in his lifetime, and which were assigned to the defendant since the institution of the suit, although he had given six months' previous notice of the offset, and also offered at the trial to prove a sufficiency of assets to pay the debts, and tendered the costs of the suit. *Brown v. Garland*, 1 Wash. 221.

Where a set-off is claimed against a lien proved by an executor, under an order for account in a lien creditor's suit, the estate of the deceased creditor can not be settled in that suit, nor will the suit be delayed to await such settlement elsewhere. *Ashworth v. Trammell*, 102 Va. 852, 47 S. E. 1011.

When a commissioner is directed by a decree in a creditor's suit to sell lands of the deceased debtor and sells the lands, and the sale is confirmed, and he is ordered to collect the bonds and disburse the money, and the purchaser at the sale, who has executed his bonds, is a creditor, and the commissioner has been ordered to pay him a debt greater than the amount of the purchase money, the commissioner may offset pro tanto the indebtedness for purchase money on the debt due the purchaser from the estate. *Ellett v. Reid*, 25 W. Va. 550.

5. Evidence.

a. Presumption and Burden of Proof.

In a suit in equity devisees against an administrator with the will annexed and a purchaser from him, the court will presume the grant of administration to be regular, unless its irregularity be drawn in question by the pleadings. *Thompsons v. Meek*, 7 Leigh 419.

At law, if an executor plead plene administravit in a suit founded upon an account, which is an admission of debt; or if he even suffer judgment by default or nil dicit to pass against him in such a case, yet the plaintiff must prove his account, or he shall recover only one penny damages. *Lewis v. Bacon*, 3 Hen. & M. 89, citing *Quarles v. Littlepage*, 2 Hen. & M. 401.

It seems that charges appearing to be just and legal, in an ex parte settlement of an administration account, by commissioners appointed by the court which granted the administration, and passed by such court, the commissioners having reported, that vouchers were produced to justify such charges, are to be received, prima facie, as evidence in favour of the executor or administrator; and that the burthen of proof lies on the party who would impugn them. *Nimmo v. Com.*, 4 Hen. & M. 57. See also, *Peale v. Hickie*, 9 Gratt. 445.

b. Admissibility.

The certificate of probate or of administration granted by a court and attested by the clerk, will enable the executor or administrator to act, and may be given in evidence in any court in the commonwealth. *Dickinson v. McCraw*, 4 Rand. 158.

Where an executor or administrator wishes to prove by a deed of trust that certain property in his possession is not to be considered as assets, he must specially plead the deed, and can not give it in evidence under a plea of "plene administravit" in which it is not mentioned. *Taylor v. Richards*, 3 Munf. 8.

In an action of debt against an administrator on a bond alleged to be the bond of his intestate, the issue was upon the plea of non est factum; and on the trial the plaintiff, after calling the attesting witness, to corroborate him, offered in evidence a paper signed by the defendant, in which the bond was referred to. This paper was executed by the defendant in the lifetime of his intestate, and did not purport on its face to have been executed by the defendant as the agent of his intestate, nor was there any proof of such agency. Held, the paper having been executed by the defendant before he qualified as administrator, it is not competent evidence as the admission of a party on the record. *Gaines v. Alexander*, 7 Gratt. 257.

Declarations and Admissions.—In action on bond in name of administrator of obligee for benefit of administrator of assignee against administrator of surety thereon, the beneficial plaintiff offered as evidence of his intestate's title to the bond, the declaration of the obligee, not made in the presence of the obligors, that he had transferred the bond to the beneficial plaintiff's intestate. Held, the evidence was mere hearsay and inadmissible. *Hodnett v. Pace*, 84 Va. 873, 6 S. E. 217.

c. Weight and Sufficiency.

The mere admission of a debt is not sufficient to charge the defendant with the whole demand of the plaintiff; he must, nevertheless, prove the amount. *Quarles v. Littlepage*, 2 Hen. & M. 401, 3 Am. Dec. 637.

In assumpsit against an executor, in his individual character, for the price of goods sold and delivered to him for the use of his testator's widow and legatees, upon evidence being given of such sale and delivery, of a promise by the defendant to pay for the goods out of his testator's estate, and of assets sufficient for that purpose, the plaintiff may recover although the

promise was not in writing. *Collins v. Row*, 10 Leigh 114.

In an action for a debt due a decedent's estate the defense was that the decedent, a few weeks before his death, gave a written release. The body of the release was in the defendant's handwriting. No one saw it signed. The decedent never admitted any indebtedness to the defendant, and never mentioned to any one the giving of a release, or the intention to give it. The defendant never claimed to have it until two and one-half years after the decedent's death, and once offered to pay the administrator in land, and admitted to several that he still owed the debt. Three witnesses testified that the signature was genuine, and six that it was not. Held, that the release was not proven. *Swecker v. Swecker*, 87 Va. 305, 12 S. E. 1056.

d. Evidence at Former Trial.

Where, pending action, defendant died and plaintiff became incompetent to testify, decedent's administrator at second trial may prove plaintiff's statements at first trial. *Lee v. Hill*, 87 Va. 497, 12 S. E. 1052.

6. Witnesses.

See generally, as to witnesses, the title WITNESSES.

Competency.—In an action against the administrator of an intestate's estate, a distributee is not a competent witness for the defendant, unless he has made a valid release of all his interest in the estate. *Janey v. Blake*, 8 Leigh 88.

In an action of assumpsit brought by the plaintiff against the defendant as administrator of his decedent, to recover chiefly for work and labor done by the plaintiff for the defendant's decedent during his life; held, that the circuit court erred in permitting the plaintiff to testify as a witness in her own behalf as to her work and labor and services rendered for the deceased, and what things she did in and about the work and labor, she claimed to

have performed for the deceased in his lifetime, while she lived with him, and had taken charge of the household affairs of the deceased, and had sold produce, and bought provisions for the house with such produce, and had nursed deceased in his sickness. *Owens v. Owens*, 14 W. Va. 88.

Exceptions and Objections.—Where it is the duty of an administrator to object to a witness, and he fails to do so, whether through ignorance, inadvertence, collusion or fraud, it is the privilege of any other person interested in the estate to make the objection. *Tate v. Tate*, 75 Va. 522.

7. Verdict.

On the plea of "no assets," a verdict finding that the administrator has in his hands assets belonging to the estate of the intestate, without saying to what amount, is defective and a new trial ought to be directed. *Eppes v. Smith*, 4 Munf. 466.

A verdict upon a plea of fully administered ought to ascertain the amount of assets in the hands of the defendant at the commencement of the suit and at the time of the plea pleaded, and a verdict which merely finds that assets sufficient to pay the plaintiff's demand "have come" to the defendant's hands, without saying when, is erroneous. *Gardner v. Vidal*, 6 Rand. 106.

If the jury find a conditional verdict referring to a case agreed to be stated, but before the facts are agreed, the defendant dies, and a scire facias issues against his administrator to show cause why the said facts should not be agreed, and the matters at law thereupon argued, the administrator is not bound to agree the facts, but if he chooses may abate the suit. *Hooe v. Pierce*, 1 Wash. 212.

Quære, whether a declaration against the administrator of one of two joint obligors, averring that neither the defendant, nor the other obligor, nor any representative of his, had paid the debt (without stating that such other obli-

gor was dead, or that the defendant's intestate had survived him); and alleging, in assigning the breach that right of action had accrued, under the premises, against the defendant's intestate (without setting forth in what manner), be good after the verdict. *Atwell v. Towles*, 1 Munf. 175.

Upon issue joined on the plea of "fully administered," a verdict finding, in general terms, "the issue for the plaintiff, and that assets equal to the claim of the plaintiff came to the hands of the defendant," is uncertain and insufficient. It should set forth, with sufficient certainty, what portion of the assets, which came to the defendant's hands, was unadministered at the time of suing out the plaintiff's writ. *Rogers v. Chandler*, 3 Munf. 65.

As to the sufficiency of a verdict of this nature, see also, *Booth v. Armstrong*, 2 Wash. 301; *Gardner v. Vidal*, 6 Rand. 106; *Sturdivant v. Raines*, 1 Leigh 481; *Brizendine v. Tisdale*, 5 Leigh 51.

Where a plea of "fully administered" concluded to the country instead of with an offer to verify, the defect is cured by verdict. *Eppes v. Smith*, 4 Munf. 466.

8. Judgment or Decree.

See generally, the title JUDGMENTS AND DECREES.

a. Rendition, Form and Requisites.

(1) General Consideration.

Joint Decree.—It is error to render a joint decree against two executors, when only one is before the court. *Myrick v. Adams*, 4 Munf. 366.

Requiring Refunding Bond.—The widow and two infant children of a decedent filed a bill against the administrator, and a decree was entered by consent that the administrator was indebted to the estate in a certain sum, and that of this sum one-third belonged to the widow and two-thirds to the infant children. Held, that the decree was not erroneous in not requiring refunding bonds to be given by the plain-

tiffs, since this would have been incompatible with the evident intent and legal effect of the decree. *Harman v. Davis*, 30 Gratt. 461.

Decree for Payment.—Where, in a suit by a creditor to subject property of his deceased debtor to the payment of his debt, the claim is proved or admitted, and the executor confesses assets, the plaintiff may, at the hearing, have a decree for payment, and he is not compelled to take a decree for an account. *Duerson v. Alsop*, 27 Gratt. 229.

Payment into Court.—In a creditor's suit against a person in his own right and as administrator, where the plaintiff claims to be a creditor by judgment against the defendant as administrator and the defendant admits that he owes his intestate's estate for land purchased in intestate's lifetime, the court may decree that the defendant shall pay such debt into court, or to a receiver, although he is one of the next of kin of his intestate. *Farmer v. Yates*, 23 Gratt. 145.

(3) Judgment Quando Acciderint.

Where, on an issue joined on the plea of plene administravit, the jury finds assets to a certain amount less than the plaintiff's claim, judgment should be entered for that amount only, and execution will issue for such amount immediately, and for the balance when assets shall come to the defendant's hands. *Nimmo v. Com.*, 1 Hen. & M. 57, 4 Am. Dec. 488.

Where an administrator defendant pleads the single plea of "fully administered," and the issue is found for him, the plaintiff ought to have judgment for debt and costs, when assets, etc., and the defendant is entitled to a judgment against the plaintiff for the general costs of the action. *Timberlake v. Benson*, 2 Va. Cas. 348.

Where the defendant administrator pleads nonassumpsit and "fully administered," and the first is found for the plaintiff and the second for the defend-

ant, the judgment ought to be for the plaintiff for the debt and costs, to be levied on the goods of the estate, quando acciderint, but for the defendant for the separate costs of the second issue. *Timberlake v. Benson*, 2 Va. Cas. 348.

Where the defendant pleads both pleas, and the plaintiff declines to reply to the plea of "fully administered," or having replied to it withdraws it without subjecting the defendant to costs by doing so and the first issue is then found for the plaintiff he ought to have a judgment for the debt and costs, quando acciderint, and the defendant is not entitled to any costs. *Timberlake v. Benson*, 2 Va. Cas. 348.

(3) Judgment De Bonis Testatoris.

A personal judgment or decree against a personal representative, when sued in his representative capacity only, is erroneous. *Jones v. Reid*, 12 W. Va. 350, 29 Am. Rep. 455.

Judgment in detinue against an executor as such, should be given against him personally, for the goods by him detained, or the alternative value; but for all damages for detention, both in the testator's time and in his own, it should be against him de bonis testatoris. *Allen v. Harlan*, 6 Leigh 42, 29 Am. Dec. 205; *Greenlee v. Bailey*, 9 Leigh 526.

But in *Catlett v. Russell*, 6 Leigh 344, it was held, that the judgment in detinue against an executor as such, should be for the goods or the alternative value against the executor de bonis propriis, and for the damages for detention, both in the testator's and executor's own time, de bonis testatoris. *Campbell, J.*, and *Brockenbrough, J.*, dissented, however, holding, in accordance with the decision in *Allen v. Harlan*, 6 Leigh 42, 29 Am. Dec. 205, that the judgment should be against the executor for the goods, if to be had, if not, for the alternative value, the damages for detention, and

the costs, all to be levied de bonis testatoris.

Where a defendant dies, and the suit is revived against his administrator, the decree against him should be de testatoris only. In order to charge the administrator, the proceeding must be such as to give him an opportunity of being heard. *Cocke v. Gilpin*, 1 Rob. 20; *Hunt v. Martin*, 8 Gratt. 578.

Where an action of detinue is revived against an administrator with the will annexed, and a judgment is recovered, the judgment for the damages for detention of the property and the costs should not be against the administrator personally, but against him as administrator to be levied on the goods of his testator in his hands to be administered. *Hunt v. Martin*, 8 Gratt. 578.

Where the administrator of a defendant in detinue, who dies pending the suit, consents that the cause shall stand revived against him, and the cause goes to trial upon the plea put in by his intestate, the judgment against him should be personal for the property or its alternative value, but the costs and damages should be levied of the goods and chattels of the intestate in the hands of the administrator. *Greenlee v. Bailey*, 9 Leigh 526.

A decree against an executor for rents and profits received by the testator ought expressly to direct that he pay the sum in question out of the assets in his hands to be administered; otherwise, it is to be understood as against him personally, and, therefore, is erroneous. *Hite v. Paul*, 2 Munf. 154.

In an action of debt on bond against an administrator, issues were joined on pleas of payment and fully administered. The verdict was for the plaintiff on the first issue, and on the last, "that assets more than sufficient to pay the debt, etc., came to the defendant's hands to be administered." Held, that the verdict on the last issue was in-

sufficient to found a judgment de bonis testatoris. *Sturdivant v. Raines*, 1 Leigh 481. See also, *Brizendine v. Tisdale*, 5 Leigh 51.

In a suit in equity against executors it is not regular to enter a decree to be levied of the goods of the testator, without an account. *McRae v. Bates*, 4 Hen. & M. 490.

In assumpsit by a legatee against an executor for a legacy, one count in the declaration alleged a promise made by the defendant, as executor, to pay the legacy. Held, that this was a count against the executor in his representative character, upon which the judgment could only be de bonis testatoris. *Kayser v. Disher*, 9 Leigh 357.

(4) Judgment De Bonis Propriis.

As a general rule, a judgment can not be rendered against an administrator de bonis propriis. *Pugh v. Jones*, 6 Leigh 299.

It is error to make a personal decree against an administrator without an account or admission showing assets of his intestate's estate in his hands sufficient to satisfy the decree. *Wills v. Dunn*, 5 Gratt. 384.

Where an executor obtains a judgment for a debt due his testator against the administrator of the debtor, to be levied of the goods and chattels of the intestate, and afterwards brings an action of debt against the administrator, suggesting a devastavit, and declares in detinet only, he can not have judgment de bonis propriis of the administrator, but only de bonis testatoris. *Spotswood v. Price*, 3 Hen. & M. 123.

Where an order accepted by the personal representative is rejected in a creditors' suit as a valid claim against the decedent's estate, there can be no personal decree for the amount thereof against such representative; because it is asserted in the bill as a debt due by the estate, and the decree must be consistent with the case made by the pleadings. *Staples v. Staples*, 85 Va. 76, 7 S. E. 199.

Where a balance is found in the

hands of an executor or administrator, the decree should be de bonis propriis; and an acknowledgment of assets with other circumstances, will have the same effect. *Templeton v. Fauntleroy*, 3 Rand. 434.

Where, in a suit against an executor, all the counts in the declaration are such that an action can not be maintained upon them against the executor as such, the description of him as such may be regarded as surplusage, and judgment be rendered against him personally; but, if one of the counts will sustain an action against the executor as such, then the description can not be rejected and the action must fail. *Fitzhugh v. Fitzhugh*, 11 Gratt. 300, 62 Am. Dec. 653. See also, *Belvin v. French*, 84 Va. 81, 3 S. E. 891; *Martin v. Stover*, 2 Call 514.

In assumpsit against executors for money had and received by them to the plaintiff's use, it seems that judgment should be de bonis propriis and not de bonis testatoris. *Martin v. Stover*, 2 Call 514.

An executor executed a note for a debt of his testator which he signed as executor; upon this note an action was brought against him as executor; but the count was in the debit and detinet, and the breach was laid in his failure to pay. There was a judgment by default. Quære, whether it should be against the executor as such or de bonis propriis. *Snead v. Coleman*, 7 Gratt. 300, 56 Am. Dec. 112.

An executor or administrator, holding slaves in which his testator or intestate had only an estate for life, terminable upon his dying without issue living at the time of his death may be charged in detinue, personally, and not as executor or administrator. *Royall v. Eppes*, 2 Munf. 479.

Two wards, after their majority, sued the administrator and heirs of their deceased guardian. It was shown that several of the heirs were infants, and there had been partition of the reality among them, but no distribu-

tion of the personalty. Held, that a decree against the administrator alone was proper, as the payment of the debt out of the personalty would prevent further litigation for contribution among the heirs. *Martin v. Fielder*, 83 Va. 455, 4 S. E. 602.

It is a settled rule in equity that wherever a balance is found in the hands of an executor or administrator, the decree shall be *bonis propriis*, and, in such case, a decree *de bonis testatoris* will be reversed. *Templeman v. Fauntleroy*, 3 Rand. 434, 446. See also, *Franklin v. Depriest*, 13 Gratt. 257; *Barr v. Barr*, 2 Hen. & M. 26; *Sheppard v. Starke*, 3 Munf. 29; *Moore v. Ferguson*, 2 Munf. 421.

A personal judgment or decree against an executor or administrator, or administrator *de bonis non*, who is sued in his representative character only, is fatally erroneous. *Humphreys v. West*, 3 Rand. 516; *Jones v. Reid*, 12 W. Va. 350, 370. See also, *Lincoln v. Stern*, 23 Gratt. 816, 822.

A judgment against "T. G. Mann, administrator of Sherman Clarkson, deceased," as shown in the caption, it not appearing that the recovery was to be levied of goods and chattels of Clarkson in the hands of Mann to be administered, is not a judgment against the estate, but an individual judgment against Mann. *Thompson v. Mann*, 53 W. Va. 432, 44 S. E. 246.

b. By Default or Confession.

A judgment by default against an executor is *prima facie* an admission of assets. *Mason v. Peter*, 1 Munf. 437.

Scott v. Tankersley, 10 Leigh 581, holds, that where, on a motion against a sheriff's administrator for the default of the sheriff's deputy, the executor of the deputy was notified to defend the motion, and promised to attend to it, but failed to do so, and judgment by default was rendered, the executor could not, in an action against him by the sheriff's administrator to

recover the amount of the judgment, raise the objection that the statute of limitations would have been a defense to the motion.

Judgment by Confession.—A filed a bill against B, the administrator of C, claiming a debt against the estate of C, claiming that he was entitled to have his debt paid out of the assets in the hands of the administrator. B answered the bill, and claimed that there was not sufficient assets to pay the debts against the estate. The court referred the cause, by consent of the parties to the bill, to a commissioner to ascertain among other things "what debts are due from said estate and respective priorities, if any, and any other matters deemed pertinent by any of the creditors of the said estate, or any of the parties in interest;" and directed the commissioner in the decree, before proceeding to state the account, to give notice to the creditors and all persons interested in the estate, by publication of the time and place of taking the same in some newspaper published in the city of Wheeling, at least four weeks before commencing to take the said account; and the court, in the decree, adjudged that such publication should be equivalent to personal service. The commissioner proceeded to discharge his duties under the decree, and among other debts against the estate of A, he reported a debt as being due to B of \$4,000, in the aggregate, exclusive of interest. The court heard the case upon the bill, answer of L, administrator, and report to the commissioner, to which no exceptions were filed, and directed what disposition should be made of the assets, and ordered that after paying the costs of the suit and the funeral expenses, amounting to \$169.68, out of the residue to pay the balance pro rata on the debts mentioned in schedule A to the extent of the funds in his hands—Schedule A was a list of the creditors of the estate, showing the amount due to each, filed with the

commissioner's report and as part thereof, and B was one of the creditors, B, feeling aggrieved by this decree, moved the circuit court, after due notice, to reverse and set aside the decree, and the circuit court, on motion, dismissed the motion to reverse. Held, that it was not error in the circuit court to dismiss the motion, because the decree sought to be reversed was not a decree on a bill taken for confessed. *Bell v. List*, 6 W. Va. 469.

Where an executor confesses judgment against him for a debt of the testator upon a miscalculation of the amounts of assets in his hands, and with the full understanding of his personal liability in case of a deficiency of assets, he will not be relieved in equity against the judgment in case the assets are insufficient to satisfy it. *Freelands v. Royall*, 2 Hen. & M. 575.

Where an executor confesses judgments and gives forthcoming bonds for debts due by his testator under the belief that the assets of the estate are sufficient to pay all claims against it, but afterwards, by an unexpected depreciation of property, the amount of assets proves inadequate, the executor will be relieved in equity. *Miller v. Rice*, 1 Rand. 438.

It seems that where a decree against executors for a legacy is made upon their confessing assets sufficient to satisfy the same, without specifying whether such assets consisted of money or other property, such decree may with propriety direct that they pay the legacy and interest, with the costs of the suit, out of the assets, if so much thereof they have; if not, out of their own estates. *McRae v. Brooks*, 6 Munf. 157.

Upon a motion against the administrator of a sheriff for the default of the sheriff's deputy, the executor of the deputy was notified to make defense and promised to do so but neglected to attend to it, and judgment by default was rendered. The administrator of the sheriff brought an action

against the executor to recover the amount of the judgment. Held, that the executor could not raise the objection, that the statute of limitations would have been a defense to the motion. *Scott v. Tankersley*, 10 Leigh 581.

Operation as Estoppel.—A creditor of a decedent, by accepting from the administrator a confession of judgment when assets, is thereby estopped at law from alleging that the administrator at the time of the judgment had assets applicable to the demand. *Dupuy v. Southgates*, 11 Leigh 92.

As Lien upon Realty of Decedent.—The administrator de bonis non of A confessed judgment in favor of the administrator of B, pursuant to a written agreement made between them. Held, that such judgment was not a lien upon the lands of which A died seized. *Custer v. Custer*, 17 W. Va. 113.

c. Non Obstante Veredicto.

Judgment.—An action on the case for selling the plaintiff an unsound slave by means of a fraudulent warranty of soundness, or fraudulent concealment of unsoundness, can not be maintained against the personal representative of the vendor; and in such case, though there is a verdict for the plaintiff, judgment should be rendered for the defendant, non obstante veredicto. *Boyles v. Overby*, 11 Gratt. 202.

d. Operation and Effect.

As Bar to New Action.—Where a court of probate, under the 24th section of the statute concerning wills, appoints a person to collect and preserve the estate of a decedent until administration be granted, such appointee can not properly be sued on a bond of the decedent; and if he be sued, and judgment rendered against him, scire facias upon the judgment will not lie, after administration is granted, against the administrator, nor will the judgment be any bar to a new action against the administrator upon

his decedent's bond. *Wynn v. Wynn*, 8 Leigh 264.

Parties Bound.—Nothing is involved here but the personal estate, and any decision, for or against the administrator, in the absence of fraud or collusion, is, as to it, binding upon the legatees and distributees. *Hooper v. Hooper*, 32 W. Va. 526, 534, 9 S. E. 937; *Corrothers v. Sargent*, 20 W. Va. 351; *Castellaw v. Guilmartin*, 54 Ga. 299; *Van Winkle v. Blackford*, 54 W. Va. 621, 46 S. E. 589.

In a suit by an administrator under § 7, ch. 86, W. Va. Code, 1899, to convene creditors of a decedent, when a creditor presents his demand before a commissioner taking an account of debts for allowance against the estate, a decree allowing or disallowing such demand is *res judicata* as to the creditor, and also the representatives of the estate and a party purchasing land of the estate under the decree. *Hurxthal v. Boom Co.*, 53 W. Va. 87, 44 S. E. 520.

In a suit by an administrator to convene creditors of a decedent under § 7, ch. 86, W. Va. Code, 1899, one claiming a demand against the estate under a contract with the decedent binding one to maintain dams to supply water to a mill, presents it in such suit for allowance, and it is resisted by the administrator and heirs of the decedent on the ground that the covenant was broken, and that the party was not entitled to compensation for maintaining such dam for that reason, a decree allowing such demand is conclusive to show that such agreement was not broken in the lifetime of the decedent, as between the covenantor and an assignee of the land benefited by the covenant to show compliance with the covenant in the lifetime of the decedent. *Hurxthal v. Boom Co.*, 53 W. Va. 87, 44 S. W. 520.

If on a bill filed by creditors to subject the estate, real and personal, of a decedent, to the payment of his debts, a copy of decedent's will is filed, by

which he devised and bequeathed certain property to his wife for life, and nominated her as executrix, the wife is made a party defendant as executrix and "as widow," this is sufficient to bind her personally by any proper decree made in the cause. *New v. Bass*, 92 Va. 383, 23 S. E. 747.

As Lien on Land of Decedent.—A judgment obtained by a creditor against the administrator is not a judgment lien on the realty of the intestate. *Laidley v. Kline*, 8 W. Va. 218.

As Lien on Land of Executor.—A conditional decree, directing an executor to pay certain debts due by his testator's estate, or due from him in his fiduciary capacity, when he shall have collected certain other specified claims of debts coming to his testator's estate, constitutes no lien upon the real estate of such executor. Execution can not be issued thereon and enforced against him without further proceedings in the cause wherein such decree has been rendered; nor will a bill in chancery be maintained to enforce the lien of such decree against the real estate of such executor. *Gay v. Skeen*, 36 W. Va. 582, 15 S. E. 64.

Conclusiveness as Evidence of Existence and Validity of Debt.—A judgment rendered against an administratrix upon the bond of her intestate is conclusive evidence of the validity of the debt as against the administratrix. *Montague v. Turpin*, 8 Gratt. 453.

A judgment or decree against an executor in favor of a creditor, payable out of assets, is conclusive evidence upon the executor and his sureties as to the existence and justness of the demand. *Crim v. England*, 46 W. Va. 480, 33 S. E. 310.

As Evidence against Heirs in Proceeding to Subject Land.—A judgment in a suit at law against the personal representative of a decedent can not be used as evidence against the devisees or heirs at law, in a bill by the judgment creditor, to subject the land in their hands to the payment of the

judgment. *Daingerfield v. Smith*, 83 Va. 81, 1 S. E. 599.

There being no privity between the personal representative and the party to whom the real estate has descended or been devised, a judgment against such personal representative is not even prima facie evidence against the heir or devisee. *Laidley v. Kline*, 8 W. Va. 218, 219.

A judgment against the personal representative of an estate is not even prima facie, much less conclusive, evidence against the devisee or heir of such estate; and the fact that the same person may be both personal representative and heir or devisee does not constitute an exception to the rule. *Merchants' Nat. Bank v. Good*, 21 W. Va. 455.

Judgment against the first in a suit to which the last were not parties, affects not the last for want of privity; and is not evidence against them in a suit to subject the decedent's real estate; and Va. Code, 1873, ch. 127, § 3, does not alter the rule. *Watts v. Taylor*, 80 Va. 627; *Brewis v. Lawson*, 76 Va. 36.

e. Conclusion.

In trespass against an administrator for goods taken away by the intestate, judgment ought not to be reversed, for concluding, "and the defendant may be taken, etc.," instead of "and the defendant in mercy, etc." *Vaughan v. Winckler*, 4 Munf. 136.

f. Opening, Amending and Setting Aside.

Where the pleadings show that a judgment de bonis propriis should have been de bonis testatoris, it is a clerical error which may be corrected in the lower court upon motion and is not ground for an appeal. *Snead v. Coleman*, 7 Gratt. 300, 56 Am. Dec. 112.

If judgment be obtained, at the rules in the clerk's office, against the administrator; and he, at the next quarterly court, instruct his attorney to set it aside, and plead payment, with intent

to plead fully administered afterwards; and the attorney directs the clerk to set aside the judgment, and enter the plea; but he omits it, a court of equity will direct the pleas to be received; the verdict upon the issues to be certified to that court; and, on receipt of the certificate, will proceed to a final decree upon it. *Mayo v. Bentley*, 4 Call 528.

g. Execution and Enforcement.

See generally, the title EXECUTIONS, ante, p. 416.

Where a decree is made against an executor for having paid the assets improperly, he may be subjected in the first instance, without first resorting to those who have received the assets. *Ruth v. Owens*, 2 Rand. 507.

Where an administrator is proceeding in a court of equity to enforce the lien, of a judgment recovered by him against persons who are distributees of the estate, the cause can not be delayed, until there is a settlement of the administrator's accounts. *Wyatt v. Thompson*, 10 W. Va. 645.

An execution against an executor or administrator for a balance due on his administration account should not be against the goods and chattels of the decedent in his hands to be administered, but against his own goods and chattels. *Moore v. Ferguson*, 2 Munf. 421.

Where a judgment at law is obtained against one of two obligors in a joint and several bond, and there are no proceedings to enforce it, a court of equity ought not to charge the lands of the other obligor in possession of his devisees, without having made the obligor against whom the judgment was rendered, or his representatives, party to the suit. *Foster v. Crenshaw*, 3 Munf. 514.

Where a judgment recites that it "is to be satisfied out of defendant's testator's estate if a sufficiency of the assets shall remain for the payment of debts of superior dignity," the plaintiff

may proceed immediately to ascertain whether there is a surplus of assets after paying the debts which have priority over his judgment. *Braxton v. Wood*, 4 Gratt. 25.

A decree against the domiciliary executor of a decedent may be enforced against an administrator *de bonis non* of the same decedent in any jurisdiction. *Garland v. Garland*, 84 Va. 181, 4 S. E. 334.

Where, in an action of debt upon a judgment against an administrator, suggesting a *devastavit*, the plaintiff produces the judgment and execution, and the defendant demurs to the evidence, the plaintiff is entitled to a final judgment upon the demurrer. *Nuttall v. McDowall*, 6 Call 53.

Where execution against an executor *de bonis non* proves ineffectual, the creditor may either resort to his action at law to establish a *devastavit*, or file a bill in equity against the executor and legatees for an account of assets and proportional contribution to pay the debt. *Sampson v. Payne*, 5 Munf. 176.

A fiduciary can not be compelled by summary process of rule to show cause why he shall not be fined and imprisoned to pay a decree against him as such, especially where his accounts have not been settled in a suit, and it has not been shown that he has assets in his hands. *Cheatham v. Cheatham*, 81 Va. 395.

Property Subject to Execution.—The increase of slaves after the death of the testator are looked upon as part of his estate and are liable for his debts. *Tucker v. Sweny*, Jeff. 5.

After the assent of the executor to a specific legacy, the property is changed, and a creditor obtaining a judgment against the executor can not levy an execution upon the property in the hands of the legatee. He may pursue the executor at law, or follow the property in equity, making all the legatees parties. *Burnley v. Lambert*, 1 Wash. 308.

Where personal property of a testator or intestate has been distributed to legatees or distributees of the decedent, with the assent of his executor or administrator, it is not competent to a creditor of the decedent to levy his execution on such property under a judgment obtained against the personal representative. *Randolph v. Randolph*, 6 Rand. 194.

Equity Will Not Enforce Judgment Obtained by Collusion.—A court of equity will not decree the payment out of the decedent's assets of a judgment obtained by the collusion or neglect of the administratrix. And if she be precluded from filing a bill of interpleader, there is nothing to prevent the parties entitled to the fund from filing such bill, or otherwise showing that two creditors are claiming the same debt and that both can not be entitled to payment. *Bickle v. Chrisman*, 76 Va. 678. See also, *Hasletine v. Brickey*, 16 Gratt. 116.

Stay of Execution and Relief in Equity against.—Where there are two executors, one of whom is a legatee of part of the personal estate, and a division of the testator's property is made according to the will, subsequent to which the legatee executor dies, as a creditor who afterwards obtains judgment against the surviving executor can not levy the execution upon one of the slaves allotted to the deceased executor in the hands of his administrator, if the administrator of the deceased executor obtains an injunction against the sale of the slave, which is dissolved and the slave is then sold under the execution, the creditor will, at the hearing, be decreed to pay the then value of the slave. *Chapman v. Washington*, 4 Call 327.

Where an execution against the goods of a testator is levied on slaves, which were specifically bequeathed by him and, after his death, were allotted to the legatee by the executor, who held them and hired them out for the legatee, it was held that an injunction

should be awarded to restrain proceedings until an account of the assets remaining unadministered should be taken. *Scott v. Halliday*, 5 Munf. 103; *Sampson v. Bryce*, 5 Munf. 175.

Slaves mortgaged by the intestate were sold under the deed of trust by the trustee after the intestate's death. The slaves were sold for a full price, and the purchaser borrowed part of the purchase money of the intestate's administrator, who charged himself with the same in his administration account. The purchaser, knowing at the time of the loan that the money borrowed belonged to the estate, settled the slaves purchased on his daughter, who was the widow of the intestate. Held, that equity has jurisdiction to enjoin a sale of the slaves under an execution sued out by a creditor of the intestate. *Whitton v. Terry*, 6 Leigh 189.

Suit on a bond given by a distributee for the purchase price of slaves at an executor's sale was not brought until twelve years after it was given and six years after the death of the executor to whom it was given. No account of the executorship was ever rendered, and suit was brought against the administrator of the executor in the same year to compel such settlement, and execution on the judgment was levied on slaves voluntarily conveyed by the distributee. Held, that a court of equity, on a bill by such donee, might enjoin the sale of the slaves until the distributive share of the donor could be ascertained and set off against the judgment. *Hickerson v. Helm*, 2 Rob. 628.

In *Glassford v. Hackett*, 3 Call 193, it was held, that the statute does not give a motion on a three months' replevy bond against executors given by them in stay of execution.

Sale—Title of Purchaser.—After the assent of an executor to a specific legacy, a creditor obtained a judgment against the executor, and erroneously levied execution on property in the

hands of the legatee. Held, that the purchaser acquired no title thereto. *Burnley v. Lambert*, 1 Wash. 308.

h. Equitable Relief.

An injunction in favor of an administrator on the ground of a deficiency of assets should not be made perpetual, but only until assets shall come to his hands to satisfy the judgment or any part thereof, reserving to the creditor liberty to show such assets by a scire facias at law. *Haydon v. Goode*, 4 Hen. & M. 460.

Where a judgment has been obtained against an executor, who, from the perplexed state of assets and other causes, was unable to plead at law, a court of equity will afford relief. *Pickett v. Stewart*, 1 Rand. 478.

An executor against whom judgments have been obtained at law may be relieved in a court of equity upon his showing that assets sufficient to pay all the debts of the estate came into his hands, but that a large portion of them have been since recovered by a paramount title. *Royall v. Johnson*, 1 Rand. 421.

Notwithstanding a judgment against administrators, as such, in an action of debt, to which they pleaded "payment by the intestate," and a subsequent judgment, against them personally, in an action suggesting a devastavit to which they pleaded "no waste," relief in equity was granted them in this case; on the grounds that the peculiar and perplexed state of the assets made it difficult if not impracticable, to plead in relation thereto, at law; and that, at the trial of the second action, their principal counsel was absent, and their assistant counsel withdrew from the cause; in consequence whereof, they were wholly undefended, and a verdict, perhaps contrary to justice, was obtained against them, without any negligence or default on their part. *Pendleton v. Stuart*, 6 Munf. 377.

An administrator, who enjoins a judgment against himself in his repre-

sentative capacity, on the ground that he is a creditor of the estate of the decedent, must be prepared, on motion to dissolve, to show that he is a creditor. *Deloney v. Hutcheson*, 2 Rand. 183.

In a suit by a legatee against the executor, a decree by default for the legacy was rendered against the executor three years after the service of the subpoena on him. The executor thereupon filed a bill to enjoin the decree, as obtained by surprise, alleging that, at the time of the service of the subpoena on him in the original suit, he was a nonresident of the state, and wrote to counsel practicing in the court in which the suit was pending to file his answer and attend to the suit; that such counsel neglected to answer, and died pending the suit; that the notifications in the case never came to his knowledge; and that he was in advance of the estate. Held, that the executor had been guilty of laches and was not entitled to relief. *Callaway v. Alexander*, 8 Leigh 114, 31 Am. Dec. 640.

Although a judgment at law against an executor amounts to an admission of assets and a court of equity will not relieve against that consequence, yet it will not, by an original decree, charge an executor on that ground. *White v. Bannister*, 1 Wash. 166.

Where, without fraud or collusion, a decree is rendered by a court of competent jurisdiction against an executor, he may bring his suit in equity against the legatees for contribution to satisfy such decree, without first paying the money himself or appealing from the decree against him, though requested and advised to do so. *Bower v. Glendening*, 4 Munf. 219.

9. Continuance.

See generally, the title CONTINUANCES, vol. 3, p. 270.

In a summary motion against administrators for money paid by plaintiff for defendant's intestate, it is no sufficient ground for a continuance, that

defendants had qualified only some seven or eight months before, and so had not had time to settle their accounts of administration, and that they desired to defend themselves on the ground of want of assets to pay the debt, without offering any plea, or affidavit, that the assets were insufficient. *Clements v. Powell*, 9 Leigh 1.

10. Revival of Actions.

See generally, the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2.

Upon the death of an executor, who is party to a suit, a decree rendered against the administrator de bonis non, on motion, after notice to him, is regular. *Dabney v. Smith*, 5 Leigh 13.

Where a suit is brought by an administrator de bonis non against the representatives of his predecessor, a subsequent administrator de bonis non who is also sole legatee of the original decedent, can not revive and prosecute the suit, either as legatee or administrator. *Cheatham v. Burfoot*, 9 Leigh 580.

Where an executor dies pending a suit to recover a claim against the estate of the testator, the suit may be revived against the administrator de bonis non with the will annexed. *Jones v. Reid*, 12 W. Va. 350, 29 Am. Rep. 455.

Where a caveat is revived in the name of the executor who is directed to sell the land and the devisees of the proceeds of the sale, and no objection is made until after the verdict, the irregularity of joining the devisees with the executor will then be disregarded. *Caruthers v. Eldridge*, 12 Gratt. 670.

11. Appeal and Error.

See generally, the title APPEAL AND ERROR, vol. 1, p. 418.

A creditors' bill was brought against an administrator and other defendants, not designated as heirs or creditors, praying for a settlement of the administration accounts and for the sale of lands of the decedent for the payment

of debts. One of the defendants appeared and made defense, and the court improperly decreed a sale of the lands. Held, that such defendant was entitled to appeal. *White v. Kennedy*, 23 W. Va. 221.

Where there is a decree in the circuit court against an administrator for money to be paid out of the assets in his hands to be administered, and the administrator dies, and an administrator de bonis non is appointed, the administrator de bonis non, and not the administrator of the deceased administrator, is the proper party to appeal from such decree, and it is not necessary for him to make himself a formal party to the record by an order of the circuit court, before petitioning for such appeal. *Miller v. Neff*, 33 W. Va. 197, 10 S. E. 378.

It is well settled that where an executor, as such, appeals from a decree which does not aggrieve the estate, the question can not be considered whether he is aggrieved as an individual. *Swann v. Housman*, 90 Va. 816, 20 S. E. 830.

Where the pleadings show that a judgment de bonis propriis should have been de bonis testatoris, it is a clerical error which may be corrected in the lower court and is no ground for an appeal. *Snead v. Coleman*, 7 Gratt. 300, 56 Am. Dec. 112.

If one of two coexecutors direct an appeal, writ of error, or supersedeas, originally granted to them both, to be dismissed, the other may proceed without him; and, since both are before the court, an order of severance may be made without a summons. *Reno v. Davis*, 4 Hen. & M. 283.

Objection made for the first time in the appellate court comes too late, that an administrator de bonis non with the will annexed, who had filed his bill in the court below, and upon which the cause was heard there, was not the administrator. *List v. Pumphrey*, 3 W. Va. 672.

Objection for Want of Parties.—It is obvious that in the absence of the ad-

ministrator, there can be no final adjudication of the matters in controversy, and therefore that the objection for want of parties may be made for the first time in the appellate court. *Hinton v. Bland*, 81 Va. 588. See also, *Armentrout v. Gibbons*, 25 Gratt. 371.

Appeal Bond.—An executor, who takes an appeal in a suit in which he is interested both as executor and individually, is required to give an appeal bond, as to his individual interest. *Dunton v. Robins*, 2 Munf. 341, but not as to his interest as executor. *Shearman v. Christian*, 1 Rand. 393.

An executor or administrator who, on his qualification, gives bond and security according to law, for the faithful performance of the duties of his office, is allowed to prosecute an appeal without giving an appeal bond, in all cases where the object of the appeal is to assert the rights, or protect the interests of the estate which he represents. *McCauley v. Griffin*, 4 Gratt. 9.

An executor is not required to give security upon an appeal from a decree rendered against him in a suit brought by the testator in his lifetime and revived by the executor. *Linney v. Holliday*, 3 Rand. 1.

In an action against an executor, judgment was entered against him personally, instead of de bonis testatoris. Held, that though the judgment was plainly erroneous, yet the executor could only be allowed to appeal upon his giving an appeal bond with security. *Pugh v. Jones*, 6 Leigh 299.

Where an appeal is allowed an executor from a decree against him personally in a suit against him as executor, and in his own right as legatee, he will be required to give an appeal bond with surety. *Erschine v. Henry*, 6 Leigh 378.

Where an executor appeals from a decree in favor of distributees or legatees for their proportions of the estate, he should give bond and security. *Porter v. Arnold*, 3 Rand. 479.

12. Costs.

See generally, the title COSTS, vol. 3, p. 604.

Where a suit was brought against an administrator for distribution before any assets came into his hands and, during the progress of the cause, the administrator received assets of the estate, it was held that, though the plaintiff was entitled to a decree for the assets, the administrator was not chargeable with the costs of the suit, as he had been guilty of no default. *Eidson v. Fontaine*, 9 Gratt. 286.

Where an administrator defendant pleads the single plea of "fully administered," and the issue is found for him, the plaintiff ought to have judgment for debt and costs, when assets, etc., and the defendant is entitled to a judgment against the plaintiff for the general costs of the action. *Timberlake v. Benson*, 2 Va. Cas. 348.

Where the defendant administrator pleads nonassumpsit and "fully administered," and the first is found for the plaintiff and the second for the defendant, the judgment ought to be for the plaintiff for the debt and costs, to be levied on the goods of the estate, quando acciderint, but for the defendant for the separate costs of the second issue. *Timberlake v. Benson*, 2 Va. Cas. 348.

Where the defendant pleads both pleas, and the plaintiff declines to reply to the plea of "fully administered," or having replied to it withdraws it without subjecting the defendant to costs by doing so and the first issue is then found for the plaintiff he ought to have a judgment for the debt and costs, quando acciderint, and the defendant is not entitled to any costs. *Timberlake v. Benson*, 2 Va. Cas. 348.

If a plaintiff having replied to the plea of "fully administered," afterwards withdraws his replication by consent of the court, the defendant may at that time object to it, unless on the terms of the plaintiff's paying the costs occasioned by the replication. If

he neglects to do so, it will be construed to be an admission that he is not entitled to recover such costs, and there can be no judgment at any future term for his separate costs on account thereof, if the issue of nonassumpsit is found against him. *Timberlake v. Benson*, 2 Va. Cas. 348.

Where an executor declares on an assumpsit to himself for transactions subsequent to the death of the testator, the judgment for costs should be against the executor, "to be levied of the goods and chattels of the testator in his hands to be administered, if so much thereof he hath; but if not, then to be levied of his own proper goods and chattels." *Carr v. Anderson*, 2 Hen. & M. 361; *Thornton v. Jett*, 1 Wash. 138.

Where an executor appeals, the damages, on affirmance of the judgment, as well as the costs in the appellate court, ought to be entered, "to be levied of the goods, etc., of the testator in the hands of the executor, if so much he hath; if not, then of his own proper goods." *Hawkins v. Berkeley*, 1 Wash. 204. See Va. Code, 1887, § 2677.

Where administrators, after thirty years' litigation conducted chiefly at their own expense, finally recover a large judgment for the trust estate, charging for their services only \$200, the costs recovered in such litigation should be credited to and not charged against the administrators and sureties in a subsequent suit in equity by the distributees for a third accounting of the administrators. *Robertson v. Gillenwaters*, 85 Va. 116, 7 S. E. 371.

An administrator is allowed his legal costs and reasonable counsel fees expended in defending a litigable demand against the estate, whether in the circuit or appellate court, if he acted in good faith in making such defense. *Turk v. Hevener*, 49 W. Va. 204, 38 S. E. 476.

On dismissing a bill by the heir and executor of a vendee of land to have

a good title made by the vendor, and meanwhile to restrain the collection of the purchase money, costs should not be decreed against the plaintiffs jointly, nor against the executor de bonis propriis. *Long v. Israel*, 9 Leigh 556.

Upon an appeal taken by a testator and prosecuted by his executor, the damages on affirmance of the judgment should not be awarded against the estate of the executor, in case of a deficiency of that of the testator. *Hudson v. Ross*, 1 Wash. 74.

Where an administrator has been made personally liable for some of the debts, the loss of which grew out of his neglect, he is personally liable for the costs. *Sorrel v. Procter*, 4 Hen. & M. 431.

V. Administrators De Bonis Non or with Will Annexed.

See ante "Appointment, Qualification and Tenure of Office," II.

A. DEFINITIONS.

"An administrator de bonis non (administratis) is one appointed to administer so much of the estate as may be left unadministered on the death, resignation or removal of a sole executor or administrator, or all of several executors or administrators. If the predecessor was an administrator with the will annexed or an executor, the successor is called administrator de bonis non with the will annexed (de bonis non cum testamento annexo, ordinarily abbreviated d. b. n. c. t. a.)." 11 Am. & Eng. Ency. Law (2d Ed.) 793.

Administrators with the Will Annexed.—"An administrator with the will annexed (cum testamento annexo) is one appointed when no executor was appointed, or, if an appointment was made, when the sole executor or sole surviving executor dies or is incompetent or refuses to act." 11 Am. & Eng. Ency. Law (2d Ed.) 789.

B. APPOINTMENT.

1. Nature and Necessity of Appointment.

The administrator de bonis non is appointed to finish a business already commenced. It is not, therefore, a full and complete administration which is committed to him, such as is granted to a temporary administrator, but an administration de bonis non administratis; that is to say, he is entitled to all the goods and personal estate which have not been converted by the former executor or administrator. *Hinton v. Bland*, 81 Va. 588; *Coleman v. McMurdo*, 5 Rand. 51.

2. Right and Priority of Appointment.

Since the person entitled to the estate is also entitled to the administration, a residuary legatee is entitled to letters of administration with the will annexed in preference to the widow, who elects to take under a provision of the will, and therefore has lost her right to share in the residuum. *Thornton v. Winston*, 4 Leigh 152.

If the grant of administration with the will annexed be alleged to be irregular upon the ground that the executor had not renounced, the fact of such renunciation may be established by parol evidence. *Thompsons v. Meek*, 7 Leigh 419.

Upon the death of the person beneficially entitled to the estate, his personal representative is entitled to administration with the will annexed in preference to the testator's next of kin or creditors. *Hendren v. Colgin*, 4 Munf. 231; *Cutchin v. Wilkinson*, 1 Call 1.

3. Appointment on Renunciation of Executor.

A court of probate received proof of a will and admitted it to record, and six months afterwards granted administration with the will annexed. It did not appear by the record of the court of probate that the executors named in the will had ever renounced. Held, that the failure to state such renuncia-

tion upon the record did not make the grant of administration absolutely void. *Thompsons v. Meek*, 7 Leigh 419.

4. Reversal of Order of Appointment.

"A person originally appointed executor by will but whose name was afterwards stricken out by direction of the testator has not a sufficient interest to warrant the issuing of a superse-deas at his request to reverse an order appointing an administrator with the will annexed in default of executors." *Sayre v. Grymes*, 1 Hen. & M. 404.

C. POWERS, DUTIES AND LIABILITIES.

See ante, "Powers, Duties and Liabilities," IV.

1. General Nature of Powers.

An administrator with the will annexed has in general the same powers which the executor would have had if he had qualified. *McCall v. Peachy*, 3 Munf. 288.

The present doctrine of the law as to administrators is that a subsequent administrator succeeds to all the powers and duties of his predecessor and takes the assets subject to all the obligations incurred in relation thereto. In short, they are but successive trustees. If they take the trust fund, they take them subject to all the legal obligations which may attach thereto. An administrator not having settled his accounts nor paid the debts of the estate, but squandered the funds and being insolvent, may be sued in chancery, and it is proper in such suit, to save a multiplicity of suits to join his sureties. *Thompson v. Nowlin*, 51 W. Va. 346, 41 S. E. 178, citing *Hale v. White*, 47 W. Va. 700, 35 S. E. 884; *Beverly v. Rhodes*, 86 Va. 415, 10 S. E. 572.

2. Care and Management of Estate.

a. Title and Control over Personalty.

(1) General Consideration.

An administrator de bonis non is entitled to all the personal estate of the intestate which has not been converted by the former administrator.

And where in a suit money is ordered to be paid to the intestate's estate, the administrator de bonis non must be a party. *Hinton v. Bland*, 81 Va. 588.

Assets or Proceeds Administered by Predecessor.—An administrator de bonis non has no title to assets that have been administered by his predecessor, or the proceeds thereof. *Burnley v. Duke*, 2 Rob. 102.

(2) Property Constituting Unadministered Assets.

Debts Due Predecessor for Sales.

Where, upon the settlement of the administration of a deceased administrator, it appears that he sold his intestate's effects on credit but that the collection of the sale bonds by his personal representative was unnecessary for the reimbursement or indemnity of the estate, they may be confided as unadministered assets to the administrator de bonis non and the sale need not be treated as a conversion. *Clarke v. Wells*, 6 Gratt. 475.

Securities Taken by Predecessor.

Where administration de bonis non was committed to a sheriff, which administration went into the hands of his deputy, it was held, that the deputy was chargeable with the amount of bonds taken by the first administrator and payable to him as such, and after his death delivered by his personal representative to such deputy as unadministered assets. *Tyler v. Nelson*, 14 Gratt. 214.

Bonds taken by an executor or administrator for property belonging to the estate of his decedent and lawfully sold by him and remaining uncollected at the time of the death of such executor may be claimed in equity by the administrator de bonis non. *Tyler v. Nelson*, 14 Gratt. 214. See also, *Hefernan v. Grymes*, 2 Leigh 512; *Clarke v. Wells*, 6 Gratt. 475; *Hinton v. Bland*, 81 Va. 588.

Where it appears that certain bonds taken by an administrator in settling an estate, have been accounted for and

paid over to the distributees, a subsequent administrator is not entitled to collect such bonds. *Smith v. Waugh*, 84 Va. 806, 6 S. E. 132.

Proceeds of Property Converted by Intestate.—Although an administrator de bonis non has no title to assets that have been administered by his predecessor, or the proceeds thereof, yet if he receives from the administrator of his predecessor the proceeds of assets converted by his intestate with the assent of the parties entitled to recover them of him, and under a decree of a court of competent jurisdiction, he is thereby completely protected for such payments. *Burnley v. Duke*, 2 Rob. 102.

Judgment Obtained by Predecessor.—An administrator de bonis non may maintain an action of debt, on a judgment obtained by the executor. *Dykes v. Woodhouse*, 3 Rand. 287.

In such an action, it will be sufficient to allege, in the declaration that A. B., executor of C. D., recovered the judgment; and it will be inferred that the debt was originally due to the testator on the plea of nul tiel record. Decided by two judges out of three. *Dykes v. Woodhouse*, 3 Rand. 287.

In *Allen v. Cunningham*, 3 Leigh 395, Tucker, P., said: "In deciding this case I shall take the case of *Dykes v. Woodhouse*, to be unquestionable. Certainly, it ought not to be questioned except by a full court; and I should regret to see it disturbed, because it is better that the question of practice should be considered as settled, particularly as the decision is in perfect conformity with the rights of parties and the convenience of suitors. By that decision it is declared, that an administrator de bonis non with the will annexed, may maintain an action of debt on a judgment obtained by the executor of his testator, which accords with the doctrine of *Brudenel's* case, 5 Co. 9, that the executor of an administrator who recovers a judgment, is not entitled to have execution

of that judgment; and the converse of the proposition is equally true, as to the administrator of an executor." See also, *Wernick v. M'Murdo*, 5 Rand. 51, 125; *Bishop v. Harrison*, 2 Leigh 532, 536; *Allen v. Cunningham*, 3 Leigh 395, 403; *Tyler v. Nelson*, 14 Gratt. 214; *Holt v. Lynch*, 18 W. Va. 567, 572.

Stock Pledged by Predecessor.—Certificates of bank stock in the name of P. taken up by the bank and reissued to B. P., executor of P., and by B. P. pledged as collateral security for notes made by B. P., the executor in due course of the administration of the estate of P., can not be recovered from the bank so holding such certificates by an administrator de bonis non with the will annexed, of P. *McCreery v. Bank*, 55 W. Va. 663, 47 S. E. 890.

(3) Recovery from Predecessor.

An administrator de bonis non can not sue the representative of a former executor or administrator, either at law or in equity, for assets wasted or converted by the first executor or administrator; but such suit may be brought directly by creditors, legatees or distributees. *Coleman v. McMurdo*, 5 Rand. 51; *Cheatham v. Burfoot*, 9 Leigh 580. See also, *Cocke v. Harrison*, 3 Rand. 494; *Hinton v. Bland*, 31 Va. 588.

If such suit be instituted by the administrator de bonis non against the representatives of his predecessor, a party who is sole legatee of the original decedent, and has also qualified as the successor administrator de bonis non, can not revive and prosecute the suit, either in the character of legatee, or in that of personal representative. *Cheatham v. Burfoot*, 9 Leigh 580.

An administrator sold slaves at a private sale, partly for cash and partly on credit. In an answer in chancery he stated on oath that it was not his intention to convert the slaves. Held, on his letter of administration being revoked before the credit payment be-

came due and an administrator de bonis non appointed, that the latter might recover such payment directly from the vendee. *Heffernan v. Grymes*, 2 Leigh 512.

Quære, whether an administrator de bonis non can call the representative of a previous executor or administrator to an account, and recover any balance due from his testator or intestate to the estate. *Cocke v. Harrison*, 3 Rand. 494.

(4) Action for Recovery of Assets.

An administrator de bonis non may maintain an action for the recovery of any of the personal estate of the intestate which has not been converted by the former administrator. *Hinton v. Bland*, 81 Va. 588.

A, administrator of B, recovered a judgment against C, administratrix of D, for a debt due the plaintiff's intestate, and sued out a fi. fa. thereon, which was returned nulla bona. The plaintiff then died, and administration de bonis non of B's estate was granted to E. Held, that an action of debt on the administration bond of C, against her and her sureties, lay at the relation of E, the administrator de bonis non of B, and not at the relation of the representative of A, the first administrator of B, upon the construction of the statute. 1 Rev. Va. Code, ch. 104, § 63. *Allen v. Cunningham*, 3 Leigh 395.

Pending a contest over the testator's will, a curator of the estate was appointed. The curator collected an ante-war debt well secured in Confederate money. The will having been established, an executor was appointed, but was afterwards removed; and the administrator de bonis non with the will annexed filed a bill against the curator and his sureties to subject them to the payment of the debt. The defendants demurred to the bill. Held, that the administrator de bonis non with the will annexed could maintain the suit against the curator and his

sureties, under the statute. Va. Code, 1873, ch. 118, § 24. *Helsley v. Craig*, 33 Gratt. 716; Va. Code, 1887, § 2534; W. Va. Code, 1899, ch. 77, § 23, p. 708.

Actions on Judgments.—In an action by an administrator de bonis non on a judgment obtained by the executor, it is sufficient to allege in the declaration that the executor recovered the judgment, and it will be inferred, on a plea of nul tiel record, that the judgment was for a debt due the testator. *Dykes v. Woodhouse*, 3 Rand. 287.

b. Title, Rights and Powers Concerning the Realty.

(1) Maintaining Caveat to Prevent Patent.

An administrator with the will annexed being in possession of lands directed to be sold may maintain a caveat to prevent any other person from obtaining a patent for the same as waste and unappropriated. *Archer v. Saddler*, 2 Hen. & M. 370.

(2) Rents and Profits.

The estate of a testator was delivered to the sureties of the executrix, under the statute of wills of 1792, upon her failure to indemnify them. They held the same for some years, and received the profits, but never settled any account until after the death of the executrix, and an administrator de bonis non was appointed. Held, that the administrator de bonis non, and not the legatees, was the proper party plaintiff in a bill against the sureties for an account of the profits. *Waddy v. Hawkins*, 4 Leigh 458.

(3) Power to Sell Real Property.

Where executors are directed by the will to sell lands and they renounce the executorship, an administrator with the will annexed may sell under the authority given by the statute, although the will directs the executors to sell "provided the land will sell for as much as in their judgment will be equal to its value." *Brown v. Armistead*, 6 Rand. 594.

Under the statute providing that

where executors fail to qualify, or, after qualifying, die before sales and conveyances directed by the will have been made, they shall be made by the administrator with the will annexed, one who succeeds as administrator with the will annexed, upon the removal of one executor and the death of the other, has authority to make the sales and conveyances directed by the will. *Mosby v. Mosby*, 9 Gratt. 584.

An administrator with the will annexed filed a bill in equity against a devisee of his testator, who was also his partner, and obtained an injunction restraining her from disposing of the estate, and he himself then proceeded without any order or decree, and before a final decree in his case, to advertise the real estate of his testator for sale. Held, that as he had come into a court of equity seeking its aid in settling his testator's estate and the affairs of the firm he had no right to attempt a sale of the real estate of his testator without an order of the court, and that his doing so was a breach of his trust and that the sale was properly enjoined at the suit of the devisee. *Watson v. Fletcher*, 7 Gratt. 1.

A testator, being about to leave the county, made his will, providing that in case of his death, or if he should not be heard of for ten years, his land should be sold for the best price that could be obtained, as was directed by a letter to his attorney of the same date with the will, and the proceeds divided among his four sisters. Held, that the administrator with the will annexed had power to sell the land, under the statute. 1 Rev. Va. Code, ch. 104, § 52. *Broadus v. Rosson*, 3 Leigh 12.

(4) Property Fraudulently Conveyed.

See generally, the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

An administrator with the will annexed of a decedent who is indebted at the time of his death, and who leaves

nothing with which to satisfy the same except a tract of land which has been obtained from him by fraud, to set aside which fraudulent conveyance from him a suit had been instituted by such decedent, and determined adversely to him in the circuit court, has the right to prosecute an appeal from the decree, holding that a purchaser from the fraudulent grantee, indirectly, during the pendency of such litigation, was an innocent purchaser, and entitled to hold the property. *O'Connor v. O'Connor*, 45 W. Va. 354, 32 S. E. 276.

Actions by Legatees.—An administrator de bonis non with the will annexed may be directed to deliver up slaves to a legatee without first decreeing an account of his administration, where he has admitted in his answer that the debts of the estate have been paid, that he has settled his accounts before another court, and does not ask an account, and it also appears that the accounts of the executor, his predecessor, showed a considerable balance in favor of the estate of the testator. *Raney v. Heath*, 2 Pat. & M. 206.

VI. Executors De Son Tort.

Defined.—An executor de son tort (of his own wrong) is defined to be a person who, without any authority, intermeddles with the estate of the decedent and does such acts as properly belong to the office of an executor or administrator. 11 Am. & Eng. Ency. Law (2d Ed.) 1342. See also, *Shearman v. Christian*, 6 Rand. 49, 73.

Existence Contemporaneously with Rightful Representative.—In general, when there is a rightful executor or administrator, there can not be an executor de son tort, because any person, having possession of the property of the deceased, is responsible therefor to the rightful executor or administrator, and ought not, therefore, to be responsible to creditors also. Otherwise he would be doubly chargeable. But, in

the case of fraudulent conveyances, the donee in possession is an executor de son tort, although there be a rightful executor or administrator. For, as he can not be made responsible therefor to the rightful executor or administrator, the reason of the general rule fails in that case, and if the donor was not, in such case liable, as executor de son tort, the creditor would be without remedy. *Chamberlayne v. Temple*, 2 Rand. 384, 11 Am. Dec. 786. See also, *Shields v. Anderson*, 3 Leigh 729.

Right of Retainer.—See ante, "Retainer," IV, H, 6, g.

An executor de son tort can not retain his debt. *Shields v. Anderson*, 3 Leigh 729.

Liability.—Executors de son tort are liable to account for the property of the decedent to his distributees or legatees, like other executors, and can not rely on the statute of limitations to protect them from such accountability. *Hansford v. Elliott*, 9 Leigh 79.

An executor de son tort is bound by his acts and will be held responsible therefor; and those knowing his true character may likewise be bound by their dealings with him. But in the absence of acquiescence or assent, the rightful executor and those interested are not bound by such acts, except in so far as they are proper and legal. *Caperton v. Ballard*, 4 W. Va. 420.

A assumed the management of a decedent's estate, leased the land for one year, beginning April 1, 1844, and received the rent therefor. The land was returned delinquent for the nonpayment of taxes for the year 1844, and sold in October, 1845, when A became the purchaser. Held, that, though the fiduciary relation had ceased at the time of the sale, yet as the sale was occasioned by the wrong of the agent, he should not be allowed to profit by it. *Morris v. Joseph*, 1 W. Va. 256, 91 Am. Dec. 386.

Where a testator devises his furniture to his wife for life, and after her

death to one of her sons, who dies; and subsequently the wife, at her death, leaves the furniture in the house of a surviving son, who, on coming of age, takes possession of the house, he is not to be charged in money for the furniture, but has a right to deliver it, long after taking possession, to the representative of his deceased brother. *Ambler v. Macon*, 4 Call 605.

A bill in equity was filed seeking to charge a defendant as administrator de son tort. The answers to the interrogatories filed, and the answer to the complaint, denied emphatically and clearly the possession by defendants of any moneys or effects belonging to the estate, and the evidence introduced tended to support these answers, but an order was entered for the sheriff to take possession of the effects. Held, that this order was error. *Seay v. Schue*, 83 Va. 838, 3 S. E. 801.

Accounting.—See ante, "Accounting," IV, L.

Executors de son tort are liable to account for the property of the decedent to his distributee or legatees, like other executors, and shall not rely on the statute of limitations to protect them from such accountability. *Hansford v. Elliott*, 9 Leigh 79.

A bill can not be maintained by distributees against an executor of his own wrong, who has sold property of the deceased, to have an account and obtain a decree against the former for the proceeds of the sale, unless the rightful personal representative is a party plaintiff or defendant. *Nease v. Capehart*, 8 W. Va. 95.

VII. Curators.

Defined.—See ante, "Representatives or Personal Representatives," I, A.

Appointment and Duties.—As to the appointment and duties of a curator, see Va. Code (1887), § 2534; W. Va. Code (1899), § 3621. See also, ante, "Appointment, Qualification and Tenure of Office," II.

Title to Property.—See ante, "Assets," III.

A person appointed curator and receiver of chattels by a court of chancery, does not, by virtue of that appointment, acquire a right of property. *Boyle v. Townes*, 9 Leigh 158.

Liability to Suit.—When a court of probate, under the 24th section of the statute concerning wills, appoints a person to collect and preserve the estate of a decedent until administration be granted, such appointee can not properly be sued on a bond of the decedent. If he be sued and judgment rendered against him, a scire facias upon the judgment will not lie, after administration is granted, against the administrator, nor will the judgment be any bar to a new action against the administrator, upon his decedent's bond. *Wynn v. Wynn*, 8 Leigh 264.

A curator of a decedent's estate under 1 Rev. Va. Code, ch. 104, § 24, is not liable to suit of the decedent's creditors in chancery; and though a curator appointed under the 42d section is liable to be sued in like manner as an administrator, it must be shown by the record, in a suit against a curator, that he is such a curator as is in law liable to be sued and capable of defending the decedent's estate. *Wilson v. Shelton*, 9 Leigh 342.

H. is appointed curator of the estate pending a contest over C.'s will; and, whilst curator, collects an ante-war debt well secured, in confederate money. C.'s will having been established, H. qualifies as executor, but is afterwards removed; and the administrator de bonis non with the will annexed, files a bill against H., as curator, and his sureties seeking to subject them to the payment of said debt; and the defendants demur to the bill. Held, the administrator de bonis non with the will annexed, may maintain the suit against the curator and his sureties, under the statute. Va. Code, 1873, ch. 118, § 24; *Helsley v. Craig*, 33 Gratt. 716.

VIII. Foreign Executors and Administrators.

A. EXTRATERRITORIAL POWERS.

It is well settled that a grant of administration has no legal operation out of the state from whose jurisdiction it was derived. *Oney v. Ferguson*, 41 W. Va. 568, 23 S. E. 710; *Crumlish v. Shenandoah Val. R. Co.*, 40 W. Va. 627, 22 S. E. 90; *Andrews v. Ivory*, 14 Gratt. 229, 73 Am. Dec. 355; *Dickinson v. McCraw*, 4 Rand. 158. See also, *Leach v. Buckner*, 19 W. Va. 36, 44.

"In order, therefore, to reduce the assets into possession, and close the administration and distribution of a decedent's estate, it is generally necessary that there should be a personal representative in every state in which the assets may be situate. They are subject to the payment of debts according to the law of the situs, but to distribution according to the law of the domicil. It is therefore a matter of convenience that the surplus of the assets remaining in the hands of a local administrator after the payment of debts, should be sent home, that is, to the domiciliary administrator, for distribution. And this seems to be the course generally pursued; though the distribution may be made by the local administrator. Whether the one course or the other will be pursued in any particular case, depends upon the local law and the judicial discretion of the local court. If the surplus be paid over to the domiciliary administrator, it is matter of national comity and not of right. Every state is bound, to the extent of its power, to take care of the rights of its own citizens. And therefore it will see that the estate of a decedent within its jurisdiction is properly applied to the satisfaction of their rightful claims, whether as creditors, legatees or distributees of the decedent. But those claims being satisfied, it has no longer any motive to retain the fund, and will not, unless it

be more convenient to dispose of the subject fully and finally, than to send it home for that purpose. If none of the citizens of the state have any claim upon the fund, either as creditors, legatees or distributees, and the aid of its courts be not invoked by a foreign claimant, it will have no motive to interfere with the fund, or prevent the domiciliary administrator from obtaining possession of it if he can. Of course he can not sue for it, and if he can not obtain possession otherwise, he or some person else must become local administrator. He will be preferred to any person else, as he will have the ultimate receipt and distribution of the fund." *Andrews v. Avory*, 14 Gratt. 229, 73 Am. Dec. 355.

"In *Vaugh v. Northop* (15 Pet. 1), it was held, that every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government, which grants it, and does not de jure extend to other countries. It can not confer as a matter of right any authority to collect assets of the deceased in any other state; and whatever operation is allowed to it beyond the original territory of the grant is a mere matter of courtesy, which every nation is at liberty to yield or to withhold according to its own policy and pleasure with reference to its own institutions and the interests of its own citizens." *Leach v. Buckner*, 19 W. Va. 36, 44.

B. ANCILLARY OR AUXILIARY ADMINISTRATION.

1. Appointment and Revocation of Authority of Ancillary Representatives.

a. Purpose of Appointment and Scope of Authority.

"One of the main purposes of the appointment of an ancillary administrator is the subjection of the assets of the decedent to the payment of his debts due the citizen of the local sovereignty. 'In practice, the local sovereignty, state or national, permits

letters to issue upon the estates of deceased nonresidents, mainly for the purpose of convenience subjecting such assets to the claims of creditors entitled to sue in the local courts, and for appropriating whatever balance may remain to the state or sovereign, by way of distribution, in default of known legatees or kindred.' While, by comity, the courts of the jurisdiction in which the property is found will recognize the right on nonresident legatees and heirs, and will permit any surplus, after paying the local indebtedness, to be paid over to the domiciliary administrator or executor, it is only done in a spirit of comity and as a matter of judicial discretion. The local sovereignty may compel them to come into its own jurisdiction to receive what belongs to them. 'The rule to thus pay over is not, however, absolute; on the contrary, the transfer will not be made if deemed, under the circumstances, improper; and legislative policy is to secure the rights of its creditors, and citizens at all hazards. * * * For the spirit of comity does not require that citizens shall be put to the inconvenience and expense of proving their claims abroad when there are assets at hand.'" *McClung v. Sieg*, 54 W. Va. 467, 482, 46 S. E. 210.

b. Necessity.

Where a decedent leaves personal property in a state or country other than that in which he was domiciled, it is generally necessary for the court of probate there to appoint an ancillary representative to collect the local assets for the purpose of administration, unless voluntary payment is made to the domiciliary representative. This necessity is due to the fact that letters testamentary or of administration have no operation beyond the jurisdiction of the court granting them. See ante, "Extraterritorial Powers," VIII, A.

Si us of Assets.—Claims against the government of the United States are not local assets at the seat of govern-

ment, and therefore ancillary administration can not be granted in the District of Columbia in order to collect such claims in favor of a decedent, but the domiciliary representative may receive payment of the claim at any place where the government may choose to pay it, whether it be at the seat of government, or at any other place where the public funds are deposited. *Davis v. Chapman*, 83 Va. 67, 5 Am. St. Rep. 251, 1 S. E. 472.

Where a resident of Kentucky died intestate there, having no estate in Virginia but a claim against the commonwealth of Virginia, it was held, that the court of Henrico county, where the seat of government was located, had jurisdiction to grant administration. *Com. v. Hudgin*, 2 Leigh 248.

c. Wrongful Exercise of Jurisdiction.

A grant of administration by a court which is without jurisdiction, because the decedent was a nonresident and left no property in the state, is not void but voidable. *Andrews v. Avory*, 14 Gratt. 229, 73 Am. Dec. 355; *Fisher v. Bassett*, 9 Leigh 119, 33 Am. Dec. 227.

d. Revocation of Ancillary Letters.

Where a testator left two wills, one in England and the other in Virginia, the English will being the later in date, it was held, that a grant of probate to the executor named in the English will, did not ipso facto, repeal letters of administration granted in Virginia on the first will. *Burnley v. Duke*, 1 Rand 102.

2. Privity between Domiciliary Executor and Administrator with the Will Annexed.

An administrator with the will annexed is, in legal contemplation, the executor of the will, so that there is the same privity between the executor of a will and an administrator with the will annexed in another jurisdiction, as exists between executors of the same will in different jurisdictions, and a decree against a domiciliary executor

is enforceable against an administrator with the will annexed in any other jurisdiction. *Garland v. Garland*, 84 Va. 181, 4 S. E. 334.

C. COLLECTION OF ASSETS.

See ante, "Collection of Assets," IV, E, 4.

Claims against United States.—The administrator of a creditor of the federal government, duly appointed where he was domiciled at his death, has full authority to receive payment and give a full discharge of the debt due his intestate, in any place where the government may choose to pay it, whether it be at the seat of government, or at any other place where the public funds are deposited. He is not obliged to take out letters of administration in the District of Columbia, because debts due from the government have no locality at the seat of government. *Davis v. Chapman*, 83 Va. 67, 5 Am. St. Rep. 251, 1 S. E. 472.

Transfer of Stock to Foreign Representative.—As to the mode in which a foreign personal representative of the person, who was domiciled out of this state at the time of his death, may have transferred the stock or certificate of debts of the state, or of a corporation created by it, see Va. Code, 1887, §§ 2627, 2628.

D. DISPOSAL OF ASSETS.

What Law Governs.—In *Smith v. Union Bank*, 5 Pet. (U. S.) 518, affirming 4 Cranch (C. C.) 21, it appeared that one R., domiciled in Norfolk, Virginia, died leaving assets in the District of Columbia, and indebted by bond to a citizen of Virginia, and on simple contract to a bank in the District of Columbia, where administration was granted. By the law of Virginia bond debts were given priority over simple contract debts; but by the law of Maryland, which was in force in the district, no such priority was given to bond debts. It was held, that the order in which the debts of the decedent were to be paid from the assets in the Dis-

trict of Columbia was to be governed by the law of Maryland, and not by the law of Virginia.

Transmission to Domiciliary Representative.—Where there has been a principal administration in one state, and ancillary administration in another, whether the courts of the latter will permit the assets there to be transferred to the former, before the legatees as well as the creditors in the state of the ancillary administration are satisfied, will depend upon the circumstances of each case. There is no inflexible rule on the subject. *Moses v. Hart*, 25 Gratt. 795.

Where there has been a principal administration in this state and an ancillary administration in another state, foreign claimants who come here insisting on the transmission of the assets to another state, when there are domestic claimants also, ought to be required to show that the transmission is indispensable to the purposes of justice, and that distribution can not be made here without injury, or at least great inconvenience. The burden is upon them to make out a case for the interposition of the court in their favor. *Moses v. Hart*, 25 Gratt. 795.

A testator died in New York and his executrix qualified in that state. A curator of the estate in Virginia paid money to two of the testator's legatees who were in Virginia. Held, that as it was probable that the debts of the estate had been paid, the curator would not be required to pay over to the representatives of the estate the money paid to legatees, until an inquiry could be directed to ascertain whether any part of the assets was needed in New York to pay debts and legacies, and to what portion of the estate the two legatees to whom the curator paid the money were entitled under the will of the testator. *Moses v. Hart*, 25 Gratt. 795.

E. ACCOUNTING.

See ante, "Accounting," IV, L.

Where a testator in West Virginia in his will requests his executors to sell all his personal property "wherever situated," and a tract of land owned by him in Illinois, and dispose of the proceeds as directed in the will, and the testator had large personal property in Maryland, and there were no letters testamentary issued in that state, nor in the state of Illinois, and the executors took charge of the property in Maryland, and disposed of it, by selling a portion there, and bringing the residue into West Virginia, and disposing of it here, and sold the Illinois land, and received the proceeds, they and their sureties will in West Virginia be required to account for such property and proceeds. *Hooper v. Hooper*, 29 W. Va. 276, 1 S. E. 280.

The defendant was employed by the personal representatives of an intestate to go to Mississippi for the purpose of collecting certain debts due the decedent in that state. Upon his arrival in Mississippi, the defendant ascertained that it would be necessary to qualify as administrator of the decedent's estate in order to collect the debts, and upon a sale of lands of the debtors for the payment of the debts, he became the purchaser. Held, that under the circumstances, the defendant could be held to account for his administration in Virginia. *Powell v. Stratton*, 11 Gratt. 792.

F. LIABILITY IN GENERAL.

When the principal administrator of an estate has been appointed and resides in another state, and an ancillary administrator has been appointed in this state, and such ancillary administrator has, in ignorance of a debt against the estate of his intestate, turned the assets over to the principal administrator, and the principal administrator has made complete or partial distribution thereof, and the ancillary administrator is compelled to pay such debt out of his own funds, and is not guilty of any fraud or improper con-

duct, he is entitled to reimbursement by the distributees, and he is not compelled to go to the foreign jurisdiction to obtain such relief, if any of the distributees have property within this state, sufficient to reimburse him, and he may proceed by foreign attachment against such property, but his recovery against the distributees will be limited to the amount which the distributee has received from the estate. *McClung v. Sieg*, 54 W. Va. 467, 46 S. E. 210.

Land Purchased at Sale for Debt.—An administrator in Mississippi having purchased for the estate land sold for the payment of a debt due to the estate, was held under the circumstances not bound to keep the land and account for the price; but the land was to be treated as the property of the estate. *Powell v. Stratton*, 11 Gratt. 792.

Loss of Assets.—Under the circumstances of a particular case, the administrator was held not to be responsible for money which became worthless in his hands by the insolvency of the bank. *Powell v. Stratton*, 11 Gratt. 792.

G. ACTIONS.

1. Capacity to Sue.

The general rule is well settled that an executor or administrator can not sue, in his official capacity, outside of the state conferring his authority. *Fugate v. Moore*, 86 Va. 1048, 11 S. E. 1063; *Andrews v. Avory*, 14 Gratt. 229, 73 Am. Dec. 355; *Dickinson v. McCraw*, 4 Rand. 158; *Oney v. Ferguson*, 41 W. Va. 568, 23 S. E. 710; *Crumlish v. Shenandoah Val. R. Co.*, 40 W. Va. 627, 22 S. E. 90.

Where, after a foreign administrator has come into a cause by petition to assert a demand of his decedent, the domestic administrator comes by petition to assert the same demand in his name, it is proper to recognize the latter as the proper party to represent the estate, and he takes the place of the foreign administrator. In such case, orders or decrees rendered before the domestic administrator became a

party do not bind him. *Crumlish v. Shenandoah Val. R. Co.*, 40 W. Va. 627, 22 S. E. 90.

The general assembly of Virginia passed an act authorizing the New York administrator of the estate of an intestate, without qualifying under the laws of Virginia, to bring a suit in equity for the appointment of a commissioner to collect balances due on land in Virginia, sold by the intestate, in his lifetime, to make deeds for the same, and to sell the residue of the land belonging to the intestate. The suit was brought, but the commissioner died before a final settlement of his proceedings therein. Held, that the administrator could, without qualifying under the laws of Virginia, maintain a second bill for the settlement of the commissioner's accounts, the heirs of the intestate to be parties thereto. *Watson v. Pack*, 3 W. Va. 154.

Capacity Acquired by Ancillary Grant Pending Action at Law.—"In *Lusk v. Kimball*, 4 Va. Law Reg. 731, 91 Fed. Rep. 845, reversing 87 Fed. Rep. 545, it was conceded on the argument that an equity suit by a foreign administrator could be maintained where ancillary letters of administration were taken out after its institution, but it was contended that a different rule existed in the courts of law. In answer to this argument the court said: 'Just what good reason there is for allowing the amendment in equity, and not at law, does not seem apparent; and certainly in a case like the present one where great injustice would be wrought, unless there is some overpowering consideration, such a result as would follow ought not to be brought about. We do not think that plaintiffs, although laboring under the disability of not having qualified within the state of Virginia at the time of the institution of the suit, occupy the position of strangers, or persons having no interest in the litigation. They were the domiciliary representatives, and as such given the right to

qualify over others in this state, and to be accounted with for the amount of recovery, had another administrator qualified. *Andrews v. Avory*, 14 Gratt. 229, 73 Am. Dec. 355; *Stevens v. Gaylord*, 11 Mass. 356; *Swatzel v. Arnold*, 1 Woolw. (U. S.) 385. They had an interest in the subject matter of the litigation, and a perfect right to sue in the state of Tennessee for the same cause of action, could jurisdiction as against defendants have been acquired." 13 Am. & Eng. Ency. Law (2d Ed.) 950.

Waiver of Disability to Sue.—In the absence of a statute an administrator can not maintain a suit in the courts of a state other than the one in which he qualified, if the objection be properly and seasonably made; but the objection comes too late after a plea to the merits and the lapse of sufficient time to bar the plaintiff's right of action. *Lusk v. Kimball*, 4 Va. Law Reg. 731, reversing 87 Fed. Rep. 845.

Exceptions to General Rule.—"If, however, an executor or administrator should go into another state, and there, without taking out new letters of administration, should collect debts or other assets of his decedent, found there, he would be liable to be sued in the courts of that country by any creditor there, and held liable to the extent of the assets so collected." *Fugate v. Moore*, 86 Va. 1045, 11 S. E. 1063.

And an executor who has qualified and received assets in a foreign country, and has brought them into this state, is liable to be sued and to be compelled to account here, although he has never qualified here and although he may have received no assets here. *Tunstall v. Pollard*, 11 Leigh 1, overruling dictum to the contrary in *Pugh v. Jones*, 6 Leigh 299, cited and approved in *Dickinson v. Hoomes*, 8 Gratt. 353; *Andrews v. Avory*, 14 Gratt. 229; *Moses v. Hart*, 25 Gratt. 795; *Rinker v. Streit*, 33 Gratt. 663, 666; *Davis v.*

Morriss, 76 Va. 21; *Clendenning v. Conrad*, 91 Va. 410, 419, 21 S. E. 818; *Fugate v. Moore*, 86 Va. 1045, 11 S. E. 1063; *Portsmouth Gas Co. v. Sanford*, 97 Va. 124, 128, 33 S. E. 516; *Leach v. Buckner*, 19 W. Va. 36; *Hooper v. Hooper*, 29 W. Va. 276, 1 S. E. 280; *Hooper v. Hooper*, 32 W. Va. 526, 9 S. E. 937; *Oney v. Ferguson*, 41 W. Va. 568, 23 S. E. 710. See also, *Powell v. Stratton*, 11 Gratt. 792; *Hairston v. Medley*, 1 Gratt. 96.

2. Liability to Suit.

General Rule.—As a general rule an executor or administrator can not be sued in his official capacity, at law or in equity, in the courts of any state other than that in which he received his appointment. *Fugate v. Moore*, 86 Va. 1045, 11 S. E. 1063; *Davis v. Morriss*, 76 Va. 21; *Andrews v. Avory*, 14 Gratt. 229, 73 Am. Dec. 355; *Oney v. Ferguson*, 41 W. Va. 568, 23 S. E. 710; *Crumlish v. Shenandoah Val. R. Co.*, 40 W. Va. 627, 22 S. E. 90. See also, *Leach v. Buckner*, 19 W. Va. 36, 45; *Powell v. Stratton*, 11 Gratt. 792.

A general creditor may maintain a suit in chancery against a nonresident administrator appointed in this state, who has failed to return the inventory and make settlement of his accounts as required by law, and who has squandered the estate and become insolvent and the sureties on his bond are proper parties to such suit. If in such suit the administrator confessed assets which he has converted to his own use, the plaintiff is entitled to a decree for his claim against such administrator individually and his sureties and a reference to a commissioner is unnecessary. *Thompson v. Nowlin*, 51 W. Va. 346, 41 S. E. 178.

3. Joinder of Foreign and Domestic Representatives.

An administration granted in another state does not give the administrator appointed there the right to sue jointly with an administrator appointed in Vir-

ginia. *Dickinson v. McCraw*, 4 Rand. 158.

IX. Insolvent Estates.

See generally, the titles BANKRUPTCY AND INSOLVENCY, vol. 2, p. 232; RECEIVERS.

The appointment of a receiver for a decedent's estate is the proper remedy,

where it appears that the administrator has been removed, and the sheriff appointed administrator de bonis non, that the administered assets will not pay the debts of the estate, and that the remaining assets will have to be drawn upon, which being once administered the administrator de bonis non could not receive and hold. *Harman v. McMullin*, 85 Va. 187, 7 S. E. 349.

Executory Contracts.

See the title CONTRACTS, vol. 3, p. 387.

Executory Devise.

See the titles REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS; WILLS.

Executory Limitations.

See the titles REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS.

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See the title REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS.

EXEMPLARY DAMAGES.

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CROSS REFERENCES.

See the title DAMAGES, vol. 4, p. 162.

I. Definitions, Object and Right to Recover.

A. DEFINITIONS.

The common-law definition of the term "exemplary damages" is, damages inflicted by way of punishment upon a wrongdoer as a warning to him and others to prevent a repetition or commission of a similar wrong. *Mayer v. Frobe*, 40 W. Va. 246, 22 S. E. 58.

"Exemplary damages is the money given to the plaintiff by the jury as compensation for the injury inflicted by the defendant on the mental feelings of the injured person, such as his shame, degradation, loss of social position, and the like, resulting from the tort for which the action is brought." *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243, 29 Am. St. Rep. 827, 14 L. R. A. 798.

Indeterminate damages, or, as they are generally called, exemplary damages, can only be awarded when the defendant, in doing the act complained of, was actuated by a vicious intention. *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485, 495.

The terms "exemplary," "punitive," "vindictive" are synonymous. *Mayer v. Frobe*, 40 W. Va. 246, 22 S. E. 58.

Civil Damage Act.—See generally, the title INTOXICATING LIQUORS.

The term "exemplary damages," in § 20, ch. 29, W. Va. acts, 1887, is used according to its common-law definition, and can not be otherwise construed without extrajudicial interference with a plain legislative enactment. *Mayer v. Frobe*, 40 W. Va. 246, 22 S. E. 58.

B. OBJECT OF PUNITIVE DAMAGES.

The object of vindictive or exemplary damages, is, not only to recompense the party injured, but to punish the offender, and deter others from like offending in the future. *Norfolk, etc., R. Co. v. Neely*, 91 Va. 539, 22 S. E. 367; *Blackwell v. Landreth*, 90 Va. 748, 19 S. E. 791; *Norfolk, etc., R. Co. v. Anderson*, 90 Va. 1, 17 S. E. 757; *Mayer v. Frobe*, 40 W. Va. 246, 22 S. E. 58, disapproving and overruling *Pegram v. Stortz*, 31 W. Va. 220, 6 S.

E. 485; *Beck v. Thomson*, 31 W. Va. 459, 7 S. E. 447, in so far as they hold that a wrongdoer can not be punished in a civil suit by punitive damages, in a proper case.

C. RIGHT TO RECOVER.

The Virginia and West Virginia cases, with the exception of the three early West Virginia cases of *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485; *Beck v. Thomson*, 31 W. Va. 459, 7 S. E. 447; *Wilson v. Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780, which were overruled in *Mayer v. Frobe*, 40 W. Va. 246, 22 S. E. 58, hold, that where a tort is committed under aggravating circumstances, punitive, exemplary or vindictive (which terms are synonymous, *Mayer v. Frobe*, supra) damages may be recovered of the wrongdoer. *Borland v. Barrett*, 76 Va. 128, 44 Am. Rep. 152; *Norfolk, etc., R. Co. v. Anderson*, 90 Va. 1, 17 S. E. 757; *Peshine v. Shepperson*, 17 Gratt. 472; *Harman v. Cundiff*, 82 Va. 239; *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354; *Mayer v. Frobe*, 40 W. Va. 246, 22 S. E. 58; *Turner v. Norfolk, etc., R. Co.*, 40 W. Va. 675, 22 S. E. 83; *Ricketts v. Chesapeake, etc., Ry. Co.*, 33 W. Va. 433, 25 Am. St. Rep. 901, 10 S. E. 801; *Downey v. Chesapeake, etc., Ry. Co.*, 28 W. Va. 732; *Matthews v. Warner*, 29 Gratt. 570; *Forbes v. Hagman*, 75 Va. 168; *Bolton v. Vellines*, 94 Va. 393, 26 S. E. 847; *Blackwell v. Landreth*, 90 Va. 748, 19 S. E. 791.

"The case of *Mayer v. Frobe*, 40 W. Va. 246, 22 S. E. 58, determined that the rule as to exemplary damages propounded in the case of *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485, was not the law of this state." *McMaster v. Dyer*, 44 W. Va. 644, 20 S. E. 1016.

"The principal objection urged is that, when some of the sales given in evidence were made, the law of the state as to exemplary damages was governed by the rule of the cases of *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485, and *Beck v. Thompson*, 31 W.

Va. 459, 7 S. E. 447. Such, however, is not true, as the case of *Mayer v. Frobe*, 40 W. Va. 246, 22 S. E. 58, disapproved and overruled those cases, and determined what the law was to the past, as well as to the present and future, except as to such cases as had been finally ended and determined, and were past redemption. This was not one of them." *McMaster v. Dyer*, 44 W. Va. 644, 20 S. E. 1016.

"It is earnestly insisted by the appellants' counsel, that the true and only measure of damages in a suit of this character, as in all other suits for torts, is the actual pecuniary loss, which the plaintiff has sustained by reason of the wrong done; and that though courts have often said, that in cases of this character the jury may properly give vindictive damages, as a punishment to the defendant, that is punitive damages, damages beyond the injury actually sustained, for the sake of the example, that such is not the law. We are earnestly invoked to disregard these often expressed views of the ablest jurists, as contrary to fundamental principles, and as confounding the broad line, always to be kept in view, which divides civil and criminal proceedings. While no authorities are referred to by appellants' counsel, and none can be found to sustain his extreme view, that the plaintiff in such an action is only entitled to nominal damages, unless there be evidence of actual pecuniary injury, coupled with the proof of malicious intent, yet highly respectable jurists have insisted, that what is strictly called punitive damages ought in no civil case to be given; and the damages awarded the plaintiff should be only the damages, sustained by him through the defendant's wrong. But those, who entertained these views, are careful to say, that by the damages, sustained by the plaintiff, they do not mean the amount, to which his estate has been diminished by the wrong, that is, the pecuniary loss, as the phrase is generally understood;

but there is to be included in the damages sustained by the plaintiff, full compensation for his mental and bodily suffering directly consequent on the wrong; and that, while the loss to his estate, his pecuniary loss, may be a mere trifle, the loss resulting from bodily suffering or mental agony may be very great." *Sweeney v. Baker*, 13 W. Va. 158.

II. When Awarded.

A. AGGRAVATING CIRCUMSTANCES NECESSARY.

1. Fraud, Malice and Oppression.

All the cases hold, that in order to enable a party to recover punitive damages, the act complained of must be accompanied by circumstances of aggravation, such as fraud, malice, oppression, or such circumstances as show an absolute disregard of the rights of others. *Vinal v. Core*, 18 W. Va. 1; *Wilson v. City of Wheeling*, 19 W. Va. 323; *Blackwell v. Landreth*, 90 Va. 748, 19 S. E. 791; *Forbes v. Hagman*, 75 Va. 168; *Bolton v. Vellines*, 94 Va. 393, 26 S. E. 847; *Peshine v. Shepperson*, 17 Gratt. 472; *Borland v. Barret*, 76 Va. 128; *Harman v. Cundiff*, 82 Va. 239; *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354; *Norfolk, etc., R. Co. v. Wysor*, 82 Va. 250; *Norfolk, etc., R. Co. v. Lipscomb*, 90 Va. 137, 17 S. E. 809; *Downey v. Chesapeake, etc., Ry. Co.*, 28 W. Va. 732; *Mayer v. Frobe*, 40 W. Va. 246, 22 S. E. 58; *Parsons v. Harper*, 16 Gratt. 64; *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363, 33 S. E. 262.

In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages, these terms being synonymous. *Mayer v. Frobe*, 40 W. Va. 246, 22 S. E. 58.

In actions of tort, when gross fraud, malice, or oppression, or any wanton,

willful, and deliberate disregard of the injured person's rights appear, the jury are not bound to adhere, in computing it, to the determinable money loss or damages, but may give such damages as will be exemplary in keeping others from so doing, and the defendant from repeating like conduct. It may be smart-money as to the defendant, provided it be not an excessive or unreasonable solatium to the plaintiff. *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243, 29 Am. St. Rep. 827, 14 L. R. A. 798.

Vindictive damages may be given to punish the defendant for his fraud and actual malice. *Ogg v. Murdock*, 25 W. Va. 139, 146.

"Exemplary damages are allowable only where there is misconduct and malice, or what is equivalent thereto. Where the injury complained of is free from fraud, malice, oppression, or other special aggravation, compensatory damages only are allowed. *Norfolk, etc., R. Co. v. Neely*, 91 Va. 539, 22 S. E. 367; 8 *Wait's Action and Defenses* 208; *Sedgwick on Damages*, § 383; and *Peshine v. Shepperson*, 17 Gratt. 472." *Burruss v. Hines*, 94 Va. 413, 419, 26 S. E. 875.

Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to compensatory damages, but may give such exemplary damages as, in their opinion, are called for by the circumstances of the case. *Norfolk, etc., R. Co. v. Anderson*, 90 Va. 8, 17 S. E. 757.

The law awards compensatory or actual damages "only where in the unlawful act there is an absence of intentional wrong, fraud or malice, or where the act is not oppressively or recklessly committed, while punitive or exemplary damages are given where the wrongful act is done with a bad motive, or with such gross negligence as to amount to positive misconduct, or in a manner so wanton or reckless

as to manifest a wilful disregard of the rights of others." *Riely, J.*, in *Norfolk*, etc., *R. Co. v. Neely*, 91 Va. 539, 22 S. E. 367.

Want of Probable Cause.—Where the action is not founded on the want of probable cause and maliciousness, punitive damages are not recoverable, and evidence tending to establish the same is not admissible. *Bodkin v. Arnold*, 48 W. Va. 108, 35 S. E. 980, citing *Glen Jean*, etc., *R. Co. v. Kanawha*, etc., *R. Co.*, 47 W. Va. 725, 35 S. E. 978.

In actions of trespass, exemplary damages can not be recovered in the absence of circumstances of aggravation. *Peshine v. Shepperson*, 17 Gratt. 472, 484; *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354.

Where a party wrongfully sues out a distress warrant against another, he is not liable in punitive damages, in the absence of fraud, malice, oppression or other aggravating circumstances. *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354, citing and following *Peshine v. Shepperson*, 17 Gratt. 472.

2. Recklessness and Wantonness.

Exemplary damages are allowable only where there is misconduct or malice, or such recklessness or negligence as evinces a conscious disregard of the rights of others. But where the act or omission complained of is free from fraud, malice, oppression, or other special motives of aggravation, damages by way of punishment can not be awarded, and compensatory damages only are permissible. *Peshine v. Shepperson*, 17 Gratt. 472, 485; *Norfolk*, etc., *R. Co. v. Neely*, 91 Va. 539, 22 S. E. 367; *Burruss v. Hines*, 94 Va. 413, 419, 26 S. E. 875; *Wood v. American Nat. Bank*, 100 Va. 306, 316, 40 S. E. 931; *Talbott v. West Virginia*, etc., *R. Co.*, 42 W. Va. 560, 26 S. E. 311.

Actual or compensatory damages are the measure of the loss or injury sustained, while exemplary or punitive damages are something in addition to full compensation, and something not

given as his due, but for the protection of the public. The law awards the former only where in the unlawful act there is an absence of intentional wrong, fraud, or malice, or the act is not oppressively or recklessly committed; while the latter are given where the wrongful act is done with a bad motive, or with such gross negligence as to amount to positive misconduct, or in a manner so wanton or reckless as to manifest a wilful disregard of the rights of others. *Norfolk*, etc., *R. Co. v. Neely*, 91 Va. 539, 22 S. E. 367.

Unprovoked Assault.—In *Borland v. Barrett*, 76 Va. 128, defendant made an unprovoked and wanton attack upon plaintiff, in the dining room of a hotel. Held, case for punitive damages.

The failure of a bank to pay checks of a depositor properly drawn on funds on deposit, and duly presented, gives the depositor a right of action against the bank, and if such failure is wilful and malicious, or is due to negligence so gross as to evince a culpable indifference to consequences and the rights of the depositor, he has the right to recover exemplary damages. But where the failure is due to the mistake of the bookkeeper, for which the president promptly apologized and offered to correct the error as far as possible, and there is an absence of any fraud, malice, oppression or other special circumstances of aggravation, the recovery will be limited to the actual damages sustained. *Wood v. American Nat. Bank*, 100 Va. 306, 40 S. E. 931.

In an action for a malicious prosecution for a crime alleged to have been committed by the plaintiff, the measure of damages is such an amount as the jury may find will compensate the plaintiff for the actual outlay and expenses about his defense in the prosecution against him, and for his loss of time, and for the injury to his feelings, person and character by his detention in custody and prosecution; and the jury may also, if they find said prose-

cution, to have been commenced or pursued for private ends or with reckless disregard of the rights of the plaintiff, give such punitive damages as they may think proper, for such conduct on the part of the defendants. *Vinal v. Core*, 18 W. Va. 3.

In an action against a carrier for refusing to honor a round trip excursion ticket, in which the evidence revealed aggravated and oppressive misconduct on the part of the defendant, and criminal indifference to legal obligations affecting the rights of others, the plaintiff may recover punitive damages. *Scott v. Chesapeake, etc., R. Co.*, 43 W. Va. 484, 27 S. E. 211.

3. Acts Done under Mistake.

"A tort committed by mistake, in the assertion of a supposed right, or without any actual wrong intention, and without such recklessness or negligence as evince malice or conscious disregard of the rights of others, will not warrant the giving of damages for punishment, where the doctrine of such damages prevails." *Burruss v. Hines*, 94 Va. 413, 419, 26 S. E. 875.

In Actions against Carriers.

Ejection.—See the title *CARRIERS*, vol. 2, p. 671.

In *Norfolk, etc., R. Co. v. Neely*, 91 Va. 539, 22 S. E. 367, the conductor, under an honest impression that he was doing his duty, unlawfully expelled plaintiff from the car, but in doing so was guilty of no rudeness or violence. The ejection was effected quietly and respectfully, the plaintiff offering no resistance. Held, that (clearly not a case for exemplary or punitive damages) actual damages only could be recovered.

Mistake of Conductor as to Sleepers.—In *Norfolk, etc., R. Co. v. Lipscomb*, 90 Va. 137, 17 S. E. 809, a passenger with wife and two children, one very sick, bought at B. tickets to W. and was assured by defendant's officials that a through sleeper was attached to the

train. Entering sleeper, he paid for two berths, and was assured by its conductor that it would go through. Suddenly, without notice to him, sleeper was cut loose, and the train went on carrying off his baggage, including the child's clothing and medicine, part whereof was lost. Sleeper was left on the track at night when it was too late to get into a hotel or drug store. This distressing situation was produced by the negligence of the defendants' officials, of whom said conductor was one. The court is holding the company not responsible in punitive damages says: "But it is not clear that the company can be held to respond in any other measure of damages than such as are compensations for the actual injury sustained. The record discloses that the officers of the company were themselves mistaken, negligently mistaken it may be conceded, yet we perceive in the record no indication of any malicious purpose or evil intent. It was an honest mistake, and one much regretted by those in fault as soon as it occurred, and disclaimed by the company, and everything within reasonable bounds done to alleviate the unfortunate condition of the plaintiff. Such baggage as was discovered was put off at a station and reclaimed by the company's servants as the train passed on which the plaintiff ultimately travelled. The valise was lost and should be paid for, but that does not appear otherwise than as an accident. But there was no insult, no disrespect, either before or after the sleeper was cut loose."

In an action against a carrier for the arrest and false imprisonment of a passenger, if such an arrest is made without probable cause, and by reason of an honest mistake, without actual malice, or a design to injure or oppress, the liability is only for compensatory damages, and no additional sum can be added thereto as exemplary, punitive, or vindictive damages. *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363, 33 S. E. 262.

4. Actual Malice Not Necessary.

To entitle a person to recover of another vindictive or punitive damages, actual malice need not be shown. Where the act complained of is attended by such circumstances, as show a willful disregard for the rights of others, malice will be inferred. *Borland v. Barrett*, 76 Va. 128, cited and approved in *Norfolk, etc., R. Co. v. Anderson*, 90 Va. 1, 17 S. E. 757. See *Daingerfield v. Thompson*, 33 Gratt. 136.

But in *Harman v. Cundiff*, 82 Va. 239, the court in instructing the jury in an action of trespass on the case for slander, used the phrase actual malice, and this instruction was held to correctly expound the law.

Anger, Malevolence and Vindictiveness.—"An improper motive may be inferred from a wrongful act based on no reasonable ground; and such improper motive constitutes malice in law; the act need not be prompted by anger, malevolence or vindictiveness." *Bolton v. Vellines*, 94 Va. 393, 26 S. E. 847, citing and approving *Forbes v. Hagman*, 75 Va. 168.

5. Proof of Motive.

Where the measure of recovery in action of tort is determined by the motive with which an act is done, all circumstances tending to show the presence or absence of such motive are admissible in evidence. *Wood v. American Nat. Bank*, 100 Va. 306, 40 S. E. 931.

B. IN ACTIONS ON CONTRACT.

Punitive damages belong alone to actions of tort, and can not be recovered in actions for the breach of ordinary contracts. *Norfolk, etc., R. Co. v. Wysor*, 82 Va. 250; *Flint v. Gilpin*, 29 W. Va. 740, 3 S. E. 33.

"Where the action is for a breach of contract, the vicious intention of the defendant can have no effect on the damages." *Green, J., in Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485.

"While determinate pecuniary dam-

ages, as the first class of damages, are recoverable in some actions on contracts, and in all actions of tort, indeterminate damages, usually but improperly called exemplary damages, the second class, are not recoverable in actions on contracts, and are not recoverable in actions of tort. This class of damages can only be recovered, in actions of tort, when there is connected with the tort fraud, oppression, malice, or negligence so gross as to raise a presumption of intentional breach of duty, or malice, or reckless disregard of the plaintiff's rights; or, in other words, the defendant must be proven, in doing the act complained of, to have been actuated by a vicious intention. But where the action is for a breach of contract, the vicious intention of the defendant can have no effect on the damages." *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485.

C. IN ACTIONS FOR TORTS.

1. In General.

Punitive damages belong alone to actions of tort. *Norfolk, etc., R. Co. v. Wysor*, 82 Va. 250.

2. Assault and Battery.

See the title ASSAULT AND BATTERY, vol. 1, p. 742.

Exemplary damages may be awarded in actions to recover damages for assault and battery, where the wrongful act is with circumstances of aggravation, or was done wantonly, recklessly or willfully. *Borland v. Barrett*, 76 Va. 128, 44 Am. Rep. 152; *Bailey v. McCance*, 2 Va. Dec. 630; *Beck v. Thompson*, 31 W. Va. 459, 7 S. E. 447, holding the contrary was overruled in *Mayer v. Frobe*, 40 W. Va. 246, 22 S. E. 58.

3. Banks and Banking.

See the title BANKS AND BANKING, vol. 2, p. 320.

Failure of Bank to Pay Check.—In an action against a bank for failure to pay checks of a depositor properly drawn on funds on deposit "it appears from the evidence that the bank was

reprehensively negligent in not exercising greater cautions to inform itself of the standing of accounts with its customer before refusing to honor his check. It was, therefore, liable for any actual damage that may have resulted from its negligence. But there was no element either of malice, bad faith, oppression, or such willful negligence on its part proved as would have warranted the jury in imposing exemplary damages. On the contrary, while the bank was not free from blame, its friendly relations and prior dealings with the plaintiff and prompt disclaimer of all intention to injure him, repel the imputation of malice or bad faith on their part in refusing to honor his check." *Wood v. American Nat. Bank*, 100 Va. 306, 40 S. E. 931.

"If the dishonor of a depositor's check is willful and malicious, a right to recover exemplary damages would accrue. *Birchall v. Third Nat. Bank*, 19 Cent. L. J. 390. And if the negligence of a bank is so gross as to evince a culpable indifference to consequences, and the rights of the plaintiff, it would be sufficient ground for the allowance of such damages. 1 Sedg. Dam., § 368. In *Rollin v. Stewart*, 14 C. B. 595, a verdict of £500 damages was returned against a bank for dishonoring a check for a comparatively small amount. The court intimated that it was a very large sum, but did not disturb the verdict, and the matter was finally adjusted by agreement of parties at £200. See also, *Schaffner v. Ehrman*, 15 L. R. A. 134." *Wood v. American Nat. Bank*, 100 Va. 306, 312, 40 S. E. 931.

4. Breach of Promise of Marriage.

See the title BREACH OF PROMISE OF MARRIAGE, vol. 2, p. 613.

In *Flint v. Gilpin*, 29 W. Va. 740, 3 S. E. 33, in an action for breach of promise of marriage, the court, in distinguishing a marriage contract from an ordinary contract, pointed out as one of the distinguishing features, the right of recovery in the former case of punitive damages, whereas, as we have

seen, this recovery can not be had in actions for the breach of ordinary contracts.

5. Civil Damage Acts.

See the title INTOXICATING LIQUORS.

Under § 20, ch. 32, of the West Virginia Code, a married woman, injured in person, property, or means of support, by reason of unlawful sales of intoxicating liquors to husband or son, may recover exemplary damages. *McMaster v. Dyer*, 44 W. Va. 644, 29 S. E. 1016; *Mayer v. Frobe*, 40 W. Va. 246, 22 S. E. 58, overruling *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485.

By ch. 107, § 16, acts 1877, p. 144, it is provided: "An action may be maintained (under specified circumstances) by the wife against the person selling or furnishing such spirituous liquor, as well for all such damages as the plaintiff has sustained by reason of the selling or giving of such liquors, as for exemplary damages." By exemplary damages is meant, not additional damages given as a punishment of the defendant for selling intoxicating liquors to her husband illegally, but damages which shall not only compensate her for injury to her means of support, but also, in a proper case, damages which shall compensate her for her mental anguish. *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485.

Such exemplary damages can not be given to recompense her for her anxiety of mind, mortification, social degradation, and loss of her husband's society, by reason of his drunkenness and misconduct; but they can only be given where the defendant has not simply committed against her the tort of selling illegally intoxicating liquors to her husband, whereby she was injured in her means of support, but where the defendant made such sale under circumstances which showed actual malice, or wanton, deliberate, and willful disregard of her rights and known wishes. *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485.

6. Ejection of Passengers.

See the title CARRIERS, vol. 2, pp. 711, 722.

Exemplary damages may be recovered in actions by passengers against carriers for an alleged wrongful ejection, where the evidence reveals aggravated and oppressive misconduct on the part of the defendant, and criminal indifference to the legal obligations effecting the rights of others, provided always the servant was acting within the scope of his employment. *Norfolk, etc., R. Co. v. Neely*, 91 Va. 539, 22 S. E. 367; *Richmond, etc., R. Co. v. Ashby*, 79 Va. 130, 52 Am. Rep. 620; *Scott v. Chesapeake, etc., R. Co.*, 43 W. Va. 484, 27 S. E. 211.

But where there is an absence of intentional wrong, or where the act was done under an honest mistake, or is not oppressively or recklessly committed, and is not attended with circumstances of indignity or insult, actual or compensatory damages are the measure of the loss or injury. *Norfolk, etc., R. Co. v. Neely*, 91 Va. 539, 22 S. E. 367; *Norfolk, etc., R. Co. v. Lipscomb*, 90 Va. 137, 17 S. E. 809; *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363, 33 S. E. 292.

7. Executors and Administrators.

See generally, the title EXECUTORS AND ADMINISTRATORS, ante, p. 483.

An executor having sold certain slaves which were specifically bequeathed by his testatrix; having become the purchaser himself; and afterwards, recovered damages in an action of trespass against the sheriff for seizing and selling them as the property of the specific legatee, in whose possession they were found; a court of equity will require an account of his administration, to ascertain whether the sale, at which he was himself the purchaser, was necessary for the payment of the debts, or not; and (even if the sale and purchase by himself be justified by the result of the investi-

gation) will grant a new trial of the issue in the action of trespass (though no motion to that effect was made at law); in case the damages were excessive, and produced by erroneous impressions on the minds of jury; and where the damages are evidently excessive, the testimony of the jurors will be received to declare the motives which induced them to give such damages. In such case, the damages ought not to be vindictive, but only for the value of the slaves, with a reasonable allowance for hire. *Anderson v. Fox*, 2 Hen. & M. 245.

It was left a *quære* in *Vaughan v. Winckler*, 4 Munf. 136, whether vindictive damages could be recovered in trespass by an executor against an administrator for goods taken away by the intestate from the testator.

8. False Imprisonment.

See the title FALSE IMPRISONMENT.

Where the defendant, in an action for false imprisonment, was actuated by malice, punitive damages may be given to the plaintiff. *Bolton v. Velles*, 94 Va. 393, 26 S. E. 847, 64 Am. St. Rep. 737; *Ogg v. Murdock*, 25 W. Va. 139.

A common carrier of passengers by rail is liable in compensatory damages for the arrest and false imprisonment of a passenger, without reasonable or probable cause, made, or caused to be made, by its conductor in charge of the train during the execution of the contract to carry, although such act on the part of the conductor was entirely unauthorized by the company, and was purely personal to himself. But "In this case the plaintiff passenger, entitled to proper and respectful treatment, was surely entitled to exemplary damages for the great indignity and humiliation to which he was subjected in being arrested, handcuffed, and led away without the slightest pretext or cause for it whatever, except that the conductor persisted in closing his eyes and

shutting his ears to those who knew, and both showed him and told him the real offender." *Gillingham v. Ohio R. Co.*, 35 W. Va. 588, 14 S. E. 242, 243, 29 Am. St. Rep. 827, 14 L. R. A. 798.

In an action against a carrier for the arrest and false imprisonment of a passenger, if such arrest is made without probable cause, and by reason of an honest mistake, without actual malice, or a design to injure or oppress, the liability is only for compensatory damages, and no additional sum can be added thereto as exemplary, punitive, or vindictive damages. *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363, 33 S. E. 292.

Recklessness.—Although the conductor on a train may have had no motive whatever for his wrongful act, yet where he failed to heed the advice of those who knew that he was making a grave mistake, his mistake is not innocent in the eyes of the law, and the company may be held liable in punitive damages. *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 242, 243, 29 Am. St. Rep. 827, 14 L. R. A. 798.

Malice Necessary to Warrant Recovery.—In *Ogg v. Murdock*, 25 W. Va. 139, 146, which was an action for false imprisonment, the court said: "When the malice is such only as results from a groundless act, and there is no actual malice or design to injure, the rule is to allow compensatory damages, but when actual malice exists, a formed design to injure and oppress, the jury may give vindictive damages."

In an action for false imprisonment, if the act complained of was committed with malice, the plaintiff may recover punitive damages, and the following instruction was held to correctly define this malice: "An improper motive may be inferred from a wrongful act based upon no reasonable ground; that such improper motive constitutes malice in law, and that the act need not be prompted by anger, malevolence, or vindictiveness." *Bolton v. Vellines*, 94

Va. 393, 26 S. E. 847, 64 Am. St. Rep. 737.

Proof of Malice.—In case of a deliberate arrest and imprisonment of a person without color of authority or excuse, the law will imply malice on the part of the wrongdoer, sufficient to justify an award of punitive damages. *French v. White*, 4 W. Va. 170; *Bolton v. Vellines*, 94 Va. 393, 26 S. E. 847. Compare *Ogg v. Murdock*, 25 W. Va. 139.

Where the wrongful act of the defendant consisted in arresting the plaintiff, where the existing facts would have warranted the arrest if the proper legal steps had been taken, but which had not in fact been taken, and the only omission was the failure to institute action against the plaintiff before causing the arrest, it was held, that "The facts proved repel the presumption of malice, and there being no proof of an intent to injure and oppress the plaintiff, the jury were not authorized to find that the defendant was actuated by malice, and consequently they were not justified in giving vindictive damages." *Ogg v. Murdock*, 25 W. Va. 139.

9. Indemnifying Bonds.

In debt on an indemnifying bond given to a sheriff for seizure and sale of a slave under execution, it seems that the plaintiff may recover vindictive damages against the defendant, because this action on the indemnifying bond was substituted for the action which the common law gave of trespass against the sheriff for selling the plaintiff's property, and in such action the plaintiff might recover vindictive damages. *Stevens v. Bransford*, 6 Leigh 246.

10. Injury to Plaintiff's Business.

See the title TRESPASS.

In an action of trespass by a merchant in which it is alleged that the defendants, "with force and arms" and without the knowledge and against the consent of the plaintiff, entered the store of the plaintiff and carried away

a large quantity of the goods and chattels of the plaintiff, it was held: In such case, no special damage being laid, the merchant is entitled to recover for all such damages as are the natural, proximate and necessary result of the act of the purchaser; and injury to the credit and business standing of the merchant, and the injury to his business, resulting therefrom, are properly recoverable as the natural, proximate and necessary consequences of the acts of the purchaser. In such case to ascertain such damages, the nature and extent of the merchant's business, and whether profitable or unprofitable, are proper subjects of inquiry. In such a case the probable profits of the business are not the measure of damages; but they may be proved by general evidence, as well as the extent and character of the business, as affording the best guide to the jury of which the nature of the case admits. *Peshine v. Shepperson*, 17 Gratt. 472.

11. Libel and Slander.

See the title LIBEL AND SLANDER.

In an action of trespass on the case in slander, if the jury believe from the evidence that the defendant uttered the slander from actual malice, they may find exemplary damages. *Harman v. Cundiff*, 82 Va. 239; *Womack v. Circle*, 29 Gratt. 210.

12. Malicious Prosecution.

See the title MALICIOUS PROSECUTION.

In an action for malicious prosecution, the jury may give such punitive damages as they think proper, if they find that the prosecution was commenced or pursued for private ends, or with reckless disregard of the plaintiff's rights. *Vinal v. Core*, 18 W. Va. 1.

13. Obstructions on Land of Another.

For a refusal to remove an obstruction upon the lands of another, through a mistake of fact honestly entertained as to the duty to remove, compensatory damages only can be recovered.

"The refusal of the defendant to remove voluntarily the obstruction to the erection of the plaintiff's building was due to a mistake of fact on his part—that the bad condition of his was caused by the act of the plaintiff, and that he was consequently not responsible for it or under any obligation to the plaintiff to restore it to its proper condition; and, so far as the record discloses, he appears to have been honest in this belief. There was considerable and perhaps unnecessary delay in the removal of the obstructing wall, after the court awarded the injunction commanding him to do so, but this was doubtless due, in part at least, to the effort to devise some means of remedying the wall without causing great injury to his own building, and incurring the heavy expense and serious loss of having to take it down entirely. There was no ground for giving exemplary damages, and the jury erred in so finding." *Burruss v. Hines*, 94 Va. 413, 26 S. E. 875.

14. Seduction.

See the title SEDUCTION.

The damages in an action for seduction are not measured by the mere loss of service or the necessary expenses incurred; but they are given also to punish the seducer for the anguish and dishonor the outrage brings upon the parent. These damages are not merely compensatory—they may be exemplary in their nature. The rank and condition of the parties; the injury to the most sacred feelings and affections; the shame and disgrace cast upon the family; and the anguish of mind in having a daughter whose society brings no comfort to the parent, and whose example may corrupt other members of the family, are all proper to be considered. This being so, the jury, in fixing the amount of the recovery, may and ought to have reference to the pecuniary circumstances of the defendant. In all such cases, the wrong is aggravated in proportion to

the wealth and position and rank of the guilty party. All of which may be instruments by which he more readily accomplishes his purpose. *Clem v. Holmes*, 22 Gratt. 722, 36 Am. Rep. 793; *Riddle v. McGinnis*, 22 W. Va. 278; *Lee v. Hodges*, 13 Gratt. 726; *White v. Campbell*, 13 Gratt. 573.

15. Streets and Highways.

See the title **STREETS AND HIGHWAYS**.

In an early West Virginia case, it was held, that vindictive or punitive damages could not be recovered in an action against a city to recover damages for injuries occasioned by its streets being out of repair and the like; compensatory damages only should be given. *Wilson v. Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780. But this case was overruled in *Mayer v. Frobe*, 40 W. Va. 246, 22 S. E. 58.

16. Telegraph Companies.

See the title **TELEGRAPHS AND TELEPHONES**.

Where there is no averment or proof that a telegraph company, in failing to deliver a message promptly, acted wantonly or oppressively, or with such malice as implied a spirit of mischief or criminal indifference to civil obligations, the jury is not warranted, in a suit against such company for damages for such failure, in awarding punitive or vindictive damages. *Davis v. Western Union Tel. Co.*, 46 W. Va. 48, 32 S. E. 1026, citing *Mayer v. Frobe*, 40 W. Va. 246, 22 S. E. 58.

17. Wrongful Distress.

See the title **LANDLORD AND TENANT**.

In an action under § 2898 of the Virginia Code, to recover damages for distraining property for rent not due, in the absence of any charge of fraud, malice, oppression, or other special aggravation, the measure of the plaintiff's damages is compensation for the injury suffered—such damages as are the natural and proximate result of the injury complained of. *Fishburne v. Engle-*

dove, 91 Va. 548, 22 S. E. 354, citing *Peshine v. Shepperson*, 17 Gratt. 472.

18. Liability of Corporation for Acts of Servant.

A corporation, like a natural person, may be held liable in exemplary damages for the acts of an agent, where the act is participated in, or authorized, or ratified by the principal. *Norfolk, etc., R. Co. v. Anderson*, 90 Va. 1, 8, 17 S. E. 757.

In all cases where a corporation is liable for the willful, wanton, malicious, or illegal conduct of its employees, it is subject to exemplary or punitive damages. Indeed, in so far as the defendant is concerned in actions of tort sounding in damages, all damages are in their nature punitive, although, as to the plaintiff, they may be merely compensatory. The defendant receives nothing for which he is made to compensate, but he is punished for the wrong committed by him in being compelled to make recompense to the plaintiff. If, therefore, the compensatory damages are sufficiently punitive, the defendant should not be punished twice, by being compelled to pay another sum, as so-called "punitive" damages. But if the damages allowed as compensatory are not sufficiently punitive and exemplary, then they may be increased, in a proper case, until they become so. *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363, 33 S. E. 262.

A master is liable, to the extent of compensatory damages, for the unlawful act of his servant, committed in the course of his employment, whether ratified or not, but not in punitive damages, unless he has ratified such act. *Norfolk, etc., R. Co. v. Neely*, 91 Va. 539, 22 S. E. 367; *Norfolk, etc., R. Co. v. Anderson*, 90 Va. 1, 17 S. E. 757; *Norfolk, etc., R. Co. v. Lipscomb*, 90 Va. 137, 17 S. E. 809; *Ricketts v. Chesapeake, etc., R. Co.*, 33 W. Va. 433, 25 Am. St. Rep. 901, 10 S. E. 801; *Downey v. Chesapeake, etc., R. Co.*, 28 W. Va.

732; *Talbott v. West Virginia, etc., R. Co.*, 42 W. Va. 560, 26 S. E. 311.

Corporations, generally are not liable for the grossly fraudulent, malicious, oppressive, wanton, willful, reckless, or illegal conduct of their employees, affecting the rights of others, unless such acts are expressly or impliedly authorized or ratified by them, or are a breach of the duty of protection owed to persons intrusting themselves to the care of such corporations, at their solicitation and for compensation. *Downey v. Chesapeake, etc., R. Co.*, 28 W. Va. 732; *Ricketts v. Chesapeake, etc., R. Co.*, 33 W. Va. 433, 10 S. E. 801; *Turner v. Norfolk, etc., R. Co.*, 40 W. Va. 675, 22 S. E. 83; *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243; *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363, 33 S. E. 262.

Erroneous Syllabus.—The attention of the profession is directed to the difference in the syllabus in the last case, as reported in *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243, and 29 Am. St. Rep. 827. In the latter, the following syllabus appears: "A common carrier of passengers is liable in exemplary damages for the arrest and false imprisonment of a passenger, without reasonable or probable cause, made or caused to be made by its conductor in charge of the train during the execution of the contract to carry, although such act on the part of the conductor was entirely unauthorized by the company, and was purely personal to himself." This appears to be a compilation from the points of the original syllabus and opinion made by the reporter, and not by the court. It probably states the law correctly (except as to the use of the word "exemplary," which should be "compensatory"), as showing the duty of protection which the common carrier owes to its passengers against the willful, wanton, or malicious conduct of its servants. *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363, 33 S. E. 262.

The Term "Ratification" Construed.

—Both the Virginia and West Virginia courts liberally construe the term "ratification:" thus in both *Ricketts v. Chesapeake, etc., R. Co.*, 33 W. Va. 433, 10 S. E. 801, and *Downey v. Chesapeake, etc., R. Co.*, 28 W. Va. 732, the court quotes approvingly the following language from "Patterson on Railway Accident Law," page 471, "but such authorization or ratification can be evidenced either by an express order to do the act, or an express approval of its commission, or by an antecedent retention of a servant of known incompetency, or by a subsequent retention or promotion of the negligent servant."

In *Downey v. Chesapeake, etc., R. Co.*, 28 W. Va. 732, 742, this court, after referring to the fact that there was some diversity in the decisions, says: "But the better and more reasonable doctrine seems to be, that the railway company is not to be held liable in exemplary damages for injuries caused by the negligence of its servants, unless it be shown that the servant's act was willful, and was either authorized or ratified by the company; but such authorization or ratification can be evidenced either by an express order to do the act, or an express approval of its commission, or by an antecedent retention of a servant of known incompetency, or by a subsequent retention or promotion of the negligent servant." *Ricketts v. Chesapeake, etc., R. Co.*, 33 W. Va. 433, 10 S. E. 801, 25 Am. St. Rep. 901.

III. Effect of Death.

See the titles, DAMAGES, vol. 4, p. 162; DEATH BY WRONGFUL ACT, vol. 4, p. 226.

In all cases of negligence the law governing the assessment of exemplary, punitive, or vindictive damages is the same whether death results or not. *Turner v. Norfolk, etc., R. Co.*, 40 W. Va. 675, 22 S. E. 83.

In the case of *Turner v. Norfolk, etc.*

R. Co., 40 W. Va. 675, 22 S. E. 83, it is said: "The doctrine of punitive damages should be the same in cases where death ensues from acts of negligence as where it does not ensue." Citing *Mayer v. Frobe*, 40 W. Va. 246, 22 S. E. 58; *Ricketts v. Chesapeake, etc., Co.*, 33 W. Va. 433, 10 S. E. 801, 25 Am. St. Rep. 901; *Downey v. Chesapeake, etc., R. Co.*, 28 W. Va. 732, 733; *Couch v. Chesapeake, etc., R. Co.*, 45 W. Va. 51, 80 S. E. 147.

The majority, following the English act, give merely pecuniary, while a respectable minority give punitive damages. Our statute is taken from that of Virginia, and the courts of that state have held, that punitive and consolatory damages are proper, contrary to the instruction given in this case. *Railroad Co. v. Wightman*, 29 Gratt. 431; *Railroad Co. v. Noell*, 32 Gratt. 394. In the case of *Simmons v. McConnell*, 89 Va. 494, 10 S. E. 838, the court refers to and approves the former cases, and adds: "The law furnishes no measure of damages other than the enlightened conscience of impartial jurors guided by all the facts and circumstances of the particular case." *Couch v. Chesapeake, etc., R. Co.*, 45 W. Va. 51, 30 S. E. 147.

IV. Excessive Damages.

See the titles DAMAGES, vol. 4, p. 162; NEW TRIALS.

As Ground for New Trial.—Where the case is one in which a jury might properly and legally award to the plaintiff exemplary damages, the verdict will not be set aside on the ground that the damages are excessive, unless they are so enormous as to furnish evidence of partiality, passion, corruption, or prejudice on the part of the jury. *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485; *Riddle v. McGinnis*, 22 W. Va. 253.

In cases where punitive damages are proper, the amount of damages is a question that is peculiarly within the

province of the jury, and their verdict will not be disturbed unless it appear that they were actuated by passion, prejudice, undue influence, or unless the amount is grossly excessive. *Borland v. Barrett*, 76 Va. 128, citing *Peshine v. Shepperson*, 17 Gratt. 472. See *Blackwell v. Landreth*, 90 Va. 748, 19 S. E. 791; *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354.

Illustrative Verdicts.

Assault.—In *Borland v. Barrett*, 76 Va. 128, \$10,000 punitive damages, was held not excessive, for maliciously breaking a bottle over plaintiff's head in the dining room of a hotel, inflicting a scalp wound only.

Seduction.—Three thousand dollars damages not excessive for seduction of plaintiff's daughter. *Riddle v. McGinnis*, 22 W. Va. 253.

False Imprisonment.—In a case in which the plaintiff had been kept under an illegal restraint for three days, but in which there was no proof of malice on the part of the defendant, it was held that a verdict for \$475 would be set aside as plainly excessive. *Ogg v. Murdock*, 25 W. Va. 139; *Bolton v. Vellines*, 94 Va. 393, 26 S. E. 847, 64 Am. St. Rep. 737.

V. Pleading.

See generally, the title PLEADING.

A. AGGRAVATING CIRCUMSTANCES MUST APPEAR.

Before the jury can award exemplary, punitive, or vindictive damages, the declaration must allege that the defendant acted wantonly or oppressively, or with such malice as implied a spirit of mischief or criminal indifference to civil obligations; and such allegation must be sustained by the proof. *Davis v. Western Union Telegraph Co.*, 46 W. Va. 48, 32 S. E. 1026; *Mayer v. Frobe*, 40 W. Va. 246, 249, 22 S. E. 58; *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 242, 243, 29 Am. St. Rep. 827, 14 L. R. A. 798.

Where there are no allegations in the declaration of such facts as would show that the wrongful act was accompanied with circumstances of aggravation, or no general allegation of *alia anormia*, under which circumstances of aggravation might be proved, punitive or vindictive damages, which are special damages, can not be recovered; only such damages as are the natural and proximate consequence of the lawful act, may be recovered in such a case. *Peshine v. Shepperson*, 17 Gratt. 472, cited and approved in *Fishburne v. Engledove*, 91 Va. 548, 558, 22 S. E. 354; *Lee v. Hill*, 84 Va. 919, 6 S. S. 473.

An allegation in a declaration that certain acts and omissions which constitute the cause of action were "wrongs repeatedly committed against the plaintiff," is a sufficient charge that they were willful and wanton, and will warrant a finding of exemplary damages. "It would have been better pleading to have charged that the acts and omissions complained of were willful or wanton, but they were characterized by equivalent expression, as 'wrongs repeatedly committed against the plaintiff,' and that was sufficient." *Wood v. American Nat. Bank*, 100 Va. 306, 40 S. E. 931.

A charge in a declaration against an electric street railway company, that it so carelessly and negligently constructed and maintained its tracks and wires, and so carelessly and negligently failed to keep them in repair, as to permit the escape of electricity by which the plaintiff was directly injured—describing the manner and extent of the injury—is sufficient to warrant the introduction of evidence tending to show such negligence on the part of the company at the time of, and immediately preceding for several months, the injuries to the plaintiff, as would justify the finding of exemplary or punitive damages. *Richmond Passenger, etc., Co. v. Robinson* 100 Va. 394, 41 S. E. 719.

B. NECESSITY OF DISTINCTIVE CLAIM.

Exemplary damages need not be claimed *eo nomine* in the declaration. The declaration need not set out that the wrongful act charged had been accompanied with acts of aggravation, malice, oppression or willful wrong. But if the facts averred warrant the awarding of such damages under the law, and are stated with sufficient distinctness to inform the defendant of the charge which he is required to meet, it is sufficient. *Richmond Passenger, etc., Co. v. Robinson*, 100 Va. 394, 41 S. E. 719, citing *Wood v. American Bank*, 100 Va. 306, 40 S. E. 931; *Brighthope R. Co. v. Rogers*, 76 Va. 443; *Patterson v. Chesapeake, etc., R. Co.*, 94 Va. 16, 26 S. E. 393.

"As to the sufficiency of the declaration to warrant a recovery of exemplary damages. In jurisdictions where the common-law system of pleading prevails, the doctrine is that special damages, that is to say, such damages as do not necessarily flow from the act or omission complained of, must be specially laid in the declaration, or they can not be recovered. *Lee v. Hill*, 84 Va. 919, 6 S. E. 473. On the other hand, when the damages are the natural and proximate result of the act or default complained of, they are general, are legally imported from such act or default, and need not be specially pleaded. The reason for the distinction is obvious: In the former case, a distinct averment is essential to put a defendant on notice of the nature of the demand which he is required to meet, while in the latter, a recital of the act or default is sufficient for that purpose. It is a logical sequence from the foregoing distinction, that where a declaration alleges a state of facts, which, if proved, would, under the law, entitle a plaintiff to a verdict for exemplary damages, such damages may be recovered, although not claimed *eo nomine* in the declara-

tion." *Wood v. American Nat. Bank*, 100 Va. 309, 40 S. E. 931.

If the facts averred in the declaration show that the plaintiff is entitled to recover exemplary damages, they need not be claimed *eo nomine*. If a more specific statement of the elements of damage be desired, it may be demanded under the provisions of § 3249 of the Code, "which entitles litigants to demand that a statement be filed of the particulars of the claim, or of the ground of defense, when not sufficiently described in the notice, declaration or other pleading. *Richmond v. Leaker*, 99 Va. 1, 36 S. E. 348." *Wood v. American Nat. Bank*, 100 Va. 306, 40 S. E. 931.

VI. Evidence.

A. IN GENERAL.

In *Field on Damages*, § 116, it is said, that generally where vindictive damages for willful injuries to the person are claimed, the defendant shall not be restricted to matters which took place at the very time of the injury complained of. But he has a right to show the jury the true relation of the parties, and the facts and circumstances relating to the act, in order that they may determine how far the act was wanton, vindictive or malicious, or how far it is extenuated. Quoted in *Davis v. Franke*, 33 Gratt. 418.

As the reason for allowing exemplary damages is the supposed evil motive with which the act was done, all circumstances tending to show that it had no such motive may be proved, to prevent the allowance of such damages; and if it appears that the defendant acted in good faith, it can not be held liable for exemplary damages. *Wood v. American Nat. Bank*, 100 Va. 306, 40 S. E. 931.

B. FINANCIAL STANDING OF DEFENDANT.

It has been held repeatedly, in cases where exemplary damages may be

awarded, that the financial standing of the defendant may be given in evidence as affecting the measure of damages, for a verdict absolutely ruinous to a man in moderate circumstances would scarcely be felt by a man of large fortune. Evidence of the pecuniary circumstances of the defendant has been received in actions for breach of promise of marriage, in actions by a father for the seduction of his daughter, in actions for slander, and in actions for malicious prosecution and false imprisonment. *Dent v. Pickens*, 34 W. Va. 240, 12 S. E. 698 (breach of marriage promise); *Clem v. Holmes*, 33 Gratt. 722, 36 Am. Rep. 793; *Riddle v. McGinnis*, 22 W. Va. 253 (actions for seduction); *Womack v. Circle*, 29 Gratt. 192; *Harman v. Cundiff*, 82 Va. 239; *Hayner v. Cowden*, 27 O. St. 292 (actions for slander); *Womack v. Circle*, 29 Gratt. 192; *Vinal v. Core*, 18 W. Va. 1 (malicious prosecution and false imprisonment). It is not improper to instruct the jury that if, from the evidence, they believe the defendant uttered the slander from actual malice, they may find exemplary damages, and that in estimating the damages they shall consider the standing of the parties, and the wealth of the defendant is only to be considered so far as it tends to show his rank and influence in society. *Harman v. Cundiff*, 82 Va. 239, citing and approving *Womack v. Circle*, 29 Gratt. 192, 2 Wash. (bottom page) 751.

Evidence of the defendant's wealth and standing in the community may be considered, where the evidence shows a case for punitive damage, not to show his ability to pay heavy damages, but to show the probable weight and effect his words, as in an action of slander, would have upon the community. *Harman v. Cundiff*, 82 Va. 239, citing *Womack v. Circle*, 29 Gratt. 192, 210.

In an action for slander, malicious prosecution and false imprisonment, the plaintiff, in order to show the

wealth and influence of the defendant, offered in evidence certified abstracts from the books containing the returns of the assessments for taxation of the land and personal property belonging to the defendant in the year 1876, the year of the trial of the cause. There being no objection to the form of the abstracts, or that they did not truly state what they purported, the evidence was admissible. *Womack v. Circle*, 29 Gratt. 192.

VII. Instructions.

See generally, the title INSTRUCTIONS.

In General.—If the compensatory damages are sufficiently punitive, it is improper to instruct the jury to allow an additional sum as punitive damages. *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363, 33 S. E. 262.

Must Be Limited to Evidence.—The well-settled general rule that instructions must be limited to the evidence in the case, is to be strictly followed in charging the jury as to exemplary damages. *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363, 33 S. E. 262; *Ricketts v. Chesapeake, etc., R. Co.*, 33 W. Va. 433, 10 S. E. 801, 25 Am. St. Rep. 901; *Norfolk, etc., R. Co. v. Neely*, 91 Va. 539, 541, 22 S. E. 367; *Bailey v. McCance*, 2 Va. Dec. 630; *Borland v. Barrett*, 76 Va. 128, 44 Am. Rep. 152.

The second ground of error is the defendant's overruled objection to the following instruction: "The court instructs the jury that in actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct, or criminal indifference to civil obligations, affecting the rights of others, appear, or where legislative enactment authorizes it, the jury may assess 'exemplary,' 'punitive,' or 'vindictive' damages, these terms being synonymous." *Mayer v. Frobe*, 40 W. Va. 246, 22 S. E. 58. This instruction propounds the law in a proper case, but it is abstract.

and makes no reference to the evidence or facts proven. The giving of such instruction, if calculated to mislead the jury, is reversible error. *Sheppard v. Insurance Co.*, 21 W. Va. 368; *Pasley v. English*, 10 Gratt. 236; *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363, 33 S. E. 262.

In an action against a master for damages alleged to have been sustained by the plaintiff by reason of an assault committed upon him by an employee of the defendant, if there is no evidence in the case proving, or even tending to prove, that the conduct of the employee in assaulting and injuring the plaintiff was either authorized or ratified by the company, it is error to instruct the jury that if they believe this assault was made in a malicious, unlawful, wanton, and unnecessary manner, they will be warranted in giving the plaintiff exemplary damages. *Ricketts v. Chesapeake, etc., R. Co.*, 33 W. Va. 433, 10 S. E. 801, 25 Am. St. Rep. 901, citing *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485.

In an action of trespass on the case to recover for being expelled from a passenger car by the conductor, the third instruction was as follows: "Should the jury further believe from the evidence that the act of the said conductor was not only illegal, but was also wanton or oppressive, or in utter disregard of the rights of the plaintiff, and that after the defendant company had knowledge of such act it participated in it or ratified it, expressly or by implication, then the jury may add to actual damages something by way of punitive damages against the defendant. Punitive damages are damages against a party who has wronged another in a wanton, willful or oppressive manner in disregard of his rights, as a warning to him and others to prevent them from committing like offenses in the future." This instruction assumes that there was evidence before the jury not only of an illegal act, but evidence that tended to

prove that the act was done in a wanton and oppressive manner and in utter disregard of the rights of the plaintiff, and also evidence that the defendant company, with knowledge thereof, ratified what its agent, the conductor, had done. The instruction informed the jury that if satisfied that these facts were proved by the evidence, they had the right to inflict on the defendant company exemplary or punitive damages. The propriety of this instruction depends upon the evidence before the jury. If there was evidence tending to prove the acts hypothetically stated in the instruction, then its sufficiency to establish them was for the determination of the jury, and it was right to give the instruction; but if there was no evidence to that end, which was a matter for the court to decide, it should not have been given; for, when there is no evidence to support an instruction that is asked for, it should not be given, and if given it is reversible error. *Borland v. Barrett*, 76 Va. 128, 133; *Rea v. Trotter*, 26 Gratt. 585; *Norfolk, etc., R. Co. v. Neely*, 91 Va. 539, 541, 542, 22 S. E. 367.

An instruction, in an action for assault, that, if defendant assaulted plaintiff willfully, the jury might give vindictive damages, is not objectionable, as assuming that an assault was made. *Bailey v. McCance*, 2 Va. Dec. 630.

Measure of Damages.—"The fifth instruction is as to the measure of damages, and the elements of damages to be considered by the jury. They are told that the damages awarded must be compensatory for the loss of time, for the suffering, bodily and mental, sustained by reason of such wrongful act or acts, and for expenses incurred in procuring discharge from restraint, including a reasonable attorney's fee. The jury are then instructed that if they believe the act to have been committed by the defendant

with malice, they may also award to the plaintiff punitive damages. This instruction is unobjectionable." *Bolton v. Vellines*, 94 Va. 393, 26 S. E. 847, 64 Am. St. Rep. 737. See *Borland v. Barrett*, 76 Va. 128, 44 Am. Rep. 152.

Malice.—An instruction which asserts that if defendant, in assaulting plaintiff, had neither malice nor deliberate purpose to injure, the measure of damages is compensatory, and not vindictive, is erroneous. The jury in such case may give not only such damages as they think necessary to compensate the plaintiff, but also such as will operate as a punishment to the defendant and tend to deter him and others from similar outrages. "It is to be further observed the right to recover exemplary damages is not confined to cases of actual malice. Whenever the assault is of a grievous or wanton nature, manifesting a willful disregard of the rights of others, actual malice need not be shown to entitle the aggrieved party to exemplary damages. Whilst, therefore, the existence of malice may be shown in aggravation of such damages, its absence does not defeat the right to their recovery. 2d Sedgwick, 26, 28, on Torts, 227. The instruction, however, asserts that if the defendant had neither malice nor deliberate purpose to injure, the measure of damages is compensatory and not vindictive, and the defendant is bound only for such damages as result from loss of time and labor, expense of medical services, and bodily pain and suffering, and diminished capacity to work consequent upon the injury. It will be perceived the instruction ignores the right of the plaintiff to reparation for the indignity and insult to his feelings which may have resulted from the time and manner of the attack." *Borland v. Barrett*, 76 Va. 128, 44 Am. Rep. 152.

EXEMPLIFICATION.—See the title EXECUTION AND PROOF OF DOCUMENTS, ante, p. 406, and references given.

An **exemplification** is a perfect copy of a record or office book, so far as relates to the matter in question. *Dickinson v. Railroad Co.*, 7 W. Va. 396, 413, citing 1 Bouv. L. Dict. 363.

Exemptions.

See the titles CARRIERS, vol. 2, p. 693; CONFEDERATE STATES, vol. 2, p. 59; CONSTITUTIONAL LAW, vol. 3, p. 219; EXEMPTIONS FROM EXECUTION AND ATTACHMENT; HOMESTEAD EXEMPTIONS; JURY; MILITIA; TAXATION.

EXEMPTIONS FROM EXECUTION AND ATTACHMENT.

CROSS REFERENCES.

See the titles ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 1, p. 799; FORTHCOMING AND DELIVERY BONDS; INDEMNITY; HOMESTEAD EXEMPTIONS, and the cross references there given; SHERIFFS AND CONSTABLES; SHERIFFS' SALES.

As to the recognition or enforcement of the exemption laws of another state, see the title CONFLICT OF LAWS, vol. 3, p. 122.

As to the application of exemption laws where exempt goods have been indistinguishably mingled with those not exempt and the burden of proof thereunder, see the title CONFUSION OF GOODS, vol. 3, p. 123.

Introductory.—For the reason that the statutes of the Virginias exempt a certain amount of property, allowing the exemption to be claimed out of the real or personal property or both, the exemption being called a "homestead" exemption, the treatment of the cases arising under these statutes, whether the exemption be claimed in real or personal property, will be found in the title HOMESTEAD EXEMPTIONS, and this article will include only a few general principles.

Power of Exemptions.—The principle is well settled, that the power of exemption is an essential element of sovereignty and can only be surrendered or diminished in plain and explicit terms. *Probasco v. Moundsville*, 11 W. Va. 501, 510.

Constitutionality of Exemption Acts.—Section 6, ch. 193, of the acts of 1872-3, so far as it excepted, from the benefit of the exemption from execution, debts due for rent, was in viola-

tion of § 48, art. 6, of the constitution of West Virginia, and therefore null and void. *Donaldson v. Voltz*, 19 W. Va. 156.

Construction of Exemption Laws.—In *State v. Allen*, 48 W. Va. 154, 35 S. E. 990, the court said: "That exemption statute must be liberally construed to accomplish its object, which is for the protection and benefit of a poor debtor and his helpless family, to give them the bread of life and a pillow whereon to lay the head, to save them from destruction and absolute want."

When Exemption May Be Claimed.

—A husband or parent entitled to claim the exemption of personal property to the value of two hundred dollars as exempt from legal process may claim such exemption at any time before the sale of the property under such process begins, if then a resident of this state; and, though he was not such resident at the date of the levy

under such process, yet if he is bona fide such resident before the sale begins, or bona fide resumes residence in this state, which had once existed, but was lost at the date of such levy, he may claim such exemption. *State v. Allen*, 48 W. Va. 154, 35 S. E. 990.

Residence of Claimant.—"If the party be a resident of the state before his title to the property is absolutely gone by sale, the policy and purpose of the law demand that it shall be saved to him, as well as if he had never been out of the state." *State v. Allen*, 48 W. Va. 154, 35 S. E. 990. See the title ATTACHMENT AND GARNISHMENT, vol. 2, pp. 77, 81.

Meaning of Nonresidence.—Nonresidence, within the meaning of the law exempting personal property to the value of two hundred dollars from legal process, has the same meaning as nonresidence under the attachment law. *State v. Allen*, 48 W. Va. 154, 35 S. E. 990.

Railroad Cars Exempt from Attachment.—One railroad company has an agreement with another by which loaded cars of the one, are to be received at connecting points by the other and hauled over its line to the destination of load of the cars, and then be reloaded with other freight by the receiving company on its line, and carried over its line and returned loaded to the railroad of the owner of the cars, the receiving company compensating the owning company for such use of the cars. Such cars can not be seized under an attachment against the company owning the cars, so as to defeat the rights under such arrangement or contract, of the company receiving and entitled to so use the cars, and a garnishment of the receiving company can not affect its rights under such arrangements by reason of its possession of such cars (p. 493). *Wall v. Norfolk, etc., R. Co.*, 52 W. Va. 485, 44 S. E. 294.

A railroad car sent, loaded with

freight, from another state into this state, and to be returned loaded to the former state in the transaction of interstate commerce, can not be levied upon under an attachment in this state, nor will another railroad company having such cars in its possession in the process of carrying on interstate commerce be liable to garnishment by reason of its possession received from another company against which an attachment was issued. This is because of the commerce clause of the national constitution and the interstate commerce act of congress. *Wall v. Norfolk, etc., R. Co.*, 52 W. Va. 485, 44 S. E. 294.

Salary of Attorney General Exempt from Attachment.—The salary of the attorney general is not liable to attachment. *Blair v. Marye*, 80 Va. 485, 502.

Pension Draft or Check.—In *Hissem v. Johnson*, 27 W. Va. 644, the court said: "It seems that all the cases agree, that the pension money is exempt from any legal or equitable process whatever until it is actually paid to and received by the pensioner. That although he may have received and have in his possession the pension draft or check, such draft or check in his hands can not be reached by any legal process."

Pension Proceeds.—Section 4747, Rev. Stat., U. S., protects pension money only as it is due or to become due, and while in transit to the pensioner, and does not exempt money or property in the hands of the pensioner, although the proceeds of a pension. *Bank v. Murdock*, 48 W. Va. 301, 37 S. E. 548.

In *Hissem v. Johnson*, 27 W. Va. 644, the court said: "I do not think it was intended to add to the exemption laws of the state by exempting the proceeds of pensions from liability for the debts of the pensioner even if congress had the right to create such an exemption, which I very much doubt. But as pensions are mere bounties, which the

government has the right to grant or withhold, as its will or policy may dictate, it has the undoubted right to grant them in such manner and upon such conditions, not inconsistent with the laws and policy of the states in which the pensioners reside, as congress in its judgment and discretion may deem proper to impose. It may give the pensioner the absolute right to dispose of the bounty by gift or otherwise to whom he chooses and without regard to any debts he may owe or the claims of his creditors. The money being a bounty and not a debt due to the pensioner, his creditors have no legal rights in regard to it."

In *Hissem v. Johnson*, 27 W. Va. 644, the court said: "Let us now revert to the statute itself and endeavor to ascertain its purpose and policy in reference to the particular facts of this case, as we have just conceded them to be. Its first provision is, 'no sum of money due, or to become due, to any pensioner, shall be liable * * * under any legal or equitable process whatever.' The exemption here declared is absolute and unqualified. The next provision is, 'whether the same remains with the pension office * * * or in course of transmission to the pensioner.' This is not necessarily a qualification of the absolute exemption declared in the preceding provision. If it had been so intended the word 'while' would have been used instead of 'whether.' The latter is not a word of limitation, but the former is necessarily such. If the language were, 'no sum of money shall be liable, while it remains in the pension office, etc.,' there could be no question that the exemption was intended to be confined to the time and places specified, that is, during the time it is in the hands of the pension officers or in course of transmission to the pensioner. But the word 'whether' gives the specifying provision a very different import. It entirely excludes the implication, that the enumeration of

particular times and places of exemption was intended to exclude all others. This is made more manifest by the concluding provision, 'but shall inure wholly to the benefit of such pensioner.' If the preceding provisions are construed to limit the exemption to the places enumerated, then this provision is wholly useless and ineffectual for any purpose. Moreover, if the statute had no other purpose than to exempt the pension money while in the hands of the officers and agents of the government or in transmission from them to the pensioner, no such statute was needed; because, by the general law the money was protected from legal process or interference by creditors in any manner while in the custody of the government or any of its officers or agents appointed for its distribution, or while it is in course of transmission from them to the pensioner or person entitled to receive it."

Lands Purchased with Pension Money.—Where a pensioner received pension drafts under the act of congress and transferred said drafts or the proceeds thereof to a third person, who in consideration thereof conveyed or agreed to convey to the wife of the pensioner a tract of land; and thereafter a suit was brought by judgment creditors of the pensioner, whose judgments existed at the time said pension drafts were received; it was held that under § 4747, U. S. Rev. Stat., said land is not liable for the payments of said judgments. *Hissem v. Johnson*, 27 W. Va. 644. See the title SEPARATE ESTATE OF MARRIED WOMEN.

In *McFarland v. Fish*, 34 W. Va. 548, 12 S. E. 552, the court distinguished the case from *Hissem v. Johnson*, 27 W. Va. 644, as follows: "In this case the defendant, Fish, says he paid the \$800 in cash. It was not paid in government checks, as the evidence showed the payments were made in *Hissem v. Johnson*. In this case it does not appear how long the defendant, Fish, had been in possession of

said money, where it had been kept, or what use he had made of it by loan or otherwise since he had it. It was, however, in the shape of cash when paid. It in no manner could be considered in transitu, but was and had been in the hands of the defendant, Fish, and I can not consider that land purchased with it should in any manner be exempt from the lien of a judgment voluntarily confessed by said defendant."

Property of Principal in Possession of Agent.—Property consigned to an agent at a stipulated price, to be paid for when such property is sold, remains the property of the principal until such sale to a bona fide purchaser, and hence is not subject to execution against the agent. *Barnes, etc., Co. v. Bloch Bros., etc., Co.*, 38 W. Va. 158, 18 S. E. 482, 22 L. R. A. 850; *Brown, etc., Co. v. Deering*, 35 W. Va. 255, 13 S. E. 383.

Property Purchased for Valuable Consideration without Notice.—The trustees and beneficiaries in a deed to secure bona fide debts, without notice, are purchasers for valuable consideration within the meaning of the statute which exempts property of such persons from liability for the debts of

their assignor. *Evans v. Greenhow*, 16 Gratt. 153.

Widow's Right to Claim.—Section 653, Virginia Code, vests in the widow absolutely so much of the husband's property as would be exempt from process against him. *Riggan v. Riggan*, 93 Va. 78, 24 S. E. 920.

Under Va. Code, § 3653, vesting in the widow absolutely so much of the husband's property as would be exempt from process against him, the administrator of the husband's estate is liable to the widow for the amount received from a sale of such property. *Riggan v. Riggan*, 93 Va. 78, 24 S. E. 920.

Abuse of Exemption Laws.—The rule of decision which denies the benefit of the exemption law to a dishonest debtor, who shuffles and conceals his property is founded in a sound morality and is agreeable to the spirit and intention of the exemption law. *Rose v. Sharpless*, 33 Gratt. 153.

Waiver of Exemption.—The exemption provided for in § 3652, Virginia Code, can not be waived so as to give a lien by fi. fa. thereon. *Crump v. Com.*, 75 Va. 922, 924.

Exhibitions.

See the titles AGRICULTURE, vol. 1, p. 288; THEATERS AND SHOWS.

EXHIBITS.

- I. Necessity of Filing, 770.
- II. Papers That May Be Exhibited, 770.
- III. How Far Part of Pleadings, 771.
- IV. Construction of Exhibits, 772.
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VIII. Production or Profer of Exhibit, 773.

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X. Revenue Stamps, 773.

CROSS REFERENCES.

See the titles ANSWERS, vol. 1, p. 389; PLEADING.

I. Necessity of Filing.

On a bill taken as confessed, the plaintiff can not obtain a final decree without filing his exhibits, and proving his case. *Anonymous*, 4 Hen. & M. 476, cited in *Campbell v. Lynch*, 6 W. Va. 17; *Terry v. Fontaine*, 83 Va. 451, 2 S. E. 743.

Surplusage.—A paper or record, referred to in a bill in equity as an exhibit, yet constituting no essential part of the plaintiff's case, and on which his claims are not founded, need not be filed, as it would be surplusage to do so. *De Ende v. Wilkinson*, 2 Pat. & H. 663.

Demurrer.—"The other ground of objection to the bill is that it does not contain sufficient allegations to warrant the granting of the relief prayed for. While the bill is very imperfect in form, and, without the exhibits filed with it, would undoubtedly be bad upon demurrer, the plaintiff asks that the exhibits be read and treated as parts of his bill, which makes them as much parts of it as if incorporated in it. *Bart. Ch. Prac.* 278; *Johnson v. Anderson*, 76 Va. 766; *Thompson v. Clark*, 81 Va. 422." *Sadler v. Taylor*, 49 W. Va. 104, 38 S. E. 583.

II. Papers That May Be Exhibited.

Copies.—At common law the original record must have been produced wherever the cause was in the same court, a copy, however authenticated, being under no circumstances admissible, unless the original were lost. 4 Min. Inst. (4th Ed.) 881, citing *Burk v. Tregg*, 2 Wash. 216; *Anderson v. Dudley*, 5 Call 529. But the statutes

now provide that a copy of any record or paper in the clerk's office of any court or in the office of the secretary of state, treasurer or auditor, or surveyor of lands in any county, attested by the officer in whose office the same is, may be admitted as evidence in lieu of the original. W. Va. Code, ch. 130, § 5; Va. Code, 1887, ch. 164, §§ 3334, 3335; *Thompson v. Clark*, 81 Va. 422; *Davis v. Tebbs*, 81 Va. 600.

Prior to the statute, it was held, that if the suit be in the same court where the judgment was rendered, it is error to inspect a transcript only, instead of the original record. And in such case, if the suit was in the county court, and that judgment reversed in the district court, the court of appeals will direct the district court to remand the cause to the county court, there to be tried by the original record. *Anderson v. Dudley*, 5 Call 529.

A copy from the county records of a decree of assignment by a corporation for the benefit of its creditors, may be exhibited by the trustee in such deed with the same effect as if he had filed the original in a suit by him against the directors for negligently permitting the treasurer to embezzle funds of the corporation. *Lamb v. Cecil*, 25 W. Va. 288.

The court said: "It is true that the original deed was not filed as an exhibit, but a properly authenticated copy from the record is filed. That was sufficient and answered all the purposes of the original (W. Va. Code, 615; *Pollard v. Lively*, 4 Gratt. 73; *Ott v. McHenry*, 2 W. Va. 73)." *Lamb v. Cecil*, 25 W. Va. 288, 296.

A paper filed and recorded as a me-

chanic's lien may be exhibited as a part of a bill in equity. *Lockhead v. Berkeley Springs, etc., Imp. Co.*, 40 W. Va. 553, 21 S. E. 1031.

Trust Deed.—In a suit to remove the encumbrance of a satisfied trust deed, the plaintiff may file the trust deed as an exhibit with the bill to support his claim. *Bates v. Brown*, 80 Va. 126.

Validity of Document.—Where a deed or other written instrument is assailed and claimed to be invalid by a plaintiff, and such deed or instrument is exhibited with and made part of his bill, and it appears to be invalid upon its face, the court will not decline to declare it void and set it aside, simply because the plaintiff did not specify in his bill the particular grounds on which the court regards it void. *Simpson v. Edmiston*, 23 W. Va. 675.

III. How Far Part of Pleadings.

In General.—In chancery all exhibits with a bill or answer are parts of that bill or answer, and, generally, where one paper refers to another in a manner so as to identify it, that other paper is a part of the paper referring to it. *Gunn v. Ohio River R. Co.*, 37 W. Va. 421, 16 S. E. 628; *Barb. Ch. Prac.* 345; *Bias v. Vickers*, 27 W. Va. 456, 467; *Craig v. Sebrell*, 9 Gratt. 131; *Tracey v. Shumate*, 22 W. Va. 474; *Kester v. Lyon*, 40 W. Va. 161, 20 S. E. 933.

Where a bill or other chancery pleading exhibits a document, the document is a part of such bill or pleading as fully as if incorporated therein. *Kester v. Lyon*, 40 W. Va. 161, 20 S. E. 933.

A decree referring to the record of another suit as an exhibit in the cause, makes it a part of the record, though it is not referred to in the bill or answer, nor made an exhibit by an entry on the order book. *Craig v. Sebrell*, 9 Gratt. 131.

The court below in its final decree in the cause, says: "But it appearing to

the court by an agreement made a matter of record and entered on the 1st of March, 1875, in the chancery cause lately pending in this court, wherein John H. Judkins, administrator, was plaintiff, and Josiah Burke et al., were defendants, that the said cloud upon the said title has been since removed," etc. This makes the order or decree of the court, entered in the last named case, and said agreement, exhibits in the cause. *Craig v. Sebrell*, 9 Gratt. 131; *Richardson v. Donehoo*, 16 W. Va. 685.

How Far Part of Bill.—Instruments properly referred to and exhibited become as much a part of the bill as if actually incorporated therein. *Kester v. Lyon*, 40 W. Va. 161, 20 S. E. 933; *Thompson v. Clark*, 81 Va. 422; *Johnson v. Anderson*, 76 Va. 766.

Exhibits filed with a bill of complaint and asked to be read and treated as parts of it, are so considered, as much as if they were actually incorporated in it, and if the bill and exhibits so read present grounds for equitable relief, the demurrer is properly overruled. *Sadler v. Taylor*, 49 W. Va. 104, 38 S. E. 583, citing *Thompson v. Clark*, 81 Va. 422; *Johnson v. Anderson*, 76 Va. 766.

A plaintiff by exhibiting with and making the record in an action at law a part of his bill, necessarily makes the facts appearing in such record, allegations of his bill, to be considered along with its other allegations. *Bias v. Vickers*, 27 W. Va. 456, citing *Richardson v. Donehoo*, 16 W. Va. 685; *Simpson v. Edmiston*, 23 W. Va. 675; *Craig v. Sebrell*, 9 Gratt. 131.

Transcript of Foreign Decree.—Against A., in Ohio, J. obtained a final decree to foreclose a mortgage securing two notes, and received all of first and part of second note. Twelve years later, without notice to A., a decree was entered for balance of second note. In the interval, J. filed his bill, in Virginia, to attach A.'s land for the

balance. A. answered that the cause of action arose July, 1868, and the suit was not brought within five years thereafter. J. then filed his supplemental bill, exhibiting a transcript of and setting up the last Ohio decree as a defense against the plea of the statute of limitations. To this A. demurred and plead nul tiel record. Held, the transcript of the Ohio record referred to and filed with that bill, on demurrer, is considered as much a part thereof as if set out in haec verba. *Johnson v. Anderson*, 76 Va. 766.

IV. Construction of Exhibits.

The court will on demurrer construe an instrument filed along with a bill as an exhibit. *Lockhead v. Berkeley Springs, etc., Imp. Co.*, 40 W. Va. 553, 21 S. E. 1031, citing *Bias v. Vickers*, 27 W. Va. 456.

V. Conclusiveness of Exhibits.

In passing upon a demurrer to a bill with which written documents are exhibited, as parts thereof, the court is not bound to accept as true and correct the allegations contained in the bill as to what such documents prove, or what is their effect in law, but may look to and go by the documents themselves. *Lockhead v. Berkeley Springs, etc., Imp. Co.*, 40 W. Va. 553, 21 S. E. 1031.

Determination of Question of Identity.—Where, in suit to remove encumbrance of a satisfied trust deed, on demurrer, the bill is held to present a case meet for equity, and exhibits are filed tending to support such case, and the answer denies the identity of the property claimed by plaintiff with the property which has been conveyed to him, it is error for the court to determine the question of identity on the pleadings and exhibits without giving the parties full opportunity to take all desired testimony. Though the bill and exhibits may not, yet witnesses might establish the identity. *Bates v. Brown*, 80 Va. 126.

VI. Force and Effect of Exhibits.

Where, in a suit for partition, the exhibits filed by the defendant with his answer, taken in connection with the answer, identify the land held by the defendant as the land claimed by the plaintiff in his bill, there is no need of proof on that point. *Davis v. Tebbs*, 81 Va. 600.

If a bill, when read in connection with exhibits filed and made a part thereof, states the case with such a degree of certainty and consistency as will enable the defendant to make defense and the court to decree upon the case made, it is sufficient. *Hutchinson v. Maxwell*, 100 Va. 169, 40 S. E. 655.

VII. Authentication and Proof of Exhibits.

Definition and Nature.—To authenticate a writing is to perform certain acts upon it for the purpose of rendering it admissible in evidence as being what it purports to be, without proof by witnesses that it is such. Authentication is then merely a convenient method of furnishing proof of certain things. *Lockhead v. Berkeley Springs, etc., Imp. Co.*, 40 W. Va. 553, 21 S. E. 1031.

Handwriting.—A defendant in a chancery suit in his answer alleges that the plaintiff's decedent delivered his three receipts to the respondent for money paid him on account of the matter in controversy, and files with his answer, as part thereof, what purports to be the original receipts. Such receipts, under § 40, ch. 125, W. Va. Code, will be regarded by the court as genuine, without any proof of the handwriting, unless the fact that such receipts were made by plaintiff's decedent is denied by affidavit. *Maxwell v. Burbridge*, 44 W. Va. 248, 28 S. E. 702.

Identification or Proof.—Where a record or other writing makes such reference to another writing by num-

ber, or other earmark, so that it may be safely identified, that makes such writing a part of the record or writing referring to it. *Hughes v. Frum*, 41 W. Va. 445, 28 S. E. 604.

By Viva Voce Testimony.—It seems, that to authorize the proving of an exhibit at the hearing, by viva voce testimony, a previous order for that purpose must have been obtained from the chancellor, and notice given to the adverse party of an intention to introduce such evidence. *Chandler v. Hill*, 2 Hen. & M. 124.

To authorize the examination of a witness to prove an exhibit at the hearing, an order must be previously obtained for that purpose. *Chandler v. Hill*, 2 Hen. & M. 124.

VIII. Production or Profert of Exhibit.

See generally, the title PROFERT AND OYER.

Production of Accounts and Receipts.—If a defendant, called upon to account for sales of certain public securities, deny that he ever received them, yet aver that the proceeds were accounted for to the plaintiff "as would appear by the accounts and receipts annexed to his answer," he ought to produce such accounts and receipts, or answer to interrogatories respecting them, if required to do so. *Clay v. Williams*, 2 Munf. 105. See *Anderson v. Dudley*, 5 Call 529.

Objection in Appellate Court.—Where a bill makes reference to im-

portant exhibits and bases allegations thereon, and the defendant answers and does not deny the existence of the exhibits nor contest their validity, and they are not produced, the defendant can make no objection in the appellate court to their nonproduction. *Chapman v. Railroad Co.*, 18 W. Va. 184.

IX. Proof of Error by Exhibits.

On a bill of review for error of law, that error must be collected from the pleadings, and exhibits filed with the pleadings, and orders and decrees, and must be made out on facts admitted in the pleadings, or stated in the decree as facts found. *Dunn v. Renick*, 40 W. Va. 349, 22 S. E. 66.

To show error on the face of a commissioner's report, in the absence of such exceptions as bring before the court the evidence before the commissioner, recourse may be had to the pleadings and exhibits therewith, provided it be impossible that the alleged error could not have been affected by extrinsic evidence. *Kester v. Lyon*, 40 W. Va. 161, 20 S. E. 933.

X. Revenue Stamps.

See generally, the title REVENUE LAWS.

Though a contract may not be stamped until it has been filed as an exhibit with the bill, it is admissible in evidence, and would have been admissible though not stamped at the time it was offered in evidence. *Talley v. Robinson*, 22 Gratt. 888.

Exoneration.

See generally, the title CONTRIBUTION AND EXONERATION, vol. 3, p. 484. See also, the titles BAIL AND RECOGNIZANCE, vol. 2, p. 219; GUARANTY; INDEMNITY; MARSHALING ASSETS AND SECURITIES; SURETYSHIP.

Expatriation.

See the title CITIZENSHIP, vol. 2, p. 826.

EXPECT.—In *Gunn v. Ohio River R. Co.*, 36 W. Va. 165, 14 S. E. 465, 468, it is said: "But it is said that there is no analogy to the rule in the cattle cases, because the company is not required to fence. The owner is not required to keep them up, but may let them run at large. Therefore they may be **expected**—looked for—on the track now and then, and so must be looked out for. This is a mere play on the root meaning of the word **expect**. Are not children suffered to go at large more or less, and is not their occasional presence upon the track to be reasonably anticipated? Therefore why not **expect** them also, taking the word in its primary sense?" See generally, the title **RAILROADS**.

Expectancy.

As to assignability of **expectancies**, see the title **ASSIGNMENTS**, vol. 1, p. 755. As to dower in estates in **expectancy**, see the title **DOWER**, vol. 4, p. 795. See also, the titles **CHATTEL MORTGAGES**, vol. 2, p. 803; **MORTGAGES**.

Expenses as Element of Damages.

See generally, the title **DAMAGES**, vol. 4, p. 188. See also, the particular titles.

Expert Testimony.

See the title **EXPERT AND OPINION EVIDENCE**, and references given.

EXPERT AND OPINION EVIDENCE.

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I. Expert Evidence.

A. DEFINITION AND DISTINCTIONS.

1. Definition.

All persons who practice a business or profession which requires them to possess a certain knowledge of the matter in hand, are experts, so far as expertness is required. *Bird v. Com.*, 21 Gratt. 800; *Norfolk, etc., Ry. Co. v. Tanner*, 100 Va. 379, 41 S. E. 721; *McKelvey v. Chesapeake, etc., R. Co.*, 35 W. Va. 500, 14 S. E. 261; *Overby v. Chesapeake, etc., R. Co.*, 37 W. Va. 524, 16 S. E. 813.

2. Expert and Nonexpert Contrasted.

The nonexpert testifies as to conclusions which may be verified by the court or jury; the expert as to conclusions that can not be; the nonexpert gives the result of a process of reasoning familiar to every day life; the expert gives the results of a process which can be mastered only by special scientists. *McKelvey v. Chesapeake, etc., R. Co.*, 35 W. Va. 500, 14 S. E. 261.

B. VARIOUS KINDS OF EXPERTS CONSIDERED.

1. Blasters.

Persons who have had considerable experience in blasting, and who know the proper method of that work, may testify as experts. *Lane Bros. v. Bauserman*, 103 Va. 146, 48 S. E. 857.

2. Civil Engineers.

An experienced civil engineer is competent to testify as an expert, re-

garding the location and drilling of oil wells. *Ammons v. South Penn Oil Co.*, 47 W. Va. 610, 35 S. E. 1004.

3. Drovers.

An experienced drover of hogs accustomed to butchering and weighing them, who was present when the hogs were weighed, and saw them and attended to the weighing of them, may give to the jury his opinion as to the weight of each hog. *McCormick v. Hamilton*, 23 Gratt. 561.

4. Farmers.

A person who all his life had been familiar with the effect of a dam upon the channel of a stream, and who had twice superintended the putting up the dam, and was also familiar with the effect upon the channel of the stream when the dam was washed away by a flood, but who was not a millwright or mechanic of any sort, but only a farmer and owner of the mill, is not competent to give evidence as an expert, as to the effect of a dam upon a stream in another county thirty miles distant. *Ellis v. Harris*, 32 Gratt. 684.

5. Gamblers.

In a prosecution for gaming, a witness may give expert testimony as to how a game is played, although he had only played it twice, and had seen it played two or three times. *Nuckolls v. Com.*, 32 Gratt. 884.

6. Geologists.

Ammons v. South Penn Oil Co., 47 W. Va. 610, 35 S. E. 1004.

7. Millrights and Mill Owners.

Millrights and mill owners may be admitted to testify as experts, where it appears that they are sufficiently qualified. *Ellis v. Harris*, 32 Gratt. 684; *Taylor v. Baltimore, etc., R. Co.*, 33 W. Va. 39, 10 S. E. 29.

A millwright may give his opinion as to the skillfulness of work done on a mill, but not a miller. (*Obiter dictum.*) *McKelvey v. Chesapeake, etc., R. Co.*, 35 W. Va. 500, 14 S. E. 261.

8. Nautical Experts.

A nautical expert may give an opinion as to whether a ship was properly managed, only where it appears that he has sufficient knowledge and experience in reference to the subject matter under consideration. *Sebrell v. Barrows*, 36 W. Va. 212, 14 S. E. 996.

9. Physicians and Surgeons.

See post, "Medical Experts," I, C, 9.

10. Priests.

A priest is competent to speak of the law relating to marriages where he celebrates marriages, because it is within his particular line of duty and experience. *Bird v. Com.*, 21 Gratt. 800.

11. Railroad Employees.

Experienced railroad men, such as section hands, foremen, conductors, engineers, etc., may testify as experts to matters incident to their employment. The weight of the evidence is to be determined by the jury, taking into consideration the character, intelligence and experience of the witnesses. *Norfolk, etc., R. Co. v. Tanner*, 100 Va. 379, 41 S. E. 721 (speed of train).

But a locomotive engineer, who has no knowledge derived from study or experience, in the construction or repair of locomotives, is not an expert, and his opinion is not admissible. *McKelvey v. Chesapeake, etc., R. Co.*, 35 W. Va. 500, 14 S. E. 261.

12. Surveyors.

A county surveyor has been held incompetent to testify as an expert in an action of ejectment, upon the question

whether the land in controversy is within the boundaries claimed by the plaintiff's declaration. *Holleran v. Meisel*, 91 Va. 143, 21 S. E. 658. See *Randolph v. Adams*, 2 W. Va. 519.

13. Title Examiner.

Examiner of titles held not competent to testify as an expert in an action of ejectment, upon the question whether the land in controversy is within the boundaries claimed by the plaintiff's declaration. *Holleran v. Meisel*, 91 Va. 143, 21 S. E. 658.

C. ADMISSIBILITY OF EXPERT TESTIMONY.**1. In General.**

When the question involved does not lie within the range of common experience or common knowledge, but requires special experience or special knowledge, then the opinions of witnesses skilled in the particular science, art or trade, to which the question relates, are admissible in evidence. *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813; *Overby v. Chesapeake, etc., R. Co.*, 37 W. Va. 524, 16 S. E. 813; *Welch v. Ins. Co.*, 23 W. Va. 288; *Bowen v. Huntington*, 35 W. Va. 682, 14 S. E. 217; *Hanriot v. Sherwood*, 82 Va. 1.

The general rule is that the opinions of experts or skilled witnesses are admissible in evidence in those cases in which the matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, for the reason that the subject matter so far partakes of the nature of a science, art or trade as to require a previous habit of experience or study in it to acquire a knowledge thereof. *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813.

"The books lay it down that men who are shown to have skill and experience in a particular specialty may be examined with reference to questions arising within the scope of their specialty." *Sebrell v. Barrows*, 36 W. Va. 212, 14 S. E. 996.

Where the facts and circumstances shown in evidence are such that men in general are capable of comprehending them, forming an intelligent opinion about them, and drawing their own conclusions therefrom, then the opinion of an expert, founded upon an hypothetical state of facts, is inadmissible. *Guarantee Co. v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909.

Test of Admissibility.—Where the inquiry, however, relates to a subject which does not require peculiar habits of study in order to enable a man to understand it, the opinion of skilled or scientific witnesses is not admissible. *Overby v. Chesapeake, etc., R. Co.*, 37 W. Va. 524, 16 S. E. 813; *Welch v. Insurance Co.*, 23 W. Va. 288; *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813; *State v. Hull*, 45 W. Va. 767, 32 S. E. 240; *State v. Perry*, 41 W. Va. 641, 24 S. E. 634. "The competency of expert testimony in a particular case depends upon the question as to whether or not any peculiar knowledge, science, skill or art, not possessed by ordinary persons, is necessary to the determination of the matter at issue; * * * that expert testimony is not admissible as to matters within the experience or knowledge of persons of ordinary information, as to which the jury are competent to draw their own inferences from the facts given in evidence before them, without extraneous aid other than the instructions of the court upon questions of law." *Hammond v. Woodman*, 41 Me. 177, 66 Am. Dec. 219, 228. The above language was approved in *Southern R. Co. v. Mauzy*, 98 Va. 692, 37 S. E. 285.

Hence, if the facts can be placed before a jury, and they are of such a nature that jurors generally are just as competent to form an opinion in reference to them and draw inferences from them as witnesses, then the opinions of experts can not be received in evidence. *Overby v. Chesapeake, etc., R. Co.*, 37 W. Va. 524, 16 S. E. 813;

Hood v. Maxwell, 1 W. Va. 219 (price of wheat).

2. Boundaries.

See the title **BOUNDARIES**, vol. 2, p. 607.

In an action of ejectment, the question whether the land in controversy is within the boundaries claimed by the plaintiff's declaration, is a question of fact upon which witnesses may state their knowledge, but upon which experts may not express opinions. On such question expert testimony is not admissible. *Holleran v. Meisel*, 91 Va. 143, 21 S. E. 658.

3. Cancellation of Written Instruments.

See the title **RESCISSION, CANCELLATION AND REFORMATION**.

The question, whether certain words in a paper have been cancelled, is a question of fact, and not of law; and in a jury case it is to be decided by the jury, and not by the court; and evidence of experts ought not to be permitted to go to the jury in such case. If the case, in which such question arises, is one in which there is no jury, the court should permit the evidence of experts to be heard before deciding such question; but if it is entirely clear on the face of the paper, that certain words have been stricken out and cancelled, then as the evidence of experts could not possibly change the action of the court, the refusal of the court in such a case to permit such experts to be examined is an error not prejudicial to the party; and the action of the court ought not to be reversed. *Beach v. O'Riley*, 14 W. Va. 55.

4. Fire Insurance.

See the title **FIRE INSURANCE**.

In an action to recover on a policy of fire insurance, it was right to exclude the testimony of a witness upon the question of increased risk, because it does not appear that he was an expert in the matter to which he was

called to testify, even if the opinions of an expert, in such case, were proper. *Bryan v. Peabody Ins. Co.*, 8 W. Va. 605.

5. Fires.

See the title FIRES.

In an action against railroad company for damages by fire, experts testified that the engine was new, of the best make, and with the best appliances, and the spark arrester the best in use. It was also proved that there were no combustible substances on the right of way, and that the fire did not start thereon, but on adjoining land. Held, plaintiff was not entitled to recover. *Bernard v. Richmond, etc., R. Co.*, 85 Va. 792, 8 S. E. 785.

In an action of trespass by A to recover damages for the burning of a stock of goods, alleged to have been caused by the negligence of an electric company, the refusal of the court to allow a witness to answer a question propounded to him as an expert, was assigned as error. "The witness was asked on one day of the trial, whether or not a certain kind of fuse was in common use, and answered that he did not know. On the next day he was put upon the stand and asked if he had made inquiries about its use, and whether or not he could make any statement in addition to that made on the day before as to the fuse being in general use in February, 1902. This question was objected to, and the court refused to allow it to be answered, upon the ground that the witness' expert knowledge on the subject was not of such a character as to fit him to answer the question. The court's ruling was plainly right." *Richmond, etc., R. Co. v. Rublin*, 102 Va. 809, 47 S. E. 834.

Burning of Wool.—The opinion of witnesses as to whether a quantity of wool burned could have been completely destroyed in the burning of a building of a certain size, is not admissible, for this is not a question

which requires expert testimony to understand. *Welch v. Ins. Co.*, 23 W. Va. 288.

6. Foreign Laws.

See the title FOREIGN LAWS.

A priest familiar with the marriage laws and usages of a foreign jurisdiction, may be permitted to prove them by his own evidence. *Bird v. Com.*, 21 Gratt. 800.

7. Gaming.

See the title GAMING.

On the trial of an indictment for gaming "the commonwealth introduced a witness—M. J. Griffin—and asked him to explain to the jury, if he could, how the game of 'keno' was played; thereupon the attorney for the prisoner asked the witness if he was an expert at the game of keno; to which the witness answered no, but that he had played it twice, and seen it played two or three times. The attorney for the commonwealth then asked the witness if he knew how the game was played; to which the witness answered that he did; and then the said attorney asked the witness to explain to the jury what he knew of the game; and thereupon the prisoner objected to the witness stating to the jury what he knew of the game, on the ground that the witness was not an expert; but the court overruled the objection, and allowed the witness to state what he knew of the game; to which ruling of the court the prisoner excepted. The evidence objected to was certainly admissible. The weight of it was of course a subject for the consideration of the jury." *Nuckolls v. Com.*, 32 Gratt. 884.

It was said: "The evidence of an expert, if there can be an expert in such a matter, and the witness was not in fact such an expert, still his evidence, to the extent of his knowledge on the subject which he explained, was admissible, and it was uncontradicted by the evidence of any expert introduced as a witness by the prisoner."

8. Genuineness of Instrument.

See the title **MUNICIPAL, STATE AND COUNTY SECURITIES.**

It was held, in *Commonwealth v. Weller*, 82 Va. 721, 1 S. E. 102, that the act of January 21, 1886, forbidding expert evidence to prove the genuineness of any instrument made by machinery, etc., is not repugnant to art. 1, § 40, of the United States Constitution, for this section has no application whatever to rules of evidence prescribed by the law-making power of the state to govern proceedings in her court. See, in accord, *Newton v. Com.*, 82 Va. 647; *Com. v. Booker*, 82 Va. 964, 7 S. E. 381; Va. Code, § 412; *Cornwall v. Com.*, 82 Va. 644; *McGahay v. Com.*, 85 Va. 519, 8 S. E. 244; *Laube v. Com.*, 85 Va. 530, 8 S. E. 246.

9. Medical Experts.**a. In General.**

When it is proven that a witness is a practicing physician, he is competent to express an opinion, as an expert, upon a medical question. *Livingston v. Com.*, 14 Gratt. 592; *Barker v. Ohio River R. Co.*, 51 W. Va. 423, 41 S. E. 143.

Where the conclusions called for by an hypothetical question from a medical man, who is being examined as an expert, depend upon facts, the evidential weight of which can only be determined by those familiar with that specialty, then those conclusions may be given by an expert in such specialty. *Bowen v. Huntington*, 35 W. Va. 682, 14 S. E. 217.

b. In Criminal Prosecutions.**(1) Homicide.**

Upon a trial for homicide, the commonwealth may introduce as witnesses physicians and surgeons to give their opinion upon a state of facts testified to by themselves or other witnesses, in respect to a wound or beating proved to have been inflicted on the deceased, as to whether such wound or beating would be a cause adequate to produce death, or was the actual cause

of death; but the questions put and the answers given should be so put or given as not to elicit or express an opinion by the physician on the credit of the witnesses or the truth of the facts testified to by others. *Livingston v. Com.*, 14 Gratt. 592. See *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813.

Instrument of Infliction.—A surgeon is competent to state, from his general knowledge of the human body, and of the practice and principles of surgery, that he had no doubt of his ability to form a correct opinion as to the difference between a dirk and a knife wound. *Mendum v. Com.*, 6 Rand. 704.

Insanity.—See post, "Weight of Expert Testimony," I, F; "Nonexpert Opinion," II.

Where the defense, in a trial for murder, is insanity, it is competent to ask a medical expert such a question as this: "Suppose a man had inherited a predisposition to insanity, would great mental anxiety, loss of property, or the honor of one's family, and losses of other kinds, be likely to develop the disease?" *Dejarnette's Case*, 75 Va. 867.

(2) Rape.

Whether a person with a wooden leg is incapacitated from kneeling, or thereby rendered incapable of committing an offense in the manner charged, is a subject matter of inquiry, justifying the introduction of expert medical testimony, to assist the jury in arriving at a correct conclusion. *State v. Perry*, 41 W. Va. 641, 24 S. E. 634.

Whether criminal charges preferred by a female patient against a physician are the result of an hallucination, while under the influence of chloroform and ether, is a question that must be determined by expert medical evidence, as it is not a matter of ordinary human experience or knowledge. *State v. Perry*, 41 W. Va. 641, 24 S. E. 634.

But a medical witness, who is examined as an expert in the trial of an

indictment for rape, after stating that he had been called upon to examine the prosecutrix, will not be allowed to express the opinion to the jury that no girl would have voluntarily submitted to the suffering necessary to have brought about this result, because the jury is just as capable of arriving at this conclusion as the physician. *State v. Hull*, 45 W. Va. 767, 32 S. E. 240.

c. In Civil Proceedings.

(1) Personal Injuries.

See post, "Damages," II, B, 6.

In an action against a carrier of passengers for injuries sustained by reason of the negligent failure of the defendant to keep its depot and platform in repair, resulting in an injury to the plaintiff, it was held, that a physician may testify as an expert that in his opinion the plaintiff's condition may have been caused by a shock, a fall or anything that produces a shock to the spinal column. *Barker v. Ohio River R. Co.*, 51 W. Va. 423, 41 S. E. 148, citing *Bowen v. Huntington*, 35 W. Va. 682, 14 S. E. 217.

In an action to recover damages for personal injuries inflicted through negligence of the defendant, it is not error to allow the attending physician to testify as to the probable future effects of the injury; nor to instruct the jury that, in assessing damages, they can take into consideration "such as will naturally, reasonably and probably result to the plaintiff as a consequence of his injuries." *Norfolk, etc., R. Co. v. Spratley*, 103 Va. 379, 46 S. E. 502.

Proximate Cause.—Where a party, suffering from paralysis, institutes an action for damages against a city, claiming that the disease is the result of injuries inflicted by the negligence of the city, and the city wishes to defend on the ground that it is the result of a disease of long standing, it is competent for a medical witness, in response to an hypothetical question, to state his conclusions as to the prox-

imate cause of the paralysis. *Bowen v. Huntington*, 35 W. Va. 682, 14 S. E. 217.

(2) Life Insurance.

It was held, in *Schwarzbach v. Protective Union*, 25 W. Va. 622, that a question asked of the examining physician and of a man engaged in the insurance business as expert, as to what would be the character of the risk of a man's life, if within three months he had a hemorrhage of the stomach, was properly not allowed to be put or answered.

d. Harmless Error.

That a medical expert was permitted to express an opinion upon a matter of common knowledge is harmless error. *McCue v. Com.*, 103 Va. 870, 49 S. E. 623.

It is not reversible error to permit a physician to give his opinion as to the cause of a diseased condition of the human body. *Barker v. Ohio River R. Co.*, 51 W. Va. 423, 41 S. E. 148, 90 Am. St. Rep. 806.

10. Negligence.

a. In General.

Where the facts from which negligence is to be inferred are within the range of ordinary human experience, the opinions of the men on the jury, in the eye of the law, are better than those of experts; but where the injury involves questions of science or skill, expert evidence is admissible. *Partlett v. Dunn*, 102 Va. 459, 46 S. E. 467.

Engineers, conductors, and others skilled in railroad matters, like other experts, are not allowed to give their opinions as to whether ordinary care or prudence has been exercised in the matter in controversy, or as to the competency of another person to perform his duties. *Purkey v. Southern Coal, etc., Co. (W. Va.)*, 50 S. E. 755.

b. Master and Servant.

See generally, the title MASTER AND SERVANT.

Custom of Witness.—In an action by an employee to recover damages from

his employer for personal injuries resulting from the alleged negligence of the latter in failing to provide for the plaintiff a reasonably safe place in which to work, and reasonably safe and suitable appliances or machinery with which to work, an expert witness can not give his own practice in guying up an "A" derrick, rather than the usual or customary manner of doing such work. *Partlett v. Dunn*, 102 Va. 459, 46 S. E. 467.

Derrick.—In an action by an employee to recover damages from his employer for personal injuries resulting from the negligence of the latter in failing to provide for the plaintiff a reasonably safe place in which to work and reasonably safe and suitable appliances or machinery with which to work, it was held that expert evidence was admissible to show the usual method of putting up a hoisting apparatus, because the manner in which such an appliance should be constructed, placed in position, and fastened so as to make it reasonably safe and suitable for the work to be done, is not within the range of the experience of men unskilled in the use of such an appliance. *Partlett v. Dunn*, 102 Va. 459, 46 S. E. 467.

Moving Heavy Wheels.—A witness having sufficient knowledge may testify as to the general practice of machine shops in moving large wheels, and the comparative safety of different methods, but his testimony is not competent to show that the different methods of another shop are better than those of the defendant. *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509.

Loading Cars.—But witnesses can not express an opinion as to the best and safest mode of loading car wheels on a flat car, for expert testimony is not necessary to explain or elucidate such a matter, since the question of danger or safety in loading car wheels in a particular mode is one which any person of common intelligence and ob-

servation can as readily determine as a so-called expert. *Southern R. Co. v. Mauzy*, 98 Va. 692, 37 S. E. 285.

Explosives.—In an action of trespass on the case to recover damages for personal injuries suffered by the plaintiff while working in the defendant's rock quarry, and alleged to have been caused by their negligence in setting off a blast, it was held, that witnesses who had been engaged in stone quarries, drilling holes and blasting for many years, one of them for sixteen or seventeen years, and the other for twelve or fifteen years, and who had had considerable experience in unloading unexploded blasts, and who knew the proper method of doing that work, have such knowledge as entitles them to testify as experts upon the subject upon which they were examined, though neither claimed to know what was the method in general use. *Lane Bros. v. Bauserman*, 103 Va. 146, 48 S. E. 857.

Thawing Dynamite before Open Fire.—In an action to recover damages against the master for the death of the plaintiff's intestate occasioned by the explosion of dynamite, the opinions of scientific experts are not necessary upon the question as to whether thawing dynamite before an open fire is safe or not. "Scientific experts of the highest character and reputation had testified in the case that the thawing of dynamite before an open fire in the open air was very dangerous, and that there were cheap appliances for thawing it which greatly decreased the danger. Practical experts, railroad builders, of character and wide experience, who had been engaged in using dynamite for many years in the building of railroads and other works requiring the use of powerful explosives, testified that the usual and common method of thawing dynamite was before an open fire in the open air, and that they regarded that method as safe and the most practicable, and had known very few instances in which injuries had re-

sulted from dynamite being thawed in that manner. If the view of the scientific experts were to prevail with the jury, the thawing of dynamite before an open fire in the open air was gross negligence. If the opinion of the practical experts was to control, that method seemed to be the usual and common one and reasonably safe. The plaintiff in error, if it requested it, had the right to have the court instruct the jury that the measure of ordinary care imposed upon it for the safety of its servants in the use of dynamite, was that ordinary care which reasonable and prudent men would and do exercise under like circumstances." *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869.

c. Streets and Sidewalks.

See the title **STREETS AND HIGHWAYS**.

The question of what is "ordinary care," on the part of a city in keeping its footways in a reasonably safe condition, is one for the jury to pass upon under all the circumstances of the case, the age of the plaintiff being one of the facts considered, and can not be shown by expert testimony. *Roanoke v. Shull*, 97 Va. 419, 34 S. E. 34.

d. Speed and Distance.

Speed.—For the purpose of showing the speed at which a train was moving at the time of an accident, employees of the railway company and others, who are shown from their previous employments and occupations to have had frequent opportunities of observing trains in motion, are competent witnesses; the weight to be attached to their testimony being a matter for the determination of the jury in the light of all the circumstances. *Norfolk, etc., R. Co. v. Tanner*, 100 Va. 379, 41 S. E. 721.

But in a West Virginia case, it was held, that the speed of a passing train is not a question of science, but of observation, and any one possessing knowledge of time and distance is com-

petent to testify in relation thereto. *McVey v. Chesapeake, etc., R. Co.*, 48 W. Va. 111, 32 S. E. 1012.

Distance.—Expert evidence is admissible to determine within what space a car running under certain conditions may be stopped, because this is a subject not within the range of common experience and observation, but involves technical and peculiar knowledge as to which expert evidence is admissible. *Norfolk R., etc., Co. v. Corletto*, 100 Va. 355, 41 S. E. 740.

Expert testimony as to the distance within which an electric car could have been stopped in a given case, should be based upon the operation of cars of similar construction and equipment, and under like conditions. *Richmond Passenger, etc., Co. v. Racks*, 101 Va. 487, 44 S. E. 709.

11. Oil and Gas.

See the title **MINES AND MINERALS**.

A civil engineer of twelve years experience, with sufficient experience in the oil fields in locating the position of wells, and determining the elevation of the sand at the point where wells were to be drilled, is competent to testify as an expert for the purpose of determining locations for new wells or wells to be drilled, where he shows that he has familiarized himself with the oil producing rock, etc. "A man does not necessarily have to be a thorough geologist to be an expert in matters pertaining to the production of oil, however desirable a knowledge of geology may be. Practical observation alone will make an expert of the man of good common sense in any given line of business." *Ammons v. South Penn Oil Co.*, 47 W. Va. 610, 35 S. E. 1004.

12. Ships and Shipping.

See the title **SHIPS AND SHIPPING**.

Where a witness is called and examined as an expert as to whether a steamboat was properly landed for the

purpose of discharging a passenger, as to what officers were required to properly man such a boat, it must not only appear that the witness has such knowledge and experience in reference to the subject matter under consideration, but that he is acquainted with the class and dimensions of the boat, and the character and condition of the river and the shore where the landing was made, or has heard the same described by witnesses in a case, before he can be allowed to express his opinion as an expert. *Sebrell v. Barrows*, 3^d W. Va. 212, 14 S. E. 996.

13. Value.

See post, "Nonexpert Opinion," II.

It seems that the testimony of a witness is inadmissible to prove the value of wheat per bushel; by having the price of flour per barrel given him, without other proof that such person is an expert, because wheat and flour are articles of such universal acquaintance and use in this country, that the presumption is that every man (not proved to the contrary) is some sort an expert in that matter, but this is probably the extreme limit of the rule. *Hood v. Maxwell*, 1 W. Va. 219.

Eminent Domain.—See post, "Damages," II, B, 6.

Opinions of witnesses not personally acquainted with land appropriated for railroad purposes, are not admissible as to the value of the land actually taken, or damages to the residue, it not being a question of expert evidence; but a person so acquainted and conversant with the land may state the circumstances and respects in which the land is prejudiced or benefited by the railroad, and may then express his opinion as to the value of the land after completion of the road as compared with what it was before. *Kay v. Glade Creek, etc., R. Co.*, 47 W. Va. 467, 35 S. E. 973.

14. Watercourses.

See post, "Nonexpert Opinion," II.

Although a person has, all his life,

been familiar with the effect of a dam upon the channel of a stream, and has twice superintended the putting up of the dam, and is also familiar with the effect upon the channel of the stream when the dam is washed away, but who is not a millwright or mechanic of any sort, but only a farmer and owner of the mill, is not competent to give evidence as an expert, as to the effect of a dam upon a stream in another county thirty miles away. *Ellis v. Harris*, 32 Gratt. 684.

In an action of trespass on the case against a railroad company to recover damages for the failure of the railroad company to so construct its bridge as to leave ample way for the passage of the water, so as to save a riparian owner from overflow, by reason of which negligence of the defendant backwater is caused overflowing the premises of the plaintiff and causing him damage; "The plaintiff stated as a witness that his mill had two French burrs, and that the wheat burrs were cracked after the freshet. He was asked: 'Did the water damage the burrs?' and answered: 'I think it did. They were soaked in the water, and I had never seen the cracks before.' I incline to think Taylor an expert, and his evidence admissible on this matter. *Bird v. Com.*, 21 Gratt. 800; *McCormick v. Hamilton*, 23 Gratt. 561." *Taylor v. Baltimore, etc., R. Co.*, 33 W. Va. 39, 10 S. E. 29.

15. Weight.

A witness sufficiently qualified may express his opinion as to weight. Like questions of identity, the nature of the testimony is such that it could only be given as his opinion; it does not admit of absolute certainty. It is not, properly speaking, the testimony of an expert, but is evidence of a fact. *McCormick v. Hamilton*, 23 Gratt. 561.

An experienced drover of hogs, accustomed to butchering and weighing them, who was present when the hogs were weighed, and saw them and at-

tended to the weighing of them, may give to the jury his opinion as to the weight of each hog. *McCormick v. Hamilton*, 23 Gratt. 561.

D. QUALIFICATION OF EXPERTS.

1. Proof of Expertness Required.

Before the witness will be admitted to testify, it must appear that he has such knowledge and experience in reference to the subject matter under investigation, as fits him to answer the question more accurately than a person who may not have been called upon to study the subject or to obtain or exercise any skill in it. *Mendum v. Com.*, 6 Rand. 704 (physician); *Bird v. Com.*, 21 Gratt. 800 (priest), approved in *McKelvey v. Chesapeake, etc.*, R. Co., 35 W. Va. 500, 14 S. E. 261 (locomotive engineer); *McCormick v. Hamilton*, 23 Gratt. 561 (drover); *Ellis v. Harris*, 32 Gratt. 684 (farmer); *Richmond, etc.*, R. Co. *v. Rubin*, 102 Va. 809, 47 S. E. 834 (fires); *Bryan v. Peabody Ins. Co.*, 8 W. Va. 605 (fire insurance); *Sebrell v. Barrows*, 36 W. Va. 212, 14 S. E. 996 (ships and shipping—steamboat officers). By thus indicating in parenthesis the subject of the decision, the reader may readily find by the analysis where the holding in each case cited is set out.

The objection to the evidence of witnesses given as expert testimony, where they have not shown themselves to be experts, should be sustained. *Ammons v. South Penn Oil Co.*, 47 W. Va. 610, 35 S. E. 1004.

The record should show that the witness whose opinion was asked, possessed such knowledge or experience on the subject as qualified him to testify as an expert. *Norfolk Ry., etc., Co. v. Corletto*, 100 Va. 355, 41 S. E. 740.

The mere expression of belief by a party that he is an expert is not sufficient to constitute him such; he must further testify as to some information, skill or experience in a certain line, to

bring him within that class. *Com. v. Larkin*, 88 Va. 422, 13 S. E. 901.

Must Be Skilled in That Line.—An expert must be specially skilled in his line. *McKelvey v. Chesapeake, etc.*, R. Co., 35 W. Va. 500, 14 S. E. 261.

Railroad Experts.—A witness is not considered an expert, though possessing a general knowledge of the management of railroads, unless he has a special knowledge of that branch to which he is called to speak. *McKelvey v. Chesapeake, etc.*, R. Co., 35 W. Va. 500, 14 S. E. 261.

Where a witness states that he has had four years and four months' experience in railroading, part of the time as fireman and hostler, and that he has run a switch engine for four months, and that he had examined wires of the description in question on about seven different roads, he is not qualified to speak as an expert as to the usual way signal wires are placed on the lines of railroads, nor to give his opinion as to whether wires constructed as these were could be regarded as reasonably safe to those who work about them. Because he shows by his testimony that he had never put up such wires, and that he had never repaired them, but had merely seen them while they were being put up, and noticed how it was done. *Overby v. Chesapeake, etc.*, R. Co., 37 W. Va. 524, 16 S. E. 813.

Steamboat Officers.—"The proper conduct and management of a steamboat is something which requires skill and experience, and it is not every one who has the requisite qualifications to assume and properly execute the duties of a master of a steamboat. In order that they may do so, the law requires that they shall possess the proper qualifications, and that they shall submit to an examination and obtain a license, so that the lives, limbs, and property of individuals may not be endangered by traveling and shipping upon a boat under the control and command of inexperienced and ineffi-

cient men. In addition to this, after these precautionary measures have been adopted to provide efficient officers to man such vessels, the law provides a remedy for injuries sustained by reason of the negligence of such officers in the performance of their duties; and when the question of negligence is properly raised, and a jury called to determine whether these duties have been properly performed, before a witness is allowed to express his opinion upon the question as to whether the boat was properly managed in making a particular landing, or carried a full complement of officers at the time, the law not only requires that the witness should be competent to speak as an expert (that he should have the knowledge and experience with reference to the matter in question which would enable him to give a correct opinion), but he must be acquainted with the boat, the condition of the river and the landing; in short, the facts and circumstances surrounding the transaction." *Sebrell v. Barrows*, 36 W. Va. 212, 14 S. E. 996.

Personal Knowledge.—But the expert witness need not know personally anything of the facts of the particular case. *McCormick v. Hamilton*, 23 Gratt. 561.

Source of Knowledge.—Expert knowledge may be derived from the study of a profession or from mental application, as in the case of a surgeon who derives his knowledge from the study necessarily incident to acquiring a knowledge of his profession. *Mendum v. Com.*, 6 Rand. 704.

Knowledge, to qualify one to speak as an expert, may be derived from study or experience. *McKelvey v. Chesapeake, etc., R. Co.*, 35 W. Va. 500, 14 S. E. 261.

2. Degree of Expertness.

The rule seems to be that an expert need not have all the knowledge possible for one in his class, to entitle him to speak, but may testify unless it

clearly appears that he was not qualified at all. *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509.

3. Hearing and Determination.

When the opinion of an expert is offered in evidence, and it is objected to, because he is not an expert, the court may hear evidence to ascertain whether he is so or not, and on being satisfied that he is an expert, may allow his opinion to be given in evidence. *Mendum v. Com.*, 6 Rand. 704; *Sebrell v. Barrows*, 36 W. Va. 212, 14 S. E. 996.

4. Review of Discretion of Trial Court.

The question of the qualification of a witness to speak as an expert lies largely in the discretion of the trial court, whose judgment will not be reversed unless it clearly appears that the witness was not qualified. *Lane Bros. v. Bauserman*, 103 Va. 146, 48 S. E. 857; *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509; *Savage v. Bowen*, 103 Va. 540, 49 S. E. 668.

The question of the qualifications of a witness to testify as an expert is largely in the discretion of the trial court, and although it is not altogether clear that the witness had sufficient knowledge upon the subject to be considered an expert, still the action of the trial court will not be reversed for admitting such testimony unless it clearly appears that he was not qualified. *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509.

E. EXAMINATION OF EXPERT WITNESSES.

1. In General.

"The principal object in view in the examination of expert witnesses is to elicit from them opinions or conclusions drawn from the facts, rather than the facts themselves." This species of testimony forms in this respect a notable exception to well-established rules of evidence. The rules governing the introduction of this species of testimony should not, therefore, be relaxed,

but should be strictly enforced with the greatest caution and discrimination. *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813.

Province of Jury Jealousy Guarded.

—In the examination of expert witnesses, the questions put and the answers given should be so put and given as not to elicit an opinion by the physician or other expert on the credit of the witnesses, or the truth of the facts testified to. *Livingston v. Com.*, 14 Gratt. 592; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493; *McMechen v. McMechen*, 17 W. Va. 683; *Bowen v. Huntington*, 35 W. Va. 682, 14 S. E. 217.

The object of all questions to experts should be to obtain their opinion as to matters of skill or science which are in controversy, and at the same time, to exclude their opinions as to the effect of the evidence in establishing controverted facts. *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813.

While the admission of the opinions of experts necessarily gives rise to very nice distinctions between facts and findings, it nevertheless does not annul the rule of law axiomatic with reference to them, as well as to all witnesses, that they must not be so examined as to substitute their opinions for the verdict, and thus completely usurp the peculiar province of the jury. *State v. Hull*, 45 W. Va. 767, 32 S. E. 240, citing 8 Ency. Pl. & Pr. 751.

2. Preliminary Examination.

"For the purpose of determining the competency of the witness, a preliminary examination takes place, in which the witness may be asked to state his acquaintance with the subject matter in reference to which his opinion is desired, and what he has done to qualify himself as an expert in that particular department of inquiry. The object of all testimony in courts is to place before the jury a knowledge of facts pertaining to the case under consideration, and it is a serious departure from this purpose

ever to admit, instead of actual knowledge, mere opinion, however correct it may properly be; and therefore opinion, if admitted at all, should be as nearly approximated as possible to the actual knowledge of fact for which it is substituted, and it should always be required of an expert that he should at least be sufficiently acquainted with the subject matter of his testimony to know what its laws are, and not merely to conjecture or to have an idea about it." *Sebrell v. Barrows*, 36 W. Va. 212, 14 S. E. 996; *Mendum v. Com.*, 6 Rand. 704.

3. Where Expert Is Personally Acquainted with Facts.

"Experts are generally called to express an opinion on testimony already before the jury; for instance, to say whether on a given state of facts a man was sane or insane; was diseased or not; whether a wound, examined or described, was sufficient to cause death; and so in like or analogous cases. But here the witness testified to a fact in the cause as to which he was entirely competent to testify; and his being called an expert, and being previously examined by the court as such, did not render him the less competent; indeed, that examination only showed more plainly his capability to testify intelligently and satisfactorily on the point in question." *McCormick v. Hamilton*, 23 Gratt. 561, 577.

4. Hypothetical Questions.

In General.—On direct examination the questions put to an expert must be framed hypothetically, unless there is no conflict of evidence as to the facts, or unless the expert is personally acquainted with them. *State v. Maier*, 36 W. Va. 757, 15 S. E. 991.

In order to obtain the opinion of a witness on matters not depending upon general knowledge, but on facts not testified to by himself, either the witness must be present and hear all of the testimony, or the testimony must be summed up in the question put to him,

and in either case the question is put to him hypothetically. *Sebrell v. Barrows*, 36 W. Va. 212, 14 S. E. 996.

Relevancy Required.—Of course, it is improper to propound an hypothetical question which is foreign to the issue and irrelevant to the testimony. *Bowen v. Huntington*, 35 W. Va. 682, 14 S. E. 217.

Recital of Facts.—When a medical witness is introduced and examined as an expert it is proper to propound to him an hypothetical question, reciting certain facts which the evidence in the cause tends to prove, and such recital need not contain all the facts which the evidence has a tendency to prove, but counsel may embody in the question such facts as tend to support his theory of the case in order to elicit the opinion of the witness based upon the testimony of other witnesses in the cause, or upon scientific principles applied to the facts so testified to. *Bowen v. Huntington*, 35 W. Va. 682, 14 S. E. 217.

Conflict in Evidence.—Although an expert may have heard all the testimony in the case, he can not be asked to give his opinion, based merely upon his having heard such testimony, whenever there is a conflict therein, unless the same is hypothetically propounded to him. *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813. See also, *State v. Maier*, 36 W. Va. 757, 15 S. E. 991.

Doubtful Facts.—An expert can not be asked to give his opinion upon doubtful facts in the case on trial, which remain to be found by the jury, but a similar case may be hypothetically put to him, based upon the evidence in such case. *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813.

Hypothesis Must Be Clearly Stated.—The opinion of medical experts, founded on testimony already in the case, can only be given on an hypothetical case; and the hypothesis must be clearly stated, so that the jury may know with certainty upon precisely what state of assumed facts the ex-

pert bases his opinion. *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493; *McMechen v. McMechen*, 17 W. Va. 683; *Bowen v. Huntington*, 35 W. Va. 682, 14 S. E. 217.

Assumption of Facts.—In putting hypothetical questions to expert witnesses, counsel may assume the facts in accordance with their theory of them; it is not essential that he state the facts as they exist, but the hypothesis must be based on a state of facts which the evidence in the cause tends to prove. The very meaning of the word is that it supposes or assumes something for the time being. *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493.

Knowledge of Other Facts by Expert.—Upon a trial in which expert medical testimony is competent and proper, the physician or expert may give his opinion on any hypothetical state of facts which the evidence tends to prove, but his opinion must be based upon the state of facts as testified to by himself or other witnesses, but not upon his knowledge of other facts not testified to by himself or others. *Bowen v. Huntington*, 35 W. Va. 682, 14 S. E. 217.

F. WEIGHT OF EXPERT TESTIMONY.

1. In General.

In Wharton's Law of Evidence it is said: "When expert testimony was first introduced it was regarded with great respect. An expert, when called as a witness, was viewed as the representative of the science of which he was a professor, giving impartially its conclusions. Two conditions have combined to produce the material change in this relation. In the first place, it has been discovered that no expert, no matter how incorrupt, speaks for his science as a whole. Few specialties are so small as not to be torn by factions; and often the smaller the specialty the bitterer and the more inflaming and distracting are the animosities by which these factions are

possessed. Peculiarly is this the case in matters psychological, in which there is no hypothesis so monstrous that an expert can not be found to swear to it on the stand, and to defend it with vehemence when off the stand. * * * In the second place, the retaining of experts, by a fee proportioned to the importance of their testimony, is now, in cases in which they are required, as customary as is the retaining of lawyers. No court would take as authority the sworn statement of the law given by counsel retained on a particular side, for the reason that the most high-minded men are so swayed by an employment of this kind as to lose the power of impartial judgment; and so intense is this conviction, that there is no civilized community in which the reception of a present from a suitor does not only disqualify but disgrace a judge. Hence it is, that, apart from the partisan spirit more or less common to experts, their utterances, now that they have as a class become the retained agents of parties, have lost all judicial authority, and are entitled only to the weight which a sound and cautious criticism would award to the testimony itself. In adjusting this criticism, a large allowance must be made for the bias necessarily belonging to men retained to advocate a cause, who speak not as to fact but as to opinion, and who are selected on all moot questions, either from their prior advocacy of, or from their readiness to adopt, the opinion to be proved. In this sense we may adopt the strong language of Lord Campbell, that 'skilled witnesses come with such a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to their evidence.'" Quoted in *Ware v. Starkey*, 80 Va. 191.

The testimony of experts is not entitled to any greater weight as a matter of law than that of other witnesses, unless it appears that the expert has had better means and opportunities of

knowing whereof he speaks than the nonprofessional witness, otherwise it is to receive only such weight and credit as the jury deem it entitled to when viewed in connection with all the circumstances. *Ward v. Brown*, 53 W. Va. 227, 44 S. E. 488, citing and explaining many Virginia and West Virginia cases.

In *Thompson on Trials*, § 2429, the true rule concerning expert testimony is said to be that "the testimony of experts is to be considered like any other testimony—is to be tried with the same tests, and is to receive just as much weight and credit as the jury deem it entitled to when viewed in connection with all the circumstances." Quoted in *Ward v. Brown*, 53 W. Va. 227, 44 S. E. 488.

The following language was used in one West Virginia case: "The propriety and necessity of confining expert witnesses, in delivering their testimony, to the strict legal rules governing the admission of such evidence, is apparent when it is considered that the testimony of witnesses of this character, and their opinions derived from peculiar opportunities of study and practical experience, necessarily have peculiar weight with the jury." *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813.

Illustrations.—An illustration of this principle is that it is proper to tell the jury that, in estimating the value of the testimony of an expert, it is proper to consider his means of knowledge and his opportunities to know whereof he speaks. *Ward v. Brown*, 53 W. Va. 227, 44 S. E. 488.

Expert testimony, except under special circumstances, is entitled to only such weight as the jury may deem it entitled to when viewed in connection with all the evidence and circumstances; and it is error to instruct the jury that the evidence of physicians testifying as experts only on the trial of an issue *devisavit vel non* is entitled to great weight. *Ward v. Brown*, 53 W. Va. 227, 44 S. E. 488.

2. Execution of Deed.

"The testimony of witnesses who were present at the factum of a deed, is more to be relied on than the opinion of other witnesses based upon facts which may be true, and yet not be the result of unsoundness of mind." *Beverley v. Walden*, 20 Gratt. 147; *Porter v. Porter*, 89 Va. 118, 15 S. E. 500; *Beckwith v. Butler*, 1 Wash. 224; *Jarrett v. Jarrett*, 11 W. Va. 584; *Buckey v. Buckey*, 38 W. Va. 168, 18 S. E. 383.

3. Insanity.

a. In General.

Any one who has watched with care the trial of an issue of insanity before a jury knows that expert testimony proper, based on long hypothetical questions, and their still longer and sometimes still more hypothetical answers, as we often see it given in, is in a manner worthless, and only tends or seems to darken counsel, especially when appearing as antagonists on their respective sides of the issue. *Hiatt v. Shull*, 36 W. Va. 563, 15 S. E. 146.

b. Notaries.

The evidence of a notary, taking the acknowledgment of a deed, who is also a competent physician and expert as to mental diseases, that the grantor was competent to execute it, is entitled to very great weight. *Farnsworth v. Noffsinger*, 46 W. Va. 410, 33 S. E. 246; *Buckey v. Buckey*, 38 W. Va. 168, 18 S. E. 383. See also, *Delaplain v. Grubb*, 44 W. Va. 612, 30 S. E. 201.

c. Physicians.

"In no case decided by this court, or the court of last resort of Virginia, has it ever been held, that purely expert testimony is entitled to great weight, or that the evidence of physicians testifying as experts only, is entitled to such weight. We are truly told there were giants on the Virginia bench when the rule laid down in these West Virginia cases was first announced, but they never, in a single instance, applied it to purely experts evidence. It was first announced in *Burton v. Scott*,

3 Rand. 399, decided as early as 1825.

In that case Drs. Cabell and Stevens were the physicians, who testified, the former having been the family physician, and the latter a personal acquaintance of the testator, and it does not appear from the report that a single hypothetical question was put to either of them. In *Parramore v. Taylor*, 11 Gratt. 220, the physicians testifying had both been family physicians of the testator. In *Simmerman v. Songer*, 29 Gratt. 9, the testifying physicians had been regular attending physicians of testatrix for many years. In *Cheatham v. Hatcher*, 30 Gratt. 56, the physician who testified, had evidently been attending the testatrix professionally at the time the will was executed. In *Montague v. Allen*, 78 Va. 592, Drs. Harris and McGuire had attended the testatrix in her last illness, the former regularly and the latter on a special occasion, and Dr. Cunningham had known her and testified from personal knowledge. In *Shacklett v. Roller*, 97 Va. 639, 34 S. E. 492, Dr. Hopkins, who testified, had been the family physician of the testator. The principle of law deducible from any case is to be determined by what has been decided. Hence, to learn the meaning of language used in a headnote, it must be read in connection with the opinion. So reading the Virginia and West Virginia cases, it is ascertained that it has never been decided that purely expert testimony is entitled to great weight as matter of law." *Ward v. Brown*, 53 W. Va. 227, 44 S. E. 488.

"Evidence of physicians as to testamentary capacity is entitled to greater weight than that of nonprofessional persons, provided they have had personal observation and knowledge of the person whose mental capacity is in question. Otherwise it is not. Rule on this subject announced in *Jarrett v. Jarrett*, 11 W. Va. 584; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493;

and *Nicholas v. Kershner*, 20 W. Va. 255, examined and explained. In this case two of the physicians were with the testator at the time of his alleged unsoundness of mind and testified from personal knowledge of his condition, while the other three testified as experts and without any personal knowledge whatever of the matter in controversy. It is important to note here that in the cases in which this instruction has been heretofore approved, the physicians who testified all had some personal knowledge of the condition of the person whose sanity was in question. They were not only personally acquainted with him but had prescribed for him or talked with him with the view of ascertaining his mental condition. That this is an important distinction which the court should have noted in its instruction appears from the case of *Harrison v. Rowan*, 3 Wash. 580, where it held, that when several physicians, as experts, give their testimony on a question of mental capacity, the court may properly tell the jury that the opinion of the physician who attended the testator in his last illness is entitled to more regard than that of the others." *Ward v. Brown*, 53 W. Va. 227, 44 S. E. 488.

Rogers on Expert Testimony says, at § 204: "We have seen in the preceding section that courts have asserted that the opinions of physicians on questions of mental capacity are entitled to greater weight than those of ordinary witnesses. An examination of those cases, however, shows that the opinions of medical men are considered entitled to greater weight than the opinions of nonprofessional persons, provided the physicians have had personal observation and knowledge, of the person whose capacity is the matter in issue." A critical examination of the language used in *Jarrett v. Jarrett*, 11 W. Va. 584, shows that it is open to construction. It says "the evidence of physicians * * *

is entitled to great weight." They sometimes testify as experts and sometimes from personal knowledge. The language used does not say which kind of testimony from physicians is entitled to such weight. The latter is the only kind found in any of the cases. Does not that make it clear that no other kind is meant? Can it be said that the court decided a matter not submitted to it? *Ward v. Brown*, 53 W. Va. 227, 44 S. E. 488.

In accordance with this rule it was held to be error to instruct the jury, that the evidence of physicians testifying as experts only, on questions of mental capacity, is entitled to great weight. *Ward v. Brown*, 53 W. Va. 227, 44 S. E. 488.

The opinion of a witness, as to the sanity of a person, depends, for its weight, on the capacity of the witness to judge, and his opportunity. Physicians are considered as occupying a high grade on such questions, both because they are generally men of cultivated minds and observation, and because, from the course of their education and pursuits, they are supposed to have turned their attention more particularly to such subjects, and therefore, to be able to discriminate more accurately; especially a physician who has attended the patient through the disease, which is supposed to have disabled his mind. *Burton v. Scott*, 3 Rand. 399. Opinion of Carr, J.; *Cheatham v. Hatcher*, 30 Gratt. 56; *Montague v. Allan*, 78 Va. 592. Compare *Ward v. Brown*, 53 W. Va. 227, 44 S. E. 488.

4. Questions of Law and Fact.

See generally, the title EVIDENCE, ante, p. 295.

The weight of expert testimony is for the consideration of the jury. *Nuckolls v. Com.*, 32 Gratt. 884.

G. ORDER OF PROOF.

See generally, the title ORDER OF PROOF.

Expert testimony should not be allowed after the parties have announced

that they are through, or after the case has been submitted to the jury, except under very extraordinary circumstances, and for good cause. *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869.

II. Nonexpert Opinion.

A. DEFINITION OF NONEXPERT TESTIMONY.

Some difficulty arises in defining what is opinion evidence, in its practical application.

We have seen that what a witness describes as personally observed is, in philosophical truth, merely his inference from sensations felt, and that there is no evidence which is not to this extent presumptive. In other words, all testimony is to opinions. But the witness alone is competent to form an opinion as to the causes of his sensations of this class. So, when he speaks to his opinions on this class of facts, he and his hearers alike term his opinions facts. But an opinion which the jurors are in a situation to draw as well as he will be drawn by them; and, though he should also have formed his opinion, he will not be permitted to state what it is. *Taylor v. Baltimore, etc., R. Co.*, 33 W. Va. 39, 10 S. E. 29.

In *Whart. Crim. Ev.*, § 457, it is stated: "That a witness' opinion is admissible is a settled rule, though much difficulty exists as to the meaning of the term. What is opinion? 'Did A. shoot B.?' C., a bystander, answers: 'My opinion is that he did. I saw the pistol aimed. I heard the report. I saw the flash. I saw B. fall down, as I supposed, dead. From all this I infer that A. shot B.' This is all inference on the part of the witness, yet it is admissible." Quoted in *Taylor v. Baltimore, etc., R. Co.*, 33 W. Va. 39, 10 S. E. 29.

B. ADMISSIBILITY OF NONEXPERT TESTIMONY.

1. In General.

No principle of law is better set-

tled than that the opinions of witnesses are, in general, inadmissible, and that witnesses can testify to facts only, and not to opinions or conclusions based upon the facts, for to allow the witness to draw conclusions or inferences from testimony, would be to allow him to usurp the province of the jury which is so jealously guarded by all courts of this country. *Southern R. Co. v. Mauzy*, 98 Va. 692, 37 S. E. 285; *Hanriot v. Sherwood*, 82 Va. 1; *Taylor v. Baltimore, etc., R. Co.*, 33 W. Va. 39, 10 S. E. 29; *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813; *State v. Welch*, 36 W. Va. 690, 15 S. E. 419; *Sulphur Mines Co. v. Thompson*, 93 Va. 293, 25 S. E. 232; *House v. House*, 102 Va. 235, 46 S. E. 299; *Hall v. Lyons*, 29 W. Va. 410, 1 S. E. 582; *Randolph v. Adams*, 2 W. Va. 519.

The opinions of witnesses are never to be received if all the facts can be ascertained and made intelligible to the jury, or if it is such as men in general are capable of comprehending and understanding. *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813; *Tyler v. Sites*, 90 Va. 539, 19 S. E. 174; *Guarantee Co. v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909; *Douglass v. Ohio River R. Co.*, 51 W. Va. 523, 41 S. E. 911.

The opinion of a witness, who neither knows nor can know more about the subject matter than the jury, and who must draw his deductions from facts already in the possession of the jury, is not admissible. *Overby v. Chesapeake, etc., R. Co.*, 37 W. Va. 524, 16 S. E. 813.

But though opinion evidence as a general rule, is not admissible, still when the facts are such, that it is manifestly impossible to present them to the jury with the same force and clearness as they appeared to the observer, then opinion is admissible as to the conclusions and inferences to be drawn therefrom. *Tyler v. Sites*, 90 Va. 539, 19 S. E. 174; *Cropp v. Cropp*, 88 Va. 753, 14 S. E. 529; *State v. Welch*, 36

W. Va. 690, 15 S. E. 419; *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813.

Opinions on Imperfectly Explainable Facts.—"There are classes of facts which, while they may be observed with sufficient accuracy and fullness to constitute a just foundation for an opinion, can be only imperfectly narrated. In reason, the inference which a witness draws from a series of observed facts of this sort must be helpful to a jury required to embody in a verdict their opinion upon them. The adjudications on questions of this class are to a considerable extent conflicting; many of them are obscure, and various points are unsettled; but, on the whole, the doctrine of reason is that also of the books, the result being that in these cases the witness is to relate the facts as fully and exactly as he can, and add his conclusion from all he saw and heard, as the only practicable method of supplying the necessary imperfections of the narration." *Taylor v. Baltimore*, etc., R. Co., 33 W. Va. 39, 10 S. E. 29; *State v. Welch*, 36 W. Va. 690, 15 S. E. 419; *McCormick v. Hamilton*, 23 Gratt. 561; *Hanriot v. Sherwood*, 82 Va. 1.

Experts may give their opinions upon questions of identity, velocity, distances and the like, because such questions usually depend upon a variety of circumstances which are incapable of being presented with their proper force and significance to any but the observer. *Tyler v. Sites*, 90 Va. 539, 19 S. E. 174; *State v. Welch*, 36 W. Va. 690, 15 S. E. 419; *Norfolk*, etc., Ry. Co. v. *Tanner*, 100 Va. 379, 41 S. E. 721.

2. Age.

It is inadmissible to ask a witness his opinion as to the age of another from his appearance. *Valley Mutual Life Ass'n v. Teewalt*, 79 Va. 421.

3. Appearance, Conduct and Demeanor.

A witness can not give his opinion, in an action against a railroad for killing a person walking on its tracks, whether there was enough in the de-

ceased's appearance to indicate to the engine man that he was bereft of his faculties, for this is a question for the jury to determine for themselves upon the facts of the case, and not upon the opinions of witnesses. To allow a witness to give his opinion as to another's mental condition is a very different thing from allowing him to say what, in his opinion, some one else ought to have thought. *Tyler v. Sites*, 90 Va. 539, 19 S. E. 174.

Depression in Bed.—A witness may give his opinion that a depression in a bed was, from its shape and appearance, caused by the head of a person; he having seen and examined it. *State v. Welch*, 36 W. Va. 690, 15 S. E. 419.

4. Bloodstains.

See the title BLOODSTAINS, vol. 3, p. 503.

A witness may give his opinion that stains seen by him are bloodstains, and that a certain large stain seen by him upon bedclothing was the stain of a pool of blood. *State v. Welch*, 36 W. Va. 690, 15 S. E. 419. See also, *State v. Baker*, 33 W. Va. 319, 10 S. E. 639.

5. Boundaries.

The opinion of a surveyor as to the location of a certain tract of land, where he does not mention a single fact to enable the court to determine the location of the land in question, but merely says that he is satisfied as to its identity, is clearly insufficient to locate the land in question, because it amounts to nothing more than the opinion of a witness. Moreover, the purpose of evidence is to satisfy the court and not the witness. *Randolph v. Adams*, 2 W. Va. 519.

Where witnesses admit that they can not identify a tract of land from the entries or memoranda in the books of patents, deeds and other documentary evidence, they can not give it as their opinion that it is included in the boundaries of the land in dispute, for this is not knowledge, nor is it the statement of a fact, but merely an opinion, and

hence inadmissible. *Holleran v. Meisel*, 91 Va. 143, 21 S. E. 658.

6. Damages.

In Eminent Domain Proceedings.—

See ante, "Value," I, C, 13.

"There is no objection to taking the opinion of witnesses as to either the amount of damages or as to the amount of the benefit. It is the usual practice in this state and Virginia, and though not approved in some states, it is approved in many states. See *Vandine v. Burpee*, 13 Metc. 288; *Brainard v. Boston*, etc., R. Co., 12 Gray 407; *Swann v. Middlesex*, 101 Mass. 173; *Jacksonville*, etc., R. Co. v. *Caldwell*, 21 Ill. 75; *Cairo*, etc., R. Co. v. *Woolsey*, 85 Ill. 370; *Snyder v. Western Union R. Co.*, 25 Wis. 60; *Deedrick v. Northwestern Union R. Co.*, 47 Wis. 662; *Snow v. Boston & M. R.*, 65 Me. 230. We deem it unobjectionable." *Railroad Co. v. Foreman*, 24 W. Va. 662.

In the trial of a case where a railroad is seeking to condemn lands for its track, it is not an error, for which the appellate court would reverse, that the circuit court permitted a witness to answer the following question against the protest of the railroad company: "State what in your opinion would be a fair compensation for the damages to the residue of the tract beyond the peculiar benefits, which will be derived in respect to residue from the work to be constructed." *Railroad Co. v. Foreman*, 24 W. Va. 662.

Diversion of Watercourses.—In an action for damages for diverting water, a witness may state from facts within his knowledge, what, in his opinion, was the amount of damages suffered by the plaintiff because of such diversion of the water; and to authorize the giving of such opinion it is not necessary that the party be an expert. *Hargreaves v. Kimberly*, 26 W. Va. 787.

In an action by a riparian owner to recover damages for the overflowing of the plaintiff's land, alleged to have

been caused by an insufficient waterway under the defendant's bridge, the opinion of the plaintiff, as to whether any damage would have been done, if certain alterations had not been made in the bridge, is incompetent. *Taylor v. Baltimore*, etc., R. Co., 33 W. Va. 39, 10 S. E. 29.

Future Damages.—A witness in an action for damages for diverting water, can not state, from facts within his knowledge, what in his opinion will be the future damages to the plaintiff from the act of the defendant. *Hargreaves v. Kimberly*, 26 W. Va. 787; *Rogers v. Coal River Boom & Driving Co.*, 39 W. Va. 272, 19 S. E. 401.

Personal Injuries.—See ante, "Expert Evidence," I.

In *Watson on Personal Injuries*, § 604, p. 720, it is said: "An exception to the rule excluding opinion evidence exists where it is desired to show by properly qualified experts the nature or extent of the plaintiff's injuries, and their probable permanency or the reverse. 'There is,' indeed, it has been said, 'no evidence other than that of experts by which courts and juries can determine whether a disease or an injury has or can be permanently cured, or what its effect will be upon the health and capability of the injured person in the future.' It is competent, therefore, for the physician who attended the plaintiff during the period of treatment for the injuries received, to give his opinion as to the effect of the injuries received by the plaintiff upon his future condition, or to state from his experience and medical knowledge the probability of the recurrence of inflammation in an injured muscle. And a physician may also testify, in a general way, that there is a probability that certain conditions, caused by the injuries and shown to exist at the time of the trial, will produce more serious results in the future, or may be requested to express his opinion as to the probable effect of

the injuries on the plaintiff's general health, or may be asked whether, in his opinion on the facts shown, if certain conditions exist two years after the accident, they will probably be permanent." Quoted in *Norfolk R., etc., Co. v. Spratley*, 103 Va. 379, 46 S. E. 502.

It was held, in *Lawson v. Conaway*, 37 W. Va. 159, 16 S. E. 564, in an action against a physician for malpractice, that the testimony of a witness that he was "well acquainted with the physical ability of the plaintiff to perform manual labor, both before and since the breaking of his arm, that he was an able-bodied man before the injury, and that since the injury he could perform no more than one-half a man's work, and that the witness and plaintiff were both farmers, and lived near together," is competent, and ought not to have been excluded.

7. Divorce.

In a suit by a husband against his wife for divorce a mensa et thoro upon the ground that she had attempted to take his life and he had reasonable ground to fear serious bodily hurt, the opinion of witnesses, that from their knowledge of the character or reputation of the parties, they did not believe that the husband could with safety cohabit with his wife, is inadmissible. *House v. House*, 102 Va. 235, 46 S. E. 299.

8. Fences and Cattle Guards.

See the title RAILROADS.

Opinion is not competent upon the question whether a railroad should be fenced at a certain place. *Douglass v. Ohio River R. Co.*, 51 W. Va. 523, 41 S. E. 911.

"Evidence of mere opinions of witnesses was given to show that such cattle guards was necessary. I do not think this was admissible. 'If the facts can be placed before a jury, and they are of such nature that jurors generally are just as competent to form opinions in reference to them and draw infer-

ences from them as witnesses, then the opinion of experts can not be received in evidence as to such facts. The opinion of a witness, who neither knows nor can know more about the subject than the jury, and who must draw his deduction from facts already in possession of the jury, is not admissible.'

It can not be claimed that the evidence of *Vosburg* was admissible under the law above stated, found in *Overby v. Chesapeake, etc., R. Co.*, 37 W. Va. 524, 16 S. E. 813. *Vosburg's* evidence was not admissible as an expert. Opinions of other witnesses as to necessity of cattle guards was not admissible." *Douglass v. Ohio River R. Co.*, 51 W. Va. 523, 41 S. E. 911.

9. Fires.

See the title FIRES.

A witness who has testified touching a fire near the right of way of a railroad company, can not be asked "whether he saw anything from which the fire could have started except the railroad," as the question is not only leading and suggestive, but calls for a mere opinion of the witness. *Norfolk, etc., R. Co. v. Briggs*, 103 Va. 105, 48 S. E. 521.

10. Identity.

See the title IDENTITY.

In General.—A nonexpert may give his opinion upon questions of identity, because such questions usually depend upon a variety of circumstances which are incapable of being presented with their proper force and significance to any but the observer. *Tyler v. Sites*, 90 Va. 539, 19 S. E. 174.

"It is sufficient to say that upon questions of identity it is competent to the witness to give his opinion; the grounds upon which it rests being always open to the investigation of the adverse party. When the witness states that the prisoner at the bar is the same person seen on a particular occasion, he is giving his opinion; and when he undertakes to describe the dress and appearance of the prisoner,

it is still an opinion. The weight to which it is entitled depends upon his integrity, his intelligence, his accuracy and means of observation." *Jordan v. Com.*, 25 Gratt. 943.

A witness who testifies that he knows the person in question may be asked his belief as to the identity of such person. It is not a case of "expert testimony," but depends upon the observation and knowledge of the particular witness in the given case, to go to the jury for what it is worth, no matter what his science, skill, or experience may be in the matter of identifying persons. *State v. Harr*, 38 W. Va. 58, 17 S. E. 794, citing *Hopper v. Com.*, 6 Gratt. 684.

On the trial of an indictment for robbery, where a witness gives a description of the robbers received from the wife of the prosecutor a few minutes after the occurrence, and he states that he pursued the parties and found the prisoner and another, at a place he describes, the commonwealth's attorney may ask him whether the prisoner and the other person corresponded on that night, in dress and appearance, with two of the men described by the wife of the prosecutor, under the rule that it is competent for a witness to give his opinion as to identity. *Jordan v. Com.*, 25 Gratt. 943.

11. Insanity.

See ante, "Expert Evidence," I.

In General.—On questions of insanity, a witness, who is not an expert, is allowed to express his opinion where he has personal knowledge of the facts on which his opinion is based. *State v. Maier*, 36 W. Va. 757, 15 S. E. 991.

Appearance as Indicating Insanity.—Where witnesses are examined by the state in rebuttal on the question of insanity, who have had transactions with the prisoner, and have known him well for months and years, immediately preceding the killing, the prosecution may ask such witnesses whether or not they had ever observed any-

thing about the prisoner, or what he said or did, that indicated insanity. *State v. Maier*, 36 W. Va. 757, 15 S. E. 991.

Weight of Evidence.—See post, "Weight of Nonexpert Testimony," II, C.

12. Malpractice.

See the title **PHYSICIANS AND SURGEONS**.

In an action against a physician for malpractice, a witness testified that he was "well acquainted with the physical ability of the plaintiff to perform manual labor, both before and since the breaking of his arm; that the said plaintiff, before the injury, was a strong, able-bodied man; that since he has been hurt the plaintiff has been able to perform no more than one-half a man's work; that witness had worked with plaintiff both before the arm was broken and since; that witness and plaintiff were both farmers, and lived near together." This testimony was competent, and ought not to have been excluded. "It is the expression of neither an opinion nor a conclusion, but a fact going to show the inability to work on the part of the plaintiff, as compared with his former condition, and was relevant and proper. In the form given, it was certainly not very valuable testimony, but that was for the jury. Its relevancy and competency were unquestionable. 1 Greenl. Ev., § 440." *Lawson v. Conaway*, 37 W. Va. 159, 16 S. E. 564, 18 L. R. A. 627, 38 Am. St. Rep. 17.

13. Personal Injuries.

See ante, "Expert Evidence," I.

Fact of Negligence.—In an action for personal injuries, witnesses can not be allowed to express their opinions as to whether the locality at which the injury was inflicted was dangerous or not. *Childress v. Chesapeake*, etc., R. Co., 94 Va. 186, 26 S. E. 424; *Whitelaws v. Sims*, 90 Va. 588, 19 S. E. 113; *Young v. Barner*, 27 Gratt. 96.

A nonexpert witness can not express

an opinion as to the probability of an accident under a different and hypothetical state of facts. *Norfolk, etc., R. Co. v. Suffolk Lumber Co.*, 92 Va. 413, 23 S. E. 737.

In an action to recover damages for personal injuries alleged to have been sustained by reason of the incompetency of a mine boss, it is error to admit the opinions of witnesses as to such incompetency. *Purkey v. Southern Coal, etc., Co. (W. Va.)*, 50 S. E. 755.

A question "If there had been any signal post, with signals and a watchman, as the contract requires, and as is now there, could there have been any accident on that occasion?" is inadmissible, on the ground that it calls for an expression of a mere opinion upon the part of a witness as to a conclusion upon an hypothetical state of facts. *Norfolk, etc., R. Co. v. Suffolk Lumber Co.*, 92 Va. 413, 23 S. E. 737.

Damages.—See ante, "Damages," II, B, 6.

14. Speed, Duration and Distance.

See ante, "Expert Evidence," I.

A nonexpert may express an opinion as to speed, duration and distance, because such questions usually depend upon a variety of circumstances which are incapable of being presented with their proper force and significance to any but the observer. *McKelvey v. Chesapeake, etc., R. Co.*, 35 W. Va. 500, 14 S. E. 261; *Tyler v. Sites*, 90 Va. 539, 19 S. E. 174.

The speed of a passing train is not a question of science, but of observation, and anyone possessing knowledge of time and distance is competent to testify in relation thereto. *McVey v. Chesapeake, etc., R. Co.*, 46 W. Va. 111, 32 S. E. 1012.

15. Tendency of Evidence.

The opinion of a witness as to the tendency of evidence before a coroner, is inadmissible. *Whitehurst v. Com.*, 79 Va. 556.

16. Value.

See ante, "Expert Evidence," I. See the title EVIDENCE, ante, p. 295.

A nonexpert may express an opinion as to value. *McKelvey v. Chesapeake, etc., R. Co.*, 35 W. Va. 500, 14 S. E. 261, citing *Hargreaves v. Kimberly*, 26 W. Va. 787.

In Criminal Cases.—"When it became essential, in the progress of the trial, to fix the value of certain securities, witnesses should have been brought forward to testify as to facts within their own knowledge, and to permit a witness to give his opinion upon the question at issue upon information derived from his correspondence with others, was violative of the most fundamental principle of evidence. Even in a civil case it would have been inadmissible." *Wadley v. Com.*, 98 Va. 803, 35 S. E. 452.

In Eminent Domain Proceedings.—The opinions of persons residing near the property, and who have known it for a considerable period of time, though not dealers in real estate, nor specially informed as to prices, are admissible evidence on the question of its value. *Guyandotte Valley R. Co. v. Buskirk (W. Va.)*, 50 S. E. 521.

Opinions of witnesses as to the value of property before and after an injury, are admissible as evidence in a proceeding to ascertain the compensation to be paid the landowner. *Kay v. Glade Creek, etc., R. Co.*, 47 W. Va. 467, 35 S. E. 973; *Blair v. Charleston*, 43 W. Va. 62, 26 S. E. 341, 35 L. R. A. 852; *Railroad Co. v. Foreman*, 24 W. Va. 662; *Hargreaves v. Kimberly*, 26 W. Va. 787; *Ellis v. Harris*, 32 Gratt. 684.

Opinions of witnesses as to the value of property before and after a change in a street's grade, are admissible as evidence in actions against municipal corporations for damages flowing from such change. *Blair v. Charleston*, 43 W. Va. 62, 26 S. E. 341, 35 L. R. A. 852, 64 Am. St. Rep. 837.

Value of Goods.—In an action to re-

cover the value of a stock of goods destroyed by fire, it is not error to allow the owner, in the absence of better evidence of value, to give to the jury an estimate of the total amount of his purchases since he occupied the location at which he was at the time of the fire, and his annual sales from the same date; nor to allow a witness to give his valuation of the stock destroyed, based upon a cursory view the day before the fire, not made with any purpose of valuation, nor any expectation of being thereafter called on to estimate their worth; nor is it error to allow a witness to state his estimate of the value of the stock seen at the store two days before the fire. While such evidence is of little value, still it is admissible. The owner is often unable to produce direct evidence of value, and he can only be required to prove value by the best evidence attainable. *Norfolk, etc., R. Co. v. Briggs*, 103 Va. 105, 48 S. E. 521.

Market Value.—It was held, in *James v. Adams*, 16 W. Va. 245, that the opinions of dry goods merchants are admissible to prove the market value of a remnant of dry goods, at the time the party agreed to accept it, although they are not acquainted with the particular stock of goods, but who testify to the per cent. they have depreciated, on the ground that they consist of the less saleable portion of the goods, and because they are injured by being kept a considerable time in a store.

17. Watercourses.

See ante, "Expert Evidence," I.

In an action of trespass on the case against a railroad company to recover damages caused by the overflow of the plaintiff's premises during a freshet, which overflow was caused by a bridge over a river on the defendant's right of way, it was held, that an answer to the following question was opinion evidence and inadmissible under the general rule: "State, as to your opin-

ion, observation, or otherwise, if those piers had been in the condition they were before the addition was made to them, and before the loose rock was tumbled in around the bottoms of the abutments, would the freshet that occurred at that time have overflowed your land to have done the damage that it did, or to have done any damage?" *Taylor v. Baltimore, etc., R. Co.*, 33 W. Va. 39, 10 S. E. 29.

And this because, "Wharton says that, as to matters concerning which the jury can themselves form opinions, witnesses can not state opinions which do not themselves involve the facts from which they are drawn. The question propounded to Taylor called for his opinion or conclusion, based on facts or circumstances to him known, about a material matter in issue, viz., whether the additions to the abutments did him damage; and upon the matter the jury could draw on opinion just as well as Taylor, as it was not of such nature that they could not form an opinion on it. It may be said he had peculiar knowledge of the bridge and the stream at the bridge and on his premises as before and as after those additions, and should therefore give his opinion; but the fact remains that he is asked for what is and can be only his opinion, and that drawn from facts capable in their nature of being presented to the jury, and on which they could readily pass."

C. WEIGHT OF NONEXPERT TESTIMONY.

1. In General.

The opinion of a witness, although he be a surveyor, unsupported by other evidence, as to the identity of a tract of land, unless he also states some fact or facts to enable the court to determine the location of the tract, is clearly insufficient to enable the court to locate the land. "The purpose of evidence is to satisfy the court and not the witness. It seems to me that this evidence was clearly insufficient to lo-

cate the land in question, as it amounted to nothing more than the opinion of the witness. *Thornton v. Thompson*, 5 Gratt. 121." *Randolph v. Adams*, 2 W. Va. 519.

2. As to Insanity.

In General.—The mere opinions of witnesses, not experts, as to sanity and competency to do a given act, are of little weight, unless based on facts which give good reason for such opinions; and, if the facts are frivolous or unimportant, the opinions of such witnesses, based upon them, are of little weight. *Farnsworth v. Noffsinger*, 46 W. Va. 410, 33 S. E. 246; *Jarrett v. Jarrett*, 11 W. Va. 584; *Dower v. Church*, 21 W. Va. 64; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493.

The opinions of witnesses, who have long been acquainted with a testator and have had peculiar advantages of knowing as to his capacity, are admissible in a suit to set aside a will; but except in the case of experts, their testimony is entitled to little weight unless founded on facts, because such evidence is a mere matter of opinion, and is generally conflicting. *Whitelaws v. Sims*, 90 Va. 588, 19 S. E. 113; *Young v. Barner*, 27 Gratt. 96.

The evidence of his neighbors of sound judgment and fair powers of

observation, who have known him long and well, and who have had occasion to observe or test the vigor of his mental faculties, and who can give the facts upon which their impressions and opinions are based, is ordinarily the reliable evidence in such cases. *Hiatt v. Shull*, 36 W. Va. 563, 15 S. E. 146.

The evidence of nonprofessional witnesses, as to the sanity of a party, whom they have approached on business, is clearly admissible, and entitled to great weight, where they give the grounds upon which they base their opinions. *Fishburne v. Ferguson*, 94 Va. 87, 4 S. E. 575, cited in *Cropp v. Cropp*, 88 Va. 753, 14 S. E. 529.

Means of Knowledge.—Where non-professional witnesses are conversant with the life of the person whose sanity is drawn in question, his disposition and habits, and have long been on terms of familiar intercourse with him, their testimony is regarded as being entitled to greater weight than that of scientific witnesses who have not had such opportunities of forming an opinion; nor does its value depend upon the number of the witnesses, but upon their intelligence, means of knowledge, and the reasons they give for their testimony. *Cropp v. Cropp*, 88 Va. 753, 14 S. E. 529.

Expiration of Charter.

See the title CORPORATIONS, vol. 3, p. 594.

EXPLOSIONS AND EXPLOSIVES.

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CROSS REFERENCES.

See the titles APPEAL AND ERROR, vol. 1, p. 418; DAMAGES, vol. 4, p. 162; EMINENT DOMAIN, ante, p. 106; FIRE INSURANCE; GAS; INDEPENDENT CONTRACTORS; INSTRUCTIONS; JURY; MASTER AND SERVANT; MUNICIPAL CORPORATIONS; NEGLIGENCE; NUISANCE; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; RAILROADS; STEAM; TRESPASS; WATERS AND WATERCOURSES; WITNESSES.

As to injury caused by firearms, see the title WEAPONS.

I. Scope of Title.

This title is restricted to the consideration of the municipal regulation of the keeping of explosives, and liability of city for discharge of fireworks on the street; and to private liability for injury to person and damage to property, resulting from explosives in cases indicated in the analysis.

For matters involving explosives or a discharge of explosive things outside of this, reference may be had to the list of titles under cross reference above.

II. Municipal Power to Regulate and Control.

See the title MUNICIPAL CORPORATIONS.

Storage of gunpowder in a city being dangerous, its regulation is a matter within the power of the corporate authorities. *Davenport v. Richmond*, 81 Va. 636.

And a municipal corporation may annul right to erect a powder magazine and store gunpowder, and removal of same. *Davenport v. Richmond*, 81 Va. 636.

And their judgment as expressed in

an ordinance requiring the removal of powder magazines, is conclusive upon the courts. *Davenport v. Richmond*, 81 Va. 636.

No Impairment of Contract.—An ordinance requiring the removal of powder magazines in a city, the sites whereof were sold by the city council to vendees for the purpose of erecting thereon such magazines, does not impair the obligation of a previous valid contract with that council, and does not take private property without compensation; but is constitutional. *Davenport v. Richmond*, 81 Va. 636.

Police Power.—Such ordinance is a valid exercise of the police power. *Davenport v. Richmond*, 81 Va. 636.

Valid Ordinance.—An ordinance passed August 17, 1882, by the city of Richmond declaring certain powder magazines dangerous to life and property, and directing them "to be removed at the expense of the owners, to some remote locality," is valid. *Davenport v. Richmond*, 81 Va. 636.

III. Liability for Damages by Explosives.

See the title NEGLIGENCE.

A. LIABILITY OF MUNICIPALITY FOR DISPLAY OF FIREWORKS ON ITS STREETS.

See the title MUNICIPAL CORPORATIONS.

An incorporated town is not liable for personal injuries occasioned by the firing of squibs, rockets, fireworks, and firearms on the streets by a crowd of citizens, although such acts be done with the knowledge and consent of the mayor, council, police, and other officers of such corporation. *Bartlett v. Clarksburg*, 45 W. Va. 393, 31 S. E. 918.

In *Bartlett v. Clarksburg*, 45 W. Va. 393, 31 S. E. 918, the nonliability of an incorporated town for personal injuries occasioned by the firing of fireworks, firearms, etc., on the streets, seemingly turned on the point that no written permission for such display was granted by the mayor acting by virtue or under the authority of an ordinance of the town.

B. BLASTING AND ACCIDENTAL EXPLOSION OF BLASTING MATERIALS.

1. Blasting on Contiguous Lot.

See the title TRESPASS.

When Negligence Not an Element of Liability.—In *Simmons v. McConnell*, 86 Va. 494, 10 S. E. 838, it was said that: "Blasting on a lot contiguous to another is an unreasonable, unusual, and unnatural use of property, which no care or diligence can excuse from actual damages; and that the defendant was mistaken in supposing that, if he used care and skill, he had a right to do an act which was intrinsically dangerous, and would, necessarily, probably, or naturally, result in damages."

No Accident No Proof of Care.—The fact that defendants had carried on the work of blasting in the manner usual with them, and that no accident had hitherto happened, is not proof of absence of negligence. *Simmons v. McConnell*, 86 Va. 494, 10 S. E. 838.

And so where the killing of the wife of plaintiff was caused by a stone thrown by a blast fired in defendant's quarry, between 500 and 600 feet off, refusal to instruct that the defendants were entitled to continue to conduct their business in their usual manner if no accident had been previously caused thereby; held, no error. *Simmons v. McConnell*, 86 Va. 494, 10 S. E. 838.

2. As to Master and Servant.

See the titles MASTER AND SERVANT; NEGLIGENCE.

Care in Use of Dynamite.—The measure of care imposed upon the master for the safety of his servant in the use of dynamite, is that ordinary care which reasonable and prudent men would and do exercise under like circumstances. *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869.

Servant Assumes Ordinary Risk Only.—In *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285, the court, while commenting on a case involving the use of a newly invented blasting powder, said that the plaintiff under his contract assumed the risk of personal injury in blasting with the ordinary appliances and for that purpose, but not those risks attendant upon the use of an unusual, untested and exceedingly dangerous article, which could not be tamped without inevitable explosion, which dangerous quality was unknown to him.

And that it was gross negligence in the company to furnish such an article for the laborer's use without giving him information in that particular; whether the company was aware of its dangerous quality, or furnished it for use without having taken any steps to obtain such knowledge. *Berns v. Gaston Coal Co.*, 27 W. Va. 285.

Proximate Cause.—Where dynamite placed on the tender of a locomotive engine exploded, it was held, that the proximate cause of the injury in this case was not the placing the explosives, packed in sawdust,

in a box together, but it was the placing of such box, uncovered, on the tender of the engine where it was exposed to heat and sparks, and liable to explode to the injury of the employees of the defendant transported on such engine to their place of work. *Schwartz v. Shull*, 45 W. Va. 405, 31 S. E. 914. See post, "Question of Law and Fact," IV, D.

Act of Fellow Servant.—Where defendant placed dynamite and explosive caps together with sawdust in an open box, the question whether a fellow servant of plaintiff was or was not acting under the direction of defendant in placing said box on the tender of a locomotive engine, whereby an explosion occurred, injuring the plaintiff, was held, the very gist of the case. *Schwartz v. Shull*, 45 W. Va. 405, 31 S. E. 914.

As to act of fellow servant, generally, affecting the question of master's negligence, see the title MASTER AND SERVANT. See post, "Review," IV, E.

Contributory Negligence.—A number of holes had been drilled and loaded and exploded, and the blasters had returned from cover. The boss said one hole had blown out without effect and was filled with dirt, and directed the men to drill it out again. Plaintiff expressed some fear, but went to work, and, whilst holding the drill, he was injured by an explosion. Whether the hole had blown out might easily have been ascertained by either boss or plaintiff. Held, plaintiff's negligence, notwithstanding that of boss, such as to prevent recovery. *Sexton v. Turner*, 89 Va. 341, 15 S. E. 862.

It is not unreasonable for a servant, in cold weather, to go to a fire, where dynamite is being thawed, to warm his hands; and if he and other hands resort to the fire for that purpose with the knowledge of and without objection from the master, and injury results therefrom, this is not such contribu-

tory negligence on the part of the servant as will preclude his recovery. *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869. See post, "Review," IV, E.

Where servant of defendant is injured by the explosion of an open box containing dynamite and explosive caps while bravely throwing such box off the train after it had caught fire, such endeavor to save defendant's property and the lives of himself and others from destruction is not an act of contributory negligence. *Schwartz v. Shull*, 45 W. Va. 405, 31 S. E. 914.

Placing on Tender Is Placing on Engine.—Where one is directed to place an open box containing dynamite and explosive caps on an engine, and he places it on the tender, and afterwards an explosion ensues, an instruction relative thereto which tries to make a distinction between "tender" and "engine" should be refused; for the tender is a necessary part of the engine, and is that part on which it was shown the employees were in the habit of carrying articles for the company's use. Such a distinction is a mere quibble. *Schwartz v. Shull*, 45 W. Va. 405, 31 S. E. 914.

3. Blasting in Railroad Construction.

See the titles DAMAGES, vol. 4, p. 162; EMINENT DOMAIN, vol. 4, p. 66; RAILROADS; WATERS AND WATERCOURSES.

No Liability without Negligence.—"An authority to construct any public work carries with it authority to use the appropriate means. Authority to make a railway is an authority to reduce the line of the road to a level, and for that purpose to make cuts, as well through ledges of rock as through banks of earth. In a remote and detached place, where due precaution can be taken to prevent danger to persons, blasting by gunpowder is a reasonable and appropriate mode of executing such a work, and, if due precautions are taken to prevent unnecessary dam-

ages, is a justifiable mode." *Watts v. Norfolk, etc., R. Co.*, 39 W. Va. 196, 19 S. E. 521.

And so injury to a dwelling house, in case of such grant, upon such residue, from the careful blasting of rock in construction, is not the subject of an action. *Watts v. Norfolk, etc., R. Co.*, 39 W. Va. 196, 19 S. E. 521.

C. EXPLOSION IN POWDER MILL.

See the titles NUISANCES; TRESPASS.

When Negligence Not an Element of Liability.—In *Wilson v. Phoenix Powder Co.*, 40 W. Va. 413, 21 S. E. 1035, it is said where keeping powder, nitroglycerine, or other explosive substances, in large quantities, in the vicinity of a dwelling house or place of business, is a nuisance per se, if actual injury results, the person keeping them is liable therefor, even though the act occasioning the explosion is due to other persons, and is not chargeable to his personal negligence. See post, "Form of Action," IV, A.

D. EXPLOSION OF NAPHTHA.

Judicial Notice.—It is a matter of common knowledge that naphtha is a dangerous substance (and it is generally so treated by the courts), and the gas which it gives off when exposed to the atmosphere is liable to explosion by contact with fire, and when it does it is impossible to guard against its consequences, since it is instantaneous and extends to persons and property within its reach. *Standard Oil Co. v. Wakefield*, 102 Va. 824, 47 S. E. 830.

Duty to Third Persons.—Is the duty of one shipping gas naphtha, or other article, either essentially dangerous or liable to become so, to so equip the cars upon which such article is loaded that it can be safely discharged in the ordinary way by the exercise of ordinary care. *Standard Oil Co. v. Wakefield*, 102 Va. 824, 47 S. E. 830.

And this duty is owing to the servants of its consignee, whose duty it is

to unload the articles, although no privity of contract exists between the shipper and such servants. *Standard Oil Co. v. Wakefield*, 102 Va. 824, 47 S. E. 830.

So in an action against oil company where consignee's employee was killed by an explosion of naphtha, it was held, that such oil company was liable for not exercising ordinary care to see that a valve regulating the flow of naphtha from a tank car was in a reasonably safe and proper condition. *Standard Oil Co. v. Wakefield*, 102 Va. 824, 47 S. E. 830. See the title NEGLIGENCE.

Proximate Cause.—Neglect of such company to see that such valve was in a reasonably safe and proper condition was held that proximate cause of death of its consignee's employee from an explosion with unloading such tank car. *Standard Oil Co. v. Wakefield*, 102 Va. 824, 47 S. E. 830. See the title NEGLIGENCE.

No Contributory Negligence in Unloading.—Persons proceeding to unload such a tank car in the usual way are not guilty of negligence contributing to an explosion where the primary condition of negligence was a defective adjustment of such valve. *Standard Oil Co. v. Wakefield*, 102 Va. 824, 47 S. E. 830. See the title NEGLIGENCE.

Knowledge of Defect by Agent of Corporation.—A foreman of an oil company supervises the filling of naphtha tank cars for delivery to purchasers. More than once he has attended on the premises (gas works) of one purchaser to help unload when there was difficulty. A car reached the gas works with the appliance for regulating the flow of naphtha improperly adjusted; and not knowing this, the employees at the gas works proceeded to unload in the usual way. The court said: "He (the foreman) knew, or had the opportunity of knowing, the conditions under which the cars were unloaded at

the gas works. The general rule is that knowledge acquired by the agents of corporations when acting within the scope of their agency becomes notice to or knowledge of the corporation for all judicial purposes. *Standard Oil Co. v. Wakefield*, 102 Va. 824, 47 S. E. 830. See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

E. EXPLOSION OF BOILER.

See the title STEAM.

Where one places a steam boiler upon his premises and operates the same in lawful business with care and skill, so that it is no nuisance, in the absence of proof of fault or negligence in him, he is not liable for damages to his neighbor occasioned by the explosion of the boiler. *Veith v. Salt Co.*, 51 W. Va. 96, 41 S. E. 187.

And a presumption of negligence does not arise from the mere fact of the explosion of a steam boiler used by one engaged in lawful business. Negligence on his part must be shown. *Veith v. Salt Co.*, 51 W. Va. 96, 41 S. E. 187.

In an action for damages resulting from a boiler explosion, the evidence of one having a long experience with boilers is not incompetent. *Veith v. Salt Co.*, 51 W. Va. 96, 41 S. E. 187.

IV. Actions

See the title ACTIONS, vol. 1, p. 122.

A. FORM OF ACTION.

Having regard to W. Va. Code, ch. 103, § 8, trespass on the case is a proper form of action under which to recover for damages to property resulting from explosion in a powder mill. *Wilson v. Phoenix Powder Co.*, 40 W. Va. 413, 21 S. E. 1035. See the title TRESPASS.

B. PARTIES.

Where a dwelling house was damaged by explosion in a powder mill, it was held, that either actual or constructive possession will maintain tres-

pass for damage to realty. *Wilson v. Phoenix Powder Co.*, 40 W. Va. 413, 21 S. E. 1035. See the title TRESPASS.

C. DECLARATION.

Where a mill manufacturing and storing explosives is so situated as to be a nuisance, negligence is not a necessary element as to liability for damages from an explosion. And if negligence be alleged in the declaration, it may be rejected as surplusage and need not be proved. *Wilson v. Phoenix Powder Co.*, 40 W. Va. 413, 21 S. E. 1035.

D. QUESTIONS OF LAW AND FACT.

Proximate Cause a Question for the Court.—Where defendant placed dynamite and explosive caps together in an open box, and gave it to plaintiff's fellow servant with certain directions, who afterwards placed it on the tender of a locomotive engine where it exploded, it was held, that the evidence not being contradictory, the question of determining whether the defendant's negligence in putting the caps and dynamite together, packed in sawdust, in an uncovered box, was the proximate cause of the plaintiff's injury, was for the court. *Schwartz v. Shull*, 45 W. Va. 405, 31 S. E. 917.

And so an instruction to the effect that if the jury believe that the defendant was negligent, and that such negligence was the proximate cause of the injury complained of, they must find for the plaintiff, although they believe another person's negligence intervened between the negligence of the defendant and the injury, is erroneous. *Schwartz v. Shull*, 45 W. Va. 405, 31 S. E. 914. See ante, "As to Master and Servant," III, B, 2. See the title INSTRUCTIONS.

Contributory Negligence Is for the Jury.—Where defendant is negligent in not having properly adjusted an appliance for regulating the flow of naphtha from a tank car, the question whether an intervening act on the part

of one injured thereby amounts to contributory negligence, is for the jury. *Standard Oil Co. v. Wakefield*, 102 Va. 824, 47 S. E. 830. See ante, "Explosion of Naptha," III, D.

E. REVIEW.

See the title **APPEAL AND ERROR**, vol. 1, p. 418.

Variance—Objection in Appellate Court.—A declaration avers that plaintiff's intestate was required by defendant to work nearby a fire where dynamite was being thawed, and which place of work was improper, etc., on account of its proximity to the dynamite; and the proof shows that the intestate was not at his place of work but had gone from it to a fire where dynamite was being thawed. Under Va. Code, § 3384, an objection as of variance should be made to the evidence when offered, or by motion to exclude after evidence had been received, and proper bill of exception taken to adverse ruling. Objection can not be made for the first time in appellate court. *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869. See ante, "As to Master and Servant," III, B, 2. See the title **APPEAL AND ERROR**, vol. 1, p. 563.

Objection to Jurors after Verdict.—Where the wife of one working in a large machine shop concern is killed by a stone thrown by a blast in a quarry, on trial of action for damages, where

party had opportunity to question jurors before sworn, and raised no objections to their competency, the verdict will not be set aside on the ground that one of them was employed in the same shop with plaintiff but in a different department and another's sons worked in the department—of which plaintiff was foreman unless it is apparent that the verdict was wrong in principle or the result of passion or prejudice. *Simmons v. McConnell*, 86 Va. 494, 10 S. E. 838. See ante, "Blasting on Contiguous Lot," III, B, 1. And see the titles **JURY**; **VERDICT**.

V. Instructions.

Where defendant placed dynamite and explosive caps together in an open box, which was afterwards placed on the tender of a locomotive engine and exploded, it was held, that a person may admit moral guilt of a wrong in cases where he is not legally liable; hence an instruction to the effect that, although the defendant admitted his negligence caused the injury, the plaintiff is not entitled to recover, unless the evidence including such admission shows that the defendant was negligent, and that such negligence was the proximate cause of the injury, is not improper, and, when asked, should be given. *Schwartz v. Shull*, 45 W. Va. 405, 31 S. E. 914.

Ex Post Facto Laws.

See the title **CONSTITUTIONAL LAW**, vol. 3, p. 172.

Exposure.

See the title **ACCIDENT INSURANCE**, vol. 1, p. 71.

Exposure of Person.

See the title **OBSCENITY**.

EXPRESS COMPANIES.

CROSS REFERENCES.

See the titles AGENCY, vol. 1, p. 240; CARRIERS, vol. 2, p. 671; CORPORATIONS, vol. 3, p. 510; TAXATION.

Express Companies as Common Carriers.—An express company is to be regarded as a common carrier, and its responsibility for the safe delivery of the property entrusted to it is the same as that of the carrier. *Southern Exp. Co. v. McVeigh*, 20 Gratt. 264. See the title CARRIERS, vol. 2, p. 671.

Where goods are delivered to parties to be forwarded and transported, and these parties are expressmen, and receive compensation for forwarding and transporting, the goods are in their custody as carriers. *Southern Exp. Co. v. McVeigh*, 20 Gratt. 264.

Necessity for Alleging That Express Company Is a Common Carrier.—An express company is *prima facie* a common carrier; hence, where a defendant is sued as an express company, it is sued as a common carrier, although its character as a common carrier is not set out in the declaration. *Southern Exp. Co. v. McVeigh*, 20 Gratt. 264.

In an action against an express company, the defendants were described as expressmen and forwarders engaged in receiving goods from those who might offer them, and transporting them for reward from Charlotte, North Carolina, to Richmond, Virginia, in the cars of railroads, the use of which was allowed to them by agreement between them and the railroad companies; the defendants receiving from the shippers entire costs and charges of such transportation; so that the shippers had nothing to pay to the railroad companies for transportation. It was held, that although in such declaration, the defendants were not expressly alleged to be common carriers, the facts set out constitute them to be such in law. *Southern Exp. Co. v. McVeigh*, 20 Gratt. 264.

C. O. D. Shipments.—Where goods

are sent by express C. O. D., the express company acts in a dual capacity, to wit, as the agent of the consignee in receiving and carrying the goods to their destination, and as the agent of the consignor in collecting the purchase money. *State v. Flanagan*, 38 W. Va. 53, 17 S. E. 792.

A sale of goods ordered to be shipped by express C. O. D. is complete, and the property passes to the purchaser, when the goods are delivered to the express agent for transportation, and not when they are received by the purchaser. *State v. Flanagan*, 38 W. Va. 53, 17 S. E. 792. See the titles INTOXICATING LIQUORS; SALES.

Taxation.—Section 93 of the act of February 15, 1866, imposing a tax of one per cent. on the gross earnings of "every express company," embraced express companies chartered by the state of Virginia. *Anderson v. Com.*, 18 Gratt. 295.

Liability of Stockholders for Taxes.—Though the charter of an express company did not make the stockholders personally liable for the debts of the company, but reserved to the general assembly the power to modify or repeal the charter, an assessment act passed subsequent to the charter, making the stockholders liable for taxes, so far modified the charter as to make the stockholders personally liable; and such an assessment act is not in violation of § 16, art. 4, of the constitution. *Anderson v. Com.*, 18 Gratt. 295. See the title CORPORATIONS, vol. 3, p. 510.

Under § 93 of the act of February 15th, 1866, imposing a tax of one per cent. on the gross earnings of "every express company," and making the

stockholders personally liable therefor, the present stockholders are personally liable for taxes due to the commonwealth from the company, incurred while they were stockholders. *Anderson v. Com.*, 18 Gratt. 295.

Stockholders Primarily Liable.—It seems that § 93 of the assessment act of February 15th, 1866, made the stockholders of an express company liable primarily, and not as guarantors, for taxes due from the company. *Anderson v. Com.*, 18 Gratt. 295.

Express Money Orders—Liability of Company Where Agent Exceeds Authority.—Where an agent of an express company entrusts to another in the office with him, but not in the employ of the express company, the transaction of its business, under his supervision and control, and without the knowledge of the company, and such employee of the agent goes out and solicits deposits of money with him in exchange for money orders of the company, and so receives money and issues such orders, without requiring payment of the usual fee or charge upon such orders, and absconds with the money, the person making such deposits does it knowing such issue of orders is beyond the power of the agent for whom such employee professes to act, and he can not recover from the company on such orders. *Rohrbough v. Express Co.*, 50 W. Va. 148, 40 S. E. 398. See the title AGENCY, vol. 1, p. 240.

Liability of Surety on Bond of Employee of Express Company.—E. was employed by the Southern Express Company as freight clerk at P. and while so employed executed a bond with sureties, by which, after reciting that whereas E. is to be hereafter employed by the Southern Express Company in its business of forwarding by different railroads, etc., packages of any and all kinds, and movable property, including money and securities for money, E., in consideration of such employment and the compensation he is to receive from the company for his services, covenants that he will well and truly perform all the duties required of him in his employment and truly account for all money, etc., which may come into his possession or control by reason of his employment. And E. and his sureties bound themselves for the faithful performance of the above covenants by E. in the penal sum of \$2,000. After the execution of the bond, E. was raised to the office of principal agent of the company at P., and while acting as principal agent, embezzled money which came into his hands. In an action by the express company on the bond, it was held, that the obligation, by its terms, extended to any employment of E. by the company, and that the sureties were liable for the money embezzled by E. while acting as principal agent of the company. *Collier v. Southern Express Co.*, 32 Gratt. 718.

Express Covenants.

See the title COVENANTS, vol. 3, p. 744.

Express Trusts.

See the title TRUSTS AND TRUSTEES.

Express Warranty.

See the title WARRANTY.

EXTEND.—In *Hunter v. Martin*, 4 Munf. 1, 36, it is said: "This judicial power is to 'extend to' all cases, etc. It is here proper to recollect, that the government of the confederation had, also, a court or courts; but they had only a very narrow or limited jurisdiction, and it was the object of the constitution to **extend** the jurisdiction of the federal courts, to be then established, beyond that of those which before existed. This word **extend**, is fully satisfied, by being confined to the courts of the United States, although the courts of other governments should also have a jurisdiction over the same subjects. The word, according to the best lexicographers, means to widen or enlarge. (See Johnson's Dictionary.) It has no sense, which goes to the exclusion of another jurisdiction."

Extension.

As to extension of corporate limits, see the title **MUNICIPAL CORPORATIONS**. As to extension of time as discharging persons secondarily liable, see the title **SURETYSHIP**. As to extension of time as affecting the consideration, see the title **CONTRACTS**, vol. 3, pp. 343, 358. As to extension of time for performing contracts, see the title **CONTRACTS**, vol. 3, p. 425.

EXTENSORS.—In *Ransom v. High*, 37 W. Va. 838, 17 S. E. 413, 414, it is said: "The proceeding to compel partition is described in Bract. Rem. Law (page 1263): 'When an inheritance descended to more than one heir, and they could not come to an agreement among themselves concerning the division of it, a proceeding might be instituted to compel partition. A writ was for this purpose directed to four or five persons who were appointed justices for the occasion, and were to extend and appreciate the lands by the oaths of good and lawful persons chosen by the parties, who were called **extensors**, and this extent was to be returned under their seals before the king or his justices.' See generally, the title **PARTITION**."

EXTENUATING CIRCUMSTANCES.—The trial court instructed as follows: "The court further instructs the jury that a man is presumed to intend what he does, or which is the immediate or necessary consequence of his act; and if the prisoner, with a deadly weapon in his possession, without any, or upon very slight, provocation, gives to another a mortal wound, the prisoner is *prima facie* guilty of willful, deliberate, and premeditated killing, and the necessity rests upon him of showing **extenuating circumstances**, and unless he proves such **extenuating circumstances**, or the circumstances appear from the case made by the state, he is guilty of murder in the first degree." The appellate court said: "This instruction places the burden where it belongs. Intoxication is included in the words **extenuating circumstances**." *State v. Davis*, 52 W. Va. 224, 43 S. E. 99.

External.

See the title **ACCIDENT INSURANCE**, vol. 1, p. 72.

EXTORTION.

CROSS REFERENCES.

See the titles EVIDENCE, ante, p. 299; INSTRUCTIONS; SENTENCE AND PUNISHMENT.

Interview between Witness and Accused.—On an indictment against M. for extorting money from R., an unmarried female, by threats to prosecute her for a criminal offense, on the issue of not guilty, R., as a witness on her examination in chief, spoke of what passed at two interviews between her and the accused; and on cross-examination she stated that there had been several interviews between the two she had spoken of, at which she ascertained that the accused was the person she had seen wandering about her home; the witness will not be required to state generally what passed at these interviews, but only so much, if anything, as bears upon the issue, and what was said in respect to identifying each other in connection with having seen him about the premises of her father. *Mitchell v. Com.*, 75 Va. 856.

Character of Prosecuting Witness Not in Issue.—The prisoner was indicted for extorting money by threats of injury, etc. He pleaded not guilty of such extortion by threats. The simple issue was, did he extort money from the witness by threats? It matters not how degraded or debased his victim was; she may have been the lewd and base woman which the questions indicated she was, still the law protects her, as it does the most virtuous and honorable, and because she may be lewd and base is no justification or excuse for the prisoner in extorting money from her by threats. The law will always hold the shield of its protection over the degraded and the criminal, the base and the lewd, as well as over the virtuous, the honest and the good. *Mitchell v. Com.*, 75 Va. 856.

On the trial a paper signed by the

witness R., in which she stated that she had in March, 1869, given birth to a child, which she had killed, and Dr. Bass had been sent for to deliver her of the afterbirth, was introduced in evidence; which paper the witness stated she had been compelled by the accused to copy and sign and give to him, though she told him at the time it was a lie. And then the counsel for the accused proposed to ask the witness: 1st. In 1869 were you in the family way? 2d. Were you delivered of a child on the 23d of March, 1869? 3d. Was Dr. David Bass sent for to attend you? 4th. Did he deliver you of the afterbirth on the following morning? But the court excluded all the questions. It was held, the questions were irrelevant to the issue, and properly excluded. Whether the female R. was virtuous or vicious, she was equally entitled to the protection of law. *Mitchell v. Com.*, 75 Va. 856.

Misstatement of Punishment by Clerk.—On an indictment against M. for extorting money from R., an unmarried female, by threats to prosecute her for a criminal offense, the clerk, in arraigning the prisoner, stated to the jury that the minimum of the punishment fixed by the law to the offense charged was confinement in the penitentiary for three years, and the maximum was five years. The verdict was guilty, and the term of confinement fixed at five years. Upon motion for a new trial, and in arrest of judgment on the ground that the law fixed the minimum punishment at one year; it was held, that the jury, having fixed the maximum period of confinement, it was obvious that they were not misled by the error of the clerk; and it was, therefore, not such an error as is sufficient to set aside or arrest the judg-

ment. If the charge to the jury by the clerk is to be treated as the instruction of the court, it was for the prisoner to except to it at the time. And no objection having been taken to the charge until after the verdict, the court will not set aside the verdict or arrest the judgment on this ground of error, if they are of opinion, from all the circumstances, the prisoner has not been prejudiced by the instruction. *Mitchell v. Com.*, 75 Va. 856, 857.

Extract of Judgment.

See the title JUDGMENTS AND DECREES.

Extrajudicial Confessions.

See the title CONFESSIONS, vol. 3, p. 81.

Extraordinary Care and Diligence.

See generally, the title NEGLIGENCE.

Extraordinary Remedies.

See the titles HABEAS CORPUS; INJUNCTIONS; MANDAMUS; NE EXEAT; PROHIBITION; QUO WARRANTO; SPECIFIC PERFORMANCE.

EXTRA TRAIN.—See *Ward v. Chesapeake, etc., R. Co.*, 39 W. Va. 46, 19 S. E. 389.

Extreme Cruelty.

See the title DIVORCE, vol. 4, p. 736.

Extrinsic Evidence.

See the titles PAROL EVIDENCE; WILLS.

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See the title EMINENT DOMAIN, ante, p. 84.

FACTORS AND COMMISSION MERCHANTS.

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I. Definitions, Distinctions, and General Principles.

A factor is an agent employed to sell goods consigned or delivered to him by or from his principal for a commission, usually called a factorage or commission. 3 Wait's Action on Defenses. *Davis v. Gordon*, 87 Va. 559, 13 S. E. 35; *Ruffner v. Hewitt*, 7 W. Va. 585.

Commission Merchant.—Webster defines "commission merchant" as follows: "A merchant who transacts business as the agent of another man in buying and selling, and receives a rate per cent. as his commission or reward." *Brown Mfg. Co. v. Deering*, 35 W. Va. 255, 13 S. E. 383.

A commission merchant is one who buys and sells on commission, and may sell any personal property which is left with or consigned to him for sale, except such as is expressly excepted by the act. *White v. Com.*, 78 Va. 484.

A commission merchant within the meaning of acts, 1881-82, pp. 511, 513, is one who buys and sells on commission, having possession of the goods. *White v. Com.*, 78 Va. 484, 487.

Distinction between Factor and Broker.—See the title BROKERS, vol. 2, p. 628.

A factor differs materially from a broker. Properly speaking, a broker is a mere negotiator and never sells goods in his own name but in the name of those who employ him. He is not intrusted with the custody or possession of the goods. He is strictly a

middle man, that is, a negotiator between the parties; whereas a factor may buy and sell in his own name as well as in the name of his principal. He is also intrusted with the possession, control and disposal of the goods to be bought or sold, and has a special property in them and a lien on them. *Story on Agency. Davis v. Gordon*, 87 Va. 559, 13 S. E. 35. See concerning commercial brokers, the title DRUMMERS, vol. 4, p. 831.

Home or Foreign Factor.—A factor is called a home factor when he resides in the same state or county with his principal; and he is called a foreign factor when he resides in a different state or county. *Story on Agency*, § 33, and cases there cited. *Ruffner v. Hewitt*, 7 W. Va. 585.

Purchaser and Factor Distinguished.—A person who agrees to pay a fixed price for goods at a fixed time, without regard to the price of terms at or upon which he may sell them to others, and irrespective of the fact whether he shall sell them to others or not, or shall collect the proceeds or not, and who guarantees the sale of each consignment of goods within a given period, is a purchaser of the goods and not a mere factor, though the contract contain other provisions consistent with the relation of principal and factor, and be designated by the parties as a "special selling factor appointment." *Arbuckle v. Gates*, 95 Va. 302, 30 S. E. 496. See the titles CONTRACTS, vol. 3, p. 307; INTERPRETATION AND CONSTRUCTION.

In order to amount to a factor, an agent must not be under special restriction to his principal as to the time for payment for the goods consigned, price thereof, etc. For example, in order to amount to a factor, an agent must not be required to advance to his principal the invoice price of goods consigned within thirty days, less the trade discount of one per cent. and an additional one per cent. for payment within seven days; and if the contract stipulates that this advance by the agent is to be without recourse to or reclamation on principal, and to be due in any event, and the agent is required to bear all expenses and to pay for the goods at all events whether sold or not, or the price be collected or not, and other like provisions, with no provision for the return of any part of the goods in any event, and the agent is required to sell in his own name, and is not required to render an account of his sales, the transaction amounts simply to a sale and not to an appointment of a factor. *Howell v. Boudar*, 95 Va. 815, 30 S. E. 1007.

Tobacco Auctioneer Acting as Commission Merchant.—H., a storager, and also a tobacco auctioneer, receives tobacco from the grower on consignment, sells it at auction, makes advances to the owner, charges him storage, and auction fee, and charges a commission on the amount of the sales independent of his charge as auctioneer, and accounts with him for the balance. He is transacting the business of a commission merchant, is therefore a commission merchant, and must pay the tax assessed thereon according to law. *Neal v. Com.*, 21 Gratt. 511. See also, the title LI-CENSES.

Agent for Sale of Agricultural Implements.—A party, who has no license as commission merchant but whose entire business consists of selling agricultural implements, wagons, etc., as agent for the manufacturer thereof, receiving commission for his services in dis-

posing of the same, can not be regarded either as trader or commission merchant. *Brown Mfg. Co. v. Deering*, 35 W. Va. 255, 13 S. E. 383. See the title AGENCY, vol. 1, p. 240.

Del Credere Commissions.—When for additional compensation, in case for sale, a factor undertakes to guarantee to his principal the payment of the debt due by the buyer, he is said to receive del credere commissions. *Ruffner v. Hewitt*, 7 W. Va. 585.

II. Appointment.

A factor may ordinarily be appointed by parol in the broad sense of that term as used at common law; that is, by verbal declaration, by writing not under seal, or by acts and implications. *Ruffner v. Hewitt*, 7 W. Va. 585. See the title AGENCY, vol. 1, p. 240.

III. Authority, Powers, Duties and Liabilities.

See generally, the title AGENCY, vol. 1, p. 240.

A. AUTHORITY AND POWERS.

General Authority to Sell.—Factors and commission merchants, known to be such, possess a general authority to sell; and have, in effect, all the ordinary general authority of a factor. *Davis v. Gordon*, 87 Va. 559, 13 S. E. 35. See the title AGENCY, vol. 1, p. 243.

May Sell Any Property Left for Sale.—A commission merchant may sell any personal property which is left with or consigned to him for sale, except such as is expressly excepted by the acts, 1881-82, pp. 511, 513. *White v. Com.*, 78 Va. 484, 487.

Presumption of Authority Notwithstanding Private Restrictions.—A presumption of authority to deal with the goods according to the factor's usual course of business will arise when a man expressly empowers another as his factor, although he privately restricts his powers. *Blair v. Sheridan*, 86 Va. 527, 10 S. E. 414. See also,

Davis v. Gordon, 87 Va. 559, 13 S. E. 35.

May Sell on Customary Credit of the Place.—A consignee, a factor, who receives no order to the contrary, may sell on the customary credit of the place. *M'Connico v. Curzen*, 2 Call 358. See the titles AGENCY, vol. 1, p. 240; USAGES AND CUSTOMS.

Discounting Notes of Purchasers in Order to Make Advances to Principals.—It being the known usage of the trade, commission merchants, having the tobacco of several principals on hand for sale, may sell all the tobacco of all their principals in one parcel, on a credit of four months, to one person, then in undoubted credit, and take one note from him for the payment of the whole price; also, they may have this note discounted by another merchant, it being the known usage of the trade, when they have occasion to make advances to their principals. *Johnson v. O'Hara*, 5 Leigh 456.

Discounting Notes of Purchasers for Their Own Accommodation.—When factors and commission merchants have no occasion to make advances to their principals, they are primarily liable to them for the proceeds of the sale of tobaccos consigned by these principals, which they have sold in one parcel to one purchaser, taking his note for the purchase price, and had the note discounted by another merchant for their own accommodation; and the maker of this note afterwards fails and is unable to pay the note. *Johnson v. O'Hara*, 5 Leigh 456.

Selling Property of Principal When Indebted to Principal.—A factor, indebted to his principal at the time, can not sell the property of the principal, to pay endorsements in the course of his factorage. *Alexander v. Morris*, 3 Call 89.

Extending Credit without Assent of Principal.—A commission merchant who sells produce consigned to him, on a credit, and afterwards extends that credit without the assent of the

principal, is responsible for the loss which may be occasioned thereby. *Hairston v. Medley*, 1 Gratt. 96. See also, *Johnson v. O'Hara*, 5 Leigh 456. See the titles AGENCY, vol. 1, p. 240; AUCTIONS AND AUCTIONEERS, vol. 2, p. 174.

Pawning Goods of Principal.—A consignee of goods may dispose of them in the way of trade; but he can not pawn them for his own benefit, so as to divest the property of the consignor. *Skinner v. Dodge*, 4 Hen. & M. 432. See *Hewes v. Doddridge*, 1 Rob. 143.

Principal's Right to a Decree against Pawnee for Goods.—If a factor pawns the goods of the consignor, the consignor, on a bill for the discovery of the goods, or the value thereof, a full disclosure of the circumstances being made by the answer, ought not to be left to his remedy at law, but a decree should be entered in his favor at once against the pawnee. *Skinner v. Dodge*, 4 Hen. & M. 432. See the title PLEDGE AND COLLATERAL SECURITY.

B. DUTIES AND LIABILITIES.

See the title AGENCY, vol. 1, p. 240.

As to factors purchasing the property of their principals, see the title TRUSTS AND TRUSTEES.

As to principal's rights against the factor for disobeying orders to stop goods in transitu being shipped to an insolvent buyer, see the title AGENCY, vol. 1, pp. 240, 259.

Right to Buy Up Debts of Principal.

—A factor can not buy up the debts of his principal at an under rate, and claim credit for their nominal amount; but, in such a case, he will only be allowed what he actually paid, although the purchase was made after the factorage had ceased, and the principal had brought suit for an accounting. *Alexander v. Morris*, 3 Call 89. See the titles AGENCY, vol. 1, p. 240; TRUSTS AND TRUSTEES.

Liable for Not Rendering Account.—Factor's failure for five years to render an account to his principal of outstanding indebtedness on his account was held to render him, the factor, chargeable with the amount of such indebtedness. *Deans v. Scriba*, 2 Call 415.

Liability of Executors of Factors.—The executors of a consignee will not be liable for outstanding debts, unless there is gross negligence on part of consignee. *M'Connico v. Curzen*, 2 Call 358.

Principal Bound Notwithstanding Private Instructions to Factor.—In the case of factors known to be such, they possess a general authority to sell; and if in selling they violate their private instructions, the principal is nevertheless bound. And it makes no difference in a case of this kind, whether the factor (if known to be such) has been ordinarily employed by the principal to sell, or whether it is the first and only instance of his being so employed by the principal to sell; for still, being a known factor, he is held out by the principal as possessing, in effect, all the ordinary general authority of a factor, in relation to the particular sale. *Davis v. Gordon*, 87 Va. 559, 13 S. E. 35. See also, *Blair v. Sheridan*, 86 Va. 527, 10 S. E. 414. See the title AGENCY, vol. 1, p. 240.

IV. Compensation, Reimbursement, and Security Therefor.

See the title AGENCY, vol. 1, pp. 240, 268.

Commissions Allowed Notwithstanding Account Has Not Been Rendered.—Commissions are allowed to a factor although he fails for five years to render an account to his principal for outstanding indebtedness, and is thus held chargeable with the amount of such indebtedness. *Deans v. Scriba*, 2 Call 415.

Sale of Goods for Reimbursement.—In ordinary dealings a factor must obey his principal's orders as to prices

and sales, but if he advances on the goods to the principal and demands payment of such advances, then, if his advances are not returned, he has a right to sell and reimburse himself. *George Campbell Co. v. Angus*, 91 Va. 438, 22 S. E. 167.

Factor's Lien upon Goods of the Principal for Unpaid Drafts.—Factor has a lien upon the goods of his principal in his possession, to protect himself against unpaid drafts drawn and accepted in the course of the agency; and such lien is personal to the factor. *Bouvier's Dictionary*. *Barnes Safe & Lock Co. v. Block Bros. Tobacco Co.*, 38 W. Va. 158, 18 S. E. 482.

V. Title to Goods Consigned—Liability for Debts.

The title of goods consigned to a factor to be sold remains in the principal until sold; and consequently, goods consigned to a factor are not liable for the factor's debts, and can not be sold on execution to pay his debts. *Barnes Safe & Lock Co. v. Block Bros. Tobacco Co.*, 38 W. Va. 158, 18 S. E. 482; *Brown Mfg. Co. v. Derring*, 35 W. Va. 255, 13 S. E. 383; *Arbuckle v. Gates*, 95 Va. 802, 30 S. E. 496.

VI. Procedure.

A. PLEADING.

Where goods are sold by a factor in Virginia for merchants in Britain, it is necessary, in an action in this state, to state the name of the factor in the declaration. *Ozward v. Dickinson*, 2 Call 16. See the titles PARTIES; PLEADING.

B. EVIDENCE.

Prima Facie.—An account of sales rendered by a consignee to his consignor is prima facie evidence of its correctness. *Mertens v. Nottebohm*, 4 Gratt. 163; *Ruffner v. Hewitt*, 7 W. Va. 585.

The appointment of agents to collect is prima facie evidence of due diligence

on part of consignee. So that the consignor must afterwards prove the negligence. *M'Connico v. Curzen*, 2 Call 358.

Action for Advances.—*Quære*; if a consignee, who has made advancements to his consignor, on a shipment of the goods made to the consignee, may recover the amount of these advancements without showing what he did with the goods. *Mertens v. Nottebohm*s, 4 Gratt. 163.

VII. Limitation of Actions.

Where the dealings between the principal and his factor have ceased and the accounts between them have been so adjusted that the party in whose favor the balance appears might bring an action at law thereon, then from the time of such adjustment the statute of limitations will commence to run as against such balance. *Root v. Salt Co.*, 27 W. Va. 484. See the title LIMITATION OF ACTIONS.

FACTS.—See the title QUESTIONS OF LAW AND FACT.

In *Hulings v. Hulings Lumber Co.*, 38 W. Va. 351, 18 S. E. 620, 627, it is said: "A **fact**, as distinguished from the law, may be taken as that out of which the point of law arises; that which is asserted to be or not to be, and is to be presumed or proved to be or not to be, for the purpose of applying or refusing to apply a rule at law." See also, *Dun v. Seaboard, etc., R. Co.*, 78 Va. 645.

Facts Proved.—In *Carrington v. Bennett*, 1 Leigh 340, 343, it is said: "And these being all the **facts proved** in the cause, the jury, etc., notwithstanding these last words **facts proved**, it is clear to me, that this is a detail of the evidence, and all the evidence, before the jury, not a statement, by the court of such facts, as it considered proved by the mass of evidence." See also, *Taylor v. Com.*, 77 Va. 696.

Failure of Consideration.

See the titles ACTIONS, vol. 1, p. 144; BILLS, NOTES AND CHECKS, vol. 2, p. 418; BONDS, vol. 2, p. 514; CONTRACTS, vol. 3, p. 379; RESCISION, CANCELLATION AND REFORMATION.

FAILURE TO SIT.—When a court **fails to sit** on any day to which it may have adjourned, all matters ready for the court to act upon, if it had been held on such day, shall be in the same condition and have the same effect as if continued to the next day of the same term that the court may sit. The court said: "It can not be said that there had been a **failure** of the court to **sit** on Thursday, 21st, or on Friday, 22d, for the adjournment had been ordered to Saturday, 23d. That was the first day after the 20th that the court could sit, and plainly that was the first day on which there was a **failure to sit**. When, therefore, the court having adjourned over, as it had a right to do, to Saturday, 23d, and having **failed to sit** on that day, the 26th, the day on which it resumed its session, was within the three consecutive days (even counting Sunday and Christmas day) prescribed by the statute." *Langhorne v. Waller*, 76 Va. 213, 216.

Fairfax.

As to Lord Fairfax, see the title PUBLIC LANDS.

FAIR ON ITS FACE.—See *Collins v. Mann*, 15 W. Va. 171, 180. See the title EXECUTIONS, ante, p. 416.

Faith and Credit.

See the title FOREIGN JUDGMENTS.

FALL.—W. bought of R. apple and peach trees and grape roots to be delivered at a specified place "this fall." R. delivers them at the place on the 22d day of November, and during severe freezing weather tied in bundles and unwrapped, and without previous notice of the time of delivery to W. Held, that R. had no right to deliver and require W. to receive the trees and roots at the unseasonable period, and that even if the time had been seasonable, R. should have given W. reasonable notice of the time of delivery, and more especially as the articles were perishable, and much preparation for transplanting had to be made to make them profitable to W. *Weltner v. Riggs*, 3 W. Va. 445.

FALLEN.—See *Watkins v. County Court*, 30 W. Va. 657, 5 S. E. 654, 658.

False Arrest.

See the title FALSE IMPRISONMENT.

FALSE IMPRISONMENT.

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I. Definitions.

"False imprisonment is an unlawful physical restraint by one of another's liberty, whether in prison or elsewhere." Bishop Non Contract Law, § 206; *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243, 29 Am. St. Rep. 827.

False imprisonment is a wrong akin to the wrongs of assault and battery, and consists in imposing, by force or threats, an unlawful restraint upon a man's freedom of locomotion. *Prima facie*, any restraint put by fear or force upon the actions of another is unlawful, and constitutes false imprisonment, unless a showing of justification makes it a true or legal imprisonment. *Cooley on Torts*, 196; *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243, 29 Am. St. Rep. 827.

"Personal liberty is a natural right. 'And, *prima facie*, any restraint put by fear or force upon the actions of another is unlawful, and constitutes false imprisonment, unless a showing of justification makes it a true or legal imprisonment.'" *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243.

"An abuse of a lawful arrest is also false imprisonment; as cruelly treating the arrested person, insulting him, imposing on him undue hardships." *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243.

The action of trespass for false imprisonment is in some respects pecu-

liar, and differs from an action for an ordinary assault and battery and other trespasses in this, that the trespass does not consist in a distinct and single act, but in the continuous violation of personal liberty, and every continuation of an illegal imprisonment constitutes a new trespass for which an action may be maintained. *Ruffner v. Williams*, 3 W. Va. 243.

II. What Constitutes.

A. ARREST ON VOID WARRANT.

In General.—Where a party is taken in custody upon a process, which is for any reason void, as if a *capias ad satisfaciendum* be sued out against an executor or administrator, on a judgment obtained against him for a debt due by his testator, without establishing a *devastavit*, an action of trespass and false imprisonment lies against the plaintiff suing out the writ, though not against the sheriff. *Moore v. Chapman*, 3 Hen. & M. 260, 264.

If the defendant has lawfully sued out the process of arrest against the plaintiff, and has caused him to be imprisoned upon it, and the process has been afterwards set aside because illegally issued, it constitutes no defense, but the plaintiff is entitled to recover damages for the wrong done him, without regard to the motives of the defendant, or the circumstances attending the doing of the wrongful and unlawful act. *Parsons v. Harper*, 16 Gratt. 64.

Warrant Altered and Afterwards Executed by Unauthorized Person.—

A warrant to arrest a person of whom surety for the peace is demanded, being executed neither by a sworn officer, nor the person to whom it was directed by the magistrate, but by an individual selected by the prosecutor, who erased the name of the person appointed by the magistrate, and substituted that of the person selected by himself, is thereby rendered altogether illegal and void as a justification, but may be given in evidence in mitigation of damages. *Wells v. Jackson*, 3 Munf. 458.

Warrant Failing to Give Christian Names of Persons to Be Arrested.—

Quære, if the persons, to be arrested, be described only by their surnames, the counties they reside in, and their professions, or trades, without their christian names; is not such warrant too general and uncertain, and, therefore, illegal and void? *Wells v. Jackson*, 3 Munf. 458.

Warrant against Certain Person "and Associates."—A warrant directing the "associates," of persons named, to be arrested, without mentioning the names of such associates, is illegal and void as to them. *Wells v. Jackson*, 3 Munf. 458.

B. ARREST ON IRREGULAR WARRANT.

In General.—Where the process is irregular only, the plaintiff, at whose suit the arrest is made, is not liable to an action of trespass, until the writ is superseded. *Moore v. Chapman*, 3 Hen. & M. 260, 264; *Ogg v. Murdock*, 25 W. Va. 139.

Irregularity of Arrest in Civil Action.—Where the facts and grounds actually exist, or the plaintiff has probable cause to believe they exist, on which an order for the arrest of the defendant is authorized by § 37, ch. 106, W. Va. Code, the plaintiff, who causes an arrest to be made under said statute, can not be made liable in

action of trespass for such arrest, merely because the affidavit and order of arrest are not regular and in proper legal form. *Ogg v. Murdock*, 25 W. Va. 139.

But in such case, the order of arrest is authorized only in a pending action or suit—this is made a condition precedent; and if a party makes an affidavit and causes an arrest, without the pendency of an action for his claim, his proceedings will be void for want of jurisdiction to issue the order of arrest and he will be liable for damages in an action of trespass brought by the party arrested. *Ogg v. Murdock*, 25 W. Va. 139.

Arrest for Debt Already Paid.—Trespass for assault and battery, and false imprisonment, will not lie against the plaintiff, for suing out a writ of *capias ad satisfaciendum*, and causing the defendant to be taken in execution, while he was attending court as a witness, under the protection of a subpoena, although the debt for which the execution issued had been previously paid. *Moore v. Chapman*, 3 Hen. & M. 260.

Nor can any action be sustained, as it seems, till the process of execution be quashed, or superseded. *Moore v. Chapman*, 3 Hen. & M. 260.

C. ARREST BY AGENTS OF CONFEDERATE GOVERNMENT.

See the title CONFEDERATE STATES, vol. 3, p. 61, et seq.

D. UNAUTHORIZED IMPRISONMENT BY MUNICIPAL CORPORATION.

Unless the power to imprison be plainly given it does not exist; and, when given, there must be a judicial ascertainment of the guilt of the party accused, by a competent tribunal, before it can be exercised. A power conferred on a municipal corporation to adopt ordinances and to enforce compliance with them by prescribed fines, does not confer the power of imprisonment before trial for a violation of the ordinances, nor after trial

for failure to pay the fines. *Bolton v. Vellines*, 94 Va. 393, 26 S. E. 847. See the title MUNICIPAL CORPORATIONS.

E. CONTINUATION OF ILLEGAL DETENTION.

Every continuation of an illegal imprisonment, constitutes a new trespass for which an action for false imprisonment may be instituted. *Ruffner v. Williams*, 3 W. Va. 243.

F. MALICE AS AN ELEMENT OF THE RIGHT OF ACTION.

In false imprisonment proper, as distinguished from malicious prosecution, malice is not required, but want of reasonable and probable cause is sufficient. *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243.

In an action on the case for false imprisonment, if the defendant has unlawfully sued out process of arrest against the plaintiff, and has caused him to be imprisoned upon it, and the process has been afterwards set aside because illegally issued, it constitutes no defense to the party; but the plaintiff is entitled to recover damages for the wrong done him, without regard to the motives of the defendant, or the circumstances attending the doing of the wrongful and unlawful act. *Parsons v. Harper*, 16 Gratt. 64.

When the officer, acting however honestly, arrests the wrong person, not being misled thereto by the person himself, it is a case of false imprisonment, although the mistake may be shown in mitigation of damages. *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243.

It has been held, that in an action for false imprisonment, an instruction that "an improper motive may be inferred from a wrongful act based upon no reasonable ground; that such improper motive constitutes malice in law, and that the act need not be prompted by anger, malevolence, or vindictiveness," correctly defines malice. *Bolton v. Vellines*, 94 Va. 393, 26

S. E. 847, citing *Forbes v. Hagman*, 75 Va. 168. See the title MALICIOUS PROSECUTION.

III. Persons Liable.

A. AIDERS AND ABETTORS.

Where a party is present during a part of the time of the illegal imprisonment of another, and gives aid and comfort, counsel, direction and encouragement to those engaged in it, he is personally liable for the trespass. *Ruffner v. Williams*, 3 W. Va. 243.

Where a rebel in 1861, finding that a loyal man had been wrongfully arrested, joined the gang of independent scouts who were taking him to prison, and encouraged their acts and abused him, he was held to be guilty of false imprisonment. *Ruffner v. Williams*, 3 W. Va. 243, 245.

It is held, that a party is liable as a joint trespasser, in an action for assault and battery, arrest and false imprisonment, where he was engaged in a raid made by a party of about three hundred rebels, which captured the plaintiff, though not present at the capture, and where he was with the party that captured him, at camp on the night of the capture; and where he was along with the squad for a considerable portion of the time and distance traveled by it, that took the prisoner, with others captured on the raid, to Richmond. His connection with the company, his presence with the parties having the prisoners in charge and guarding them on the return, and way to Richmond, shows his participation with the illegal detention and imprisonment so as to fix his guilt in the premises as a joint trespasser. *Cole v. Radcliff*, 4 W. Va. 332.

Generally, as to arrests by agents of confederate government, see the title CONFEDERATE STATES, vol. 3, pp. 61, 66.

B. JUDICIAL OFFICERS.

Judicial officers are not answerable for mistakes of law, or errors of judg-

ment, in cases where they have jurisdiction of the subject matter and the parties, and the judgment is one which they are authorized by law to render. *Bolton v. Vellines*, 94 Va. 393, 26 S. E. 847; *Johnston v. Moorman*, 80 Va. 131.

When acting within their jurisdiction, judicial officers are exempt in civil actions from liability for their official acts, although such acts are alleged to have been done maliciously and corruptly. *Johnston v. Moorman*, 80 Va. 131.

And in an action against such officers, acting within their jurisdiction, it is not for the jury to decide upon the question of the reasonableness of the grounds of the arrest. *Johnston v. Moorman*, 80 Va. 131.

What Constitutes a Judicial Act.—A direction to a policeman to arrest anyone who shall in the future violate a city ordinance is not a judicial act. The police commissioners of the city of Norfolk are not judicial officers, and the act complained of is not a judicial act, nor one authorized by law. *Bolton v. Vellines*, 94 Va. 393, 26 S. E. 847.

Arrest by Mayor of Town.—Since the mayor of a town, while acting in his judicial capacity, has the right to judge whether or not sufficient grounds for an arrest exist; in an action against the mayor for maliciously causing the plaintiff to be arrested and imprisoned for a breach or threatened breach of peace committed in his presence, it is error to submit to the jury the question of the reasonableness of the grounds of the arrest. *Johnston v. Moorman*, 80 Va. 131.

Arrest by Court on Rule for Contempt.—So a rule for contempt, being the judicial act of the court issuing it, can not be a foundation for an action for false imprisonment, however erroneously issued, but it may be for malicious prosecution, provided the application for the same is without probable cause, actuated by improper and malicious mo-

tives, and founded on falsehood or misrepresentation. *Tavener v. Morehead*, 41 W. Va. 116, 23 S. E. 673. See the titles CONTEMPT, vol. 3, p. 236; MALICIOUS PROSECUTION.

C. LIABILITY OF PRINCIPAL FOR ACTS OF AGENT.

F. & A., partners, living in Baltimore, carry on a business near Richmond by their general agent, M. M. brings an action in the name of F. & A. against H. & G., partners, claiming they are indebted to the plaintiffs; and upon affidavit by M., under the statute, A. & G. are held to bail, and not being able to give it they are held in prison until the trial, when the plaintiffs are nonsuited. H. and G. then bring their separate actions against F. and A. for malicious arrest and imprisonment. It seems F. & A. had no knowledge of the arrest and imprisonment until the parties were in prison, when F., coming to Richmond, he was informed of the fact by M., when he made no inquiry, as to the grounds of the arrest, and he gave no directions for their release. It was held, that this was a virtual ratification and adoption of what had been done by the agent; and the principals, F. & A., are responsible for the consequences of the agent's act. *Forbes v. Hagman*, 75 Va. 168. See the titles AGENCY, vol. 1, p. 240; MASTER AND SERVANT.

False Imprisonment by Conductor of Train.—A carrier of passengers is liable for the false imprisonment of a passenger, made or caused to be made by its conductor in charge of the train, during his execution of the carrier's contract to treat properly and convey safely. This liability is not affected by § 31, ch. 145, W. Va. Code, which enacts, among other things, that "the conductor of every train or railroad cars shall have all the powers of a conservator of the peace while in charge of the train." *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243. See the title CARRIERS, vol. 2, p. 671.

If a conductor, as a conservator of the peace, causes the arrest of a person on justifiable probable cause of his guilt of an offense against the laws of the state, neither he nor the company he serves is liable for damages by reason thereof. *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363, 33 S. E. 262.

A common carrier is under no obligation to protect a passenger from legal arrest, but only from illegal arrest. *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363, 33 S. E. 262, 265.

An instruction that a proper officer of the state has the right to enter a train of cars, within the limits of his jurisdiction, and arrest a person guilty of a known breach of the laws of this state, and that the railroad company would not be liable for such arrest, is good, and it is error not to give it. *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363, 33 S. E. 262.

Arrest by Special Policeman, Irregularly Appointed.—The mere fact that a night watchman in the employ and pay of a railroad company was sworn in as a special policeman by a city mayor at the request of the company, where the mayor was not authorized by law to appoint a special policeman for the company, gave the policeman no authority to make arrests as an officer of the law, and the company is liable in damages for false imprisonment and assault on a passenger, committed by such special policeman in the discharge of his duties as watchman. *Norfolk, etc., R. Co. v. Galliher*, 89 Va. 639, 16 S. E. 935.

IV. Actions.

A. NATURE OF RIGHT OF ACTION.

The right of action for a personal tort such as false imprisonment dies with the party and does not survive to the personal representative. *Norfolk, etc., R. Co. v. Read*, 87 Va. 185, 189, 12 S. E. 395. See the title ABATE-

MENT, REVIVAL, AND SURVIVAL, vol. 1, p. 2.

A right of action for false imprisonment can not be assigned being purely personal. *Norfolk, etc., R. Co. v. Read*, 87 Va. 185, 189, 12 S. E. 395. See the title ASSIGNMENTS, vol. 1, p. 745.

B. DECLARATION.

In General.—A declaration in an action of trespass, for assault and battery, and false imprisonment, which alleges the cause of complaint sufficiently to make known to the defendant what he is to answer to, so that judgment, according to law and the very right of the case, could be given, is sufficient, in substance, and a demurrer thereto should be overruled. *Carskadon v. Williams*, 7 W. Va. 1.

Averment That Arrest Was against Plaintiff's Will.—In an action for false imprisonment, the declaration need not charge in express terms that the imprisonment was "against the will of the plaintiff." It is sufficient if it appears that the imprisonment was against his will, and was without collusion on his part. *Bolton v. Vellines*, 94 Va. 393, 26 S. E. 847.

Averment as to Malice.—In an action on the case for suing out a capias and imprisoning the plaintiff, in an action of slander in which he was defendant, it is not necessary to aver malice or want of probable cause in suing out the capias. *Parson v. Harper*, 16 Gratt. 64.

Averment as the Charge and Acquittal.—An averment that the plaintiff was charged with an offense, and that the prosecution therefor had been abandoned and fully ended, is all that is required on the subject of charge and acquittal. *Bolton v. Vellines*, 94 Va. 393, 26 S. E. 847.

Necessity of Setting Out Defendant's Conduct.—A declaration for malicious arrest or prosecution must set forth the alleged malicious conduct of the defendant on which it is predicated, otherwise it is demurrable. *Tavener*

v. Morehead, 41 W. Va. 116, 23 S. E. 673.

C. EVIDENCE.

See the title EVIDENCE, ante, p. 295.

1. Admissibility.

Admissibility of Record in Prior Action.—In an action on the case for false imprisonment, the whole record of the case in which the imprisonment occurred is competent evidence for the plaintiff. *Parsons v. Harper*, 16 Gratt. 64.

The record in the action in which the imprisonment occurred is competent evidence for the plaintiffs; and slight variance between the declaration and the record, which would not prevent the record in the present case from being a bar to another action for the same cause, are not sufficient to exclude it. *Forbes v. Hagman*, 75 Va. 168.

Evidence of Act of Defendant Subsequent to Complaint.—What the defendant did after making his complaint to the justice to have the plaintiff arrested, is not evidence on his behalf. *Womack v. Circle*, 29 Gratt. 192.

Evidence as to Food Given Plaintiff during Imprisonment.—In an action for false imprisonment, evidence as to the kind, quality and quantity of food, is not admissible, unless the fact is specifically alleged in the declaration. *Carskadon v. Williams*, 7 W. Va. 1, 2.

Evidence as to Wealth of Defendant.—In an action for slander, malicious prosecution and false imprisonment, the plaintiff, in order to show the wealth and influence of the defendant, offered in evidence certified abstracts from the books containing the returns of the assessments for taxation of the land and personal property belonging to the defendant in the year 1876, the year of the trial of the cause. There being no objection to the form of the abstracts, or that they did not truly state what they purported, the evidence

was admissible. *Womack v. Circle*, 29 Gratt. 192.

2. Weight and Sufficiency.

Evidence that the defendant, the informer and constable, arrested the plaintiff, who was young and ignorant, and kept him in custody for four days, refusing to bring him to trial, and neglecting to give him an opportunity to furnish security, and that they endeavored to get him to sign an acknowledgment of a due bill, is sufficient to warrant a verdict against the defendants. *Jones v. Com.*, 1 Rob. 748.

But evidence that the defendant, a justice of the peace, issued a warrant for the plaintiff's arrest; that the informer and constable kept him in custody for four days, and neglected to bring him to trial, but endeavored to get him to sign an acknowledgment of a due bill; and that the informer often took his cases before the defendant, was insufficient to support a verdict against the defendant. *Jones v. Com.*, 1 Rob. 748.

In *Jones v. Com.*, 1 Rob. 748, the information was against a justice of the peace, an informer, and a constable, for assaulting and imprisoning a party, under colour of a warrant of arrest for perjury, issued against him by the justice on the oath of the informer, and executed by the constable. It was held, by the general court, upon the evidence, that the information was not sustained as to the justice, but that the informer and constable were properly convicted and fined. See the title NEW TRIALS.

D. DAMAGES.

See generally, the title DAMAGES, vol. 4, p. 162.

1. Compensatory Damages.

a. Definition.

Compensatory damages are such as indemnify the plaintiff, including injury to property, loss of time and necessary expenses, counsel fees and other actual losses. *Ogg v. Murdock*, 25 W. Va. 139, 146.

b. Measure and Elements.**(1) In General.**

The rule, in cases where the malice necessary to sustain the action is such only as results from a groundless act, and there is no actual malice or design to oppress, is to allow compensatory damages; that is, damages to indemnify the plaintiff, including injury to property, loss of time and necessary expenses, counsel fees, and other actual loss; but not to allow vindictive or punitive damages to punish the defendant. *Ogg v. Murdock*, 25 W. Va. 139; *Parsons v. Harper*, 16 Gratt. 64; *Clairborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363, 33 S. E. 262.

(2) Loss of Time.

Where the false imprisonment complained of was done without malice the plaintiff can only recover compensatory damages. One of the most important elements of recovery in such case is for his loss of time and for the interruption to his business. *Parsons v. Harper*, 16 Gratt. 64; *Bolton v. Vellines*, 94 Va. 393, 26 S. E. 847; *Burruss v. Hines*, 94 Va. 413, 26 S. E. 875; *Ogg v. Murdock*, 25 W. Va. 139.

(3) Mental and Physical Suffering.

The plaintiff may recover for any bodily or mental suffering sustained by him in consequence of the wrongful act. *Bolton v. Vellines*, 94 Va. 393, 26 S. E. 847; *Parsons v. Harper*, 16 Gratt. 64.

But, as there is no precise measure of damages for mental or physical pain, where they are elements of damages to be estimated by the jury, the verdict will not be set aside unless the damages are so great as to suggest that the jury have been influenced by passion or prejudice. *Bolton v. Vellines*, 94 Va. 393, 26 S. E. 847.

(4) Costs.

The plaintiff is also entitled to recover the costs and expenses incurred in defending the original suit or proceeding. *Parsons v. Harper*, 16 Gratt. 64; *Bolton v. Vellines*, 94 Va. 393, 26

S. E. 847; *Burruss v. Hines*, 94 Va. 413, 26 S. E. 875; *Ogg v. Murdock*, 25 W. Va. 139.

(5) Counsel Fees.

While the general rule is that counsel fees are not recoverable as damages, yet on a trial for malicious prosecution or false imprisonment, where exemplary damages are recoverable, the fees paid or incurred to counsel for defending the original suit or proceeding may be proved, and, if reasonable and necessarily incurred, may be taken into consideration by the jury in the assessment of damages. *Burruss v. Hines*, 94 Va. 413, 26 S. E. 875; *Parsons v. Harper*, 16 Gratt. 64; *Ogg v. Murdock*, 25 W. Va. 139; *Bolton v. Vellines*, 94 Va. 393, 26 S. E. 847.

In an action on the case for suing out a *capias* and imprisoning the plaintiff, in an action of slander in which he was the defendant, he may prove as damage sustained by him, the amount of the fee paid by him to counsel for a motion to quash the *capias*. *Parsons v. Harper*, 16 Gratt. 64.

c. Mitigation of Damages.

In mitigation of damages, in an action for false imprisonment, it is allowable on cross-examination to prove that the plaintiff had boasted that he had gained a great reputation from his arrest and imprisonment. *Johnston v. Moorman*, 80 Va. 131.

Where an officer acting honestly arrests a wrong person, his mistake may be shown in mitigation of damages. *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243.

d. Excessive Damages.

Where the proof in an action for false imprisonment was that the plaintiff was imprisoned from Friday to the afternoon of the following Monday, and there was no evidence to show that he sustained any injury or loss other than the loss of his time during his imprisonment, and he said himself that he had no visible property and did not pretend that he was engaged in any

business, and proved no data from which his loss of time while imprisoned could be estimated, it was held, that as the damages found by the jury were in plain disregard of the limits fixed by the court's charge giving the rule by which damages are to be assessed, it was the duty of the court to set aside the verdict and order a new trial. *Ogg v. Murdock*, 25 W. Va. 139, 146. See the title NEW TRIALS.

2. Punitive or Exemplary Damages.

See the title EXEMPLARY DAMAGES, ante, p. 748.

In General.—Vindictive damages may be given to punish the defendant for his fraud and actual malice. *Ogg v. Murdock*, 25 W. Va. 139, 146.

Where the defendant, in an action for false imprisonment, was actuated by malice, punitive damages may be given to the plaintiff. *Bolton v. Vellines*, 94 Va. 393, 26 S. E. 847; *Ogg v. Murdock*, 25 W. Va. 139.

If the compensatory damages are sufficiently punitive, it is improper to instruct the jury to allow an additional sum as punitive damages. *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363, 33 S. E. 262.

In a case in which the plaintiff had been kept under an illegal restraint for three days, but in which there was no proof of malice on the part of the defendant, it was held that a verdict for \$475 would be set aside as plainly excessive. *Ogg v. Murdock*, 25 W. Va. 139; *Bolton v. Vellines*, 94 Va. 393, 26 S. E. 847.

Detention of Passenger by Carrier.—

A carrier of passengers is liable in exemplary damages for the arrest or false imprisonment of a passenger, without reasonable and probable cause, made, or caused to be made, by its conductor in charge of a train during the execution of a contract to

carry, although such act on the part of the conductor was entirely unauthorized by the company, and was purely personal to himself. *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243, 29 Am. St. Rep. 827; *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363, 33 S. E. 262.

In an action against a carrier for the arrest and false imprisonment of a passenger, if such an arrest is made without probable cause, and by reason of an honest mistake, without actual malice, or a design to injure or oppress, the liability is only for compensatory damages, and no additional sum can be added thereto as exemplary, punitive, or vindictive damages. *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363, 33 S. E. 262.

E. VERDICT AND JUDGMENT.

G. institutes an action of trespass on the case against J. and ten others, for arrest and false imprisonment. The defendants pleaded the statute of limitations and not guilty, and issues were thereon joined. Upon the issues the jury rendered a verdict for damages against eight of the defendants jointly, find two of the defendants not guilty, and omitted to find any verdict against F., the other defendant, and the circuit court entered joint judgment on the finding of the jury against the eight defendants for the damages assessed by the jury, and the costs. It was held, that as the defendants against whom the verdict was rendered and the judgment thereon entered, were not prejudiced by the omission as to F., it was proper to enter the judgment on the verdict against the defendants who were found guilty. *Jones v. Grimmet*, 4 W. Va. 104. See the titles JUDGMENTS AND DECREES; VERDICT.

FALSELY.—See the title PERJURY.

In *Kirtley v. Deck*, 2 Munf. 13, it is said: "In *Young v. Gregorie*, 3 Call 446, 452, it is admitted that equipollent expressions are sufficient; and from 10 Mod. 214, and Gilb. Rep. K. B. 185 (same case more fully reported), it appears that the words 'falsely and maliciously,' are equivalent to 'without probable cause.'" See also, the title MALICIOUS PROSECUTION.

False Oath.

See the titles LIBEL AND SLANDER; PERJURY.

FALSE PRETENSES AND CHEATS.

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CROSS REFERENCES.

See the titles ACCOMPLICES AND ACCESSORIES, vol. 1, p. 74; AUTRE-FOIS, ACQUIT AND CONVICT, vol. 2, p. 181; FORGERY AND COUNTERFEITING; FRAUD AND DECEIT; LARCENY.

I. False Pretenses.

A. DEFINITION AND DISTINCTIONS.

Definition.—"The obtaining by any false pretense, or taking from any person with intent to defraud, money or other property." *State v. Hurst*, 11 W. Va. 54; W. Va. Code, ch. 145, § 23.

Where both possession and title are obtained by false pretenses with intent to defraud, the offense is obtaining money by false pretenses, in which case the statute declares that the offender shall be deemed guilty of larceny. *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429.

The purchase of goods with the ex-

press, as well as implied representation that they were needed for sale in the course of business, to supply sales and meet demands therefor, taken with the fact of their immediate pledge, on arrival, for loans at usurious rates, and their removal in many instances immediately upon arrival directly from the depot to storage warehouses, where pledges of them were created, to say nothing of gross misrepresentations as to financial condition, and other inculpatory facts, constitute fraud and the obtaining of such goods upon false pretenses. *Fischer v. Lee*, 98 Va. 159, 35 S. E. 441.

Principal in the Second Degree.—In *Dull v. Com.*, 25 Gratt. 965, the court

approved the refusal by the lower court to give an instruction to the effect that the jury could not find the accused guilty of the larceny charged against him unless they were satisfied that he was present, aiding and abetting therein, without the following addition: "But if the prisoner was within easy call, to aid or assist them in their purpose, or in escaping or in getting rid of, or misleading the person from whom such money was obtained, that is a presence aiding and abetting, and the prisoner is as guilty as if he were personally present."

This addition was held to imply the intent sufficiently, in answer to the argument that presence was not sufficient, but that there must be the intent to aid. *Dull v. Com.*, 25 Gratt. 965.

The court also approved the following instruction: If the jury believe from the evidence that the prisoner and others concerted and conspired together to induce, by false representations, the witness Fowlkes, or any other persons who might be induced by such representations, to enter the house of the prisoner, and to obtain the money of such persons by false pretenses, or rented his house to be used for such purposes by said conspirators, and that in pursuance of such concert, one of the prisoner's confederates induced the witness to go into said house, and by false pretenses did obtain a large sum of money from said Fowlkes, and that the prisoner was present, or within easy call, etc., as in former instruction, then the prisoner is as guilty as if he himself had obtained the money from said Fowlkes, the court saying, that though the mere fact of renting a house to others to be used by them for the purposes of committing a felony, would not make the landlord or lessor a principal, either in the first or second degree, that fact is connected with a good many other facts in the instruction, which clearly make the accused a principal in the

second degree in the felony charged against him. *Dull v. Com.*, 25 Gratt. 965.

Distinction between Larceny and False Pretenses.—"The distinction between cases in which the property, and cases in which the mere possession of property is fraudulently obtained from the owner by a person who converts the same to his own use, *animo furandi*, is well settled and familiar law, the offense in the latter case being larceny but not in the former." *Moncure, J.*, in *Dull v. Com.*, 25 Gratt. 965, 984. And where a man was induced to hand over his money merely as a kind of pledge and in the expectation of getting it back immediately, and the money is made away with, this was held larceny rather than false pretenses. *Dull v. Com.*, 25 Gratt. 965. See the title LARCENY, for full treatment.

Made Larceny by Statute.—In *Dull v. Com.*, 25 Gratt. 965, the court held, that the language of the statute was intended to, and did make, the offense of obtaining property under false pretenses, larceny, and identical in punishment with larceny. See in accord, *State v. Hurst*, 11 W. Va. 54; *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429; *Anthony v. Com.*, 88 Va. 847, 14 S. E. 834. See also, *Fay v. Com.*, 28 Gratt. 912; *Leftwich v. Com.*, 20 Gratt. 716; Va. Code, 1887, § 3722; W. Va. Code, 1899, ch. 145, § 23. But the essential elements of the offense must still be proved, though the indictment be for larceny. *Trodden v. Com.*, 31 Gratt. 862; *Fay v. Com.*, 28 Gratt. 912; *Anable v. Com.*, 24 Gratt. 563.

Distinguished from Cheat.—The false passing as a true note, a false, and forged note, purporting to be a note of a bank (which bank never existed), and procuring goods by means thereof, is not such an offense as comes within the act to prevent the deceitfully obtaining goods, etc., by privy tokens or counterfeit letters; but it is a public cheat indictable at common law, if the

defendant knew that it was such false note. And it is necessary in such case to aver the scienter in the indictment. *Com. v. Speer*, 2 Va. Cas. 65.

The false token under the act of November 18, 1789, is understood to be some real visible mark, or thing, such as a key, a ring, etc., presented by the accused, as coming from a third person, by which the person defrauded is deceived; so the counterfeit letter is in the name of a third person. *Com. v. Speer*, 2 Va. Cas. 65. (Note in edition of 1853.)

In this case the bank note, by color and means of which the cheat is charged to have been effected, was not presented as coming from a third person, but was offered in a course of trade by the prisoner to the merchant, and so does not come within the statute. *Com. v. Speer*, 2 Va. Cas. 65. (Note in edition of 1853.)

Distinguished from Offense against "Red Men's Act."—An indictment for conspiracy and the felonious taking and carrying away of personal property, under § 10, ch. 135, acts of 1882, known as the "Red Men's Act," is not sustained by the proof that the property was obtained by false pretenses with the owner's consent and without force of threats. The taking contemplated by said act is by physical force or against the owner's consent. *State v. Porter*, 25 W. Va. 685.

B. ESSENTIAL ELEMENTS.

The court in *Anable v. Com.*, 24 Gratt. 563, gave the following analysis: To constitute the statutory offense of obtaining money under false pretenses four things must concur: 1. There must be an intent to defraud. 2. There must be an actual fraud committed. 3. False pretenses must be used for the purpose of perpetrating the fraud. 4. The fraud must be accomplished by means of the false pretenses made use of for the purpose; that is, they must be in some degree the cause, if not the controlling and decisive cause,

which induced the owner to part with his property.

The Fraudulent Intent.—To come within the statute there must have been an intent to defraud, and this fraudulent intent must have existed at the time the false pretenses were made, by which the money was obtained. *Fay v. Com.*, 28 Gratt. 912. See *State v. Hurst*, 11 W. Va. 54.

"It is not sufficient that the accused knowingly states what is false. It must be shown his intent was to defraud. Such intent is not a presumption of law, but a matter of fact for the jury. Being a secret operation of the mind it can only be ascertained by the acts and representations of the party. A single act or representation in many cases would not be decisive, especially where the accused has sustained a previous good character. But when it is shown that he made similar representations about the same time to other persons, and by means of such representations obtained goods, all of which were false, the presumption is greatly strengthened that he intended to defraud." *Trogon v. Com.*, 31 Gratt. 862.

The Intent Is a Question of Fact for the Jury.—*Trogon v. Com.*, 31 Gratt. 862. See *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429.

The Scienter.—Under an indictment for obtaining money by false pretenses, it is necessary to prove that the accused knew that the pretenses were false. *State v. Hurst*, 11 W. Va. 54.

The False Pretenses.—Especially it is the gravamen of the offense, that the pretenses are false and if the prisoner can show that the representations upon which he obtained the property from the owner are true, he can not be convicted. *Anable v. Com.*, 24 Gratt. 563.

In the above case, where the accused was prosecuted for selling warrants on the treasury, without having enough money there to his credit to meet them, the court of appeals held, that the lower court erred in refusing the fol-

lowing instruction: "If the jury believe from the evidence that the prisoner had sums of money, audited and allowed him, sufficient to pay all existing legal warrants drawn by him and passed to other parties, which had been registered before the warrants said to have been sold to Dr. White and also to pay the warrants of Dr. White, then they must acquit him;" since, if this supposition is supported by proof, it negatives the essential elements of false pretense and intent to defraud. But see able dissenting opinion of Judge Moncure.

False Pretense Must Be the Controlling Cause.—Other inducements may have combined with the false pretenses to induce the owner to part with his property, but it must appear that, but for the false pretenses, the owner would not have parted with his property: that they had the controlling, prevailing influence. *Fay v. Com.*, 28 Gratt. 912; *Anable v. Com.*, 24 Gratt. 563; *Trogdon v. Com.*, 31 Gratt. 862; *State v. Hurst*, 11 W. Va. 54.

And an instruction to the jury "that they must believe from the evidence, beyond all reasonable doubt, that the alleged false pretenses were believed by M. & Co.; that but for them they would not have parted with their goods—that is, that they had the prevailing and controlling influence in making M. & Co. part with their property," is correct. *Trogden v. Com.*, 31 Gratt. 862.

Receipt of Money by Accused.—In absence of proof, under an indictment for the larceny of money obtained by false pretenses, that the money was received by the accused, he can not be properly convicted. *Fay v. Com.*, 28 Gratt. 912.

C. SUBJECT MATTER OF OFFENSE.

The Note of a Bank Is Neither "Money Nor Goods."—In *Com. v. Swinney* (1st Case), 1 Va. Cas. 150, 5 Am. Dec. 512, taken in connection with

the 2d case, a bank was held to come within the scope of the statute punishing "the falsely and deceitfully, contriving, etc., privy tokens and counterfeit letters in other men's names unto divers persons, their particular friends and acquaintances." But the statute (act of Nov. 18, 1789) saying "money or goods," a note of the bank of Va. was held not to come under the denomination of "money or goods," but to be a mere promissory note, and judgment was arrested.

In *Second Case v. Swinney*, 1 Va. Cas. 150, upon an indictment exactly like that in the first case, except that it charged the obtaining "\$50 in money current in the commonwealth of Virginia," a conviction was sustained.

D. THE INDICTMENT AND CHARGE.

1. Form of Indictment.

Indictment for Larceny.—In *Anable v. Com.*, 24 Gratt. 563, the court said that it was the settled law of Virginia that upon an indictment simply charging larceny, the state may show that the subject of the larceny was obtained by a false token or pretense. In accord, *Dowdy v. Com.*, 9 Gratt. 727; *State v. Halida*, 28 W. Va. 499; *Leftwich v. Com.*, 20 Gratt. 716; *Fay v. Com.*, 28 Gratt. 912.

Indictment Charging Specific Facts.—It is competent for the pleader instead of counting for a larceny of the subject in the form of an indictment for larceny at common law, to charge the specific facts which the act declares shall be deemed larceny. The legal conclusion deducible from these facts is drawn by the act itself and need not of necessity be drawn in the indictment. *Leftwich v. Com.*, 20 Gratt. 716.

The Same Offense Charged in Several Counts.—Judge Moncure says in *Dowdy v. Com.*, 9 Gratt. 727: That where the several counts of an indictment are all for the same offense and are in themselves good counts, he knew of no case

where the indictment will be quashed or the prosecutor compelled to elect on which count he will proceed. "It is every day practice to charge a felony in different ways, in several counts, for the purpose of meeting the evidence as it may come out upon the trial." See also, *Com. v. Halida*, 28 W. Va. 499.

Proper Joinder.—In *Anthony v. Com.*, 88 Va. 847, 14 S. E. 834, a joinder of a count for obtaining goods by false pretenses with intent to defraud with others for larceny of the same goods, was held proper.

2. Sufficient Allegation That False Pretense Was Inducing Cause.

In *State v. Hurst*, 11 W. Va. 54, the allegation in the indictment that "by means of which said false pretenses, the said H. did, etc., feloniously obtain, etc., this money" is a sufficient allegation that the prosecutor was induced by the false pretenses to part with his money.

And see *Fay v. Com.*, 28 Gratt. 912, where such an allegation is held to be necessary.

3. The Scienter and Fraudulent Intent.

In an indictment for false pretenses the scienter must be alleged, but the form "did knowingly, designedly, etc., pretend" is sufficient. *State v. Hurst*, 11 W. Va. 54.

In *State v. Halida*, 28 W. Va. 499, although the word "designedly" is omitted in the indictment, the court held its omission was sufficiently supplied by the use of the words "knowingly" and "falsely."

"Upon a prosecution for obtaining goods by false pretenses, the indictment must aver the fraudulent intent, and the commonwealth must prove it. It is the very gist of the offense." *Trogon v. Com.*, 31 Gratt. 862. See *State v. Geyer*, 44 W. Va. 649, 29 S. E. 1020; *Com. v. Speer*, 2 Va. Cas. 65.

4. Particularity of Description of Subject Matter of Offense.

In *Anable v. Com.*, 24 Gratt. 563, it

was held, that where a check was described in the indictment as endorsed by a certain person to whose order it was payable, and the evidence showed that it was not endorsed by said person when it was handed to him but was so endorsed afterwards, this was not a fatal variance, the court saying: "The law of larceny does not require a minute description of the property stolen. The general rule is that it should be described with such a certainty as will enable the jury to decide whether the chattel proved to have been stolen is the very same with that upon which the indictment was founded, and show judicially to the court that it could have been the subject matter of the offense charged and enable the defendant to plead his acquittal or conviction to a subsequent indictment relating to the same chattel." See also, *State v. Hurst*, 11 W. Va. 54, where it is held, that in such an indictment for false pretenses the same particularity is required in describing the money or property, which a person is charged with having so obtained, as would be required in an indictment for the larceny thereof. Citing *Leftwich v. Com.*, 20 Gratt. 716.

In *Leftwich v. Com.*, 20 Gratt. 716, it was held, that a demurrer to the indictment ought to have been sustained where the indictment only charged the obtaining of "United States currency" since that is a general term and not a sufficient description, as there was no law making the stealing of United States currency, *eo nomine*, larceny, the court saying that the "money or other property" obtained by false pretense should be described, in an indictment for that offense with the same particularity which would be required in an indictment for the larceny thereof. But in consequence of this case, the act of February 28, 1874, Va. Code, 1887, § 3994 was passed, providing that, "in a prosecution for the larceny of United States currency, it shall be sufficient if the accused be proved

guilty of the larceny of national bank notes or United States treasury notes;" and in the case of *Dull v. Com.*, 25 Gratt. 965, though it was declared better to describe a statutory offense in the very language of a statute, still the court held, that the words "national currency of the United States" were equivalent and came within the statute.

Number.—In a prosecution for obtaining under false pretenses, notes, circulating as currency, the number of the notes need not be stated. *State v. Hurst*, 11 W. Va. 54.

They may be described as "divers United States treasury notes and national bank notes and fractional currency notes amounting in the whole to \$158 and of the value of \$158." *State v. Hurst*, 11 W. Va. 54.

Variance at the Trial.—Where the indictment charges the larceny of divers notes of the United States currency, in the whole amounting to \$208 and the evidence does not show that the accused received notes but that he received \$50 in cash and the promise to pay the balance in monthly installments of \$15 each; this is a fatal variance and is ground for a reversal of the judgment against accused. *Fay v. Com.*, 28 Gratt. 912.

5. Sufficient Record of an Indictment.

The record of an indictment in these words: "An indictment against C. G. & D. G. for obtaining property by false pretense," is sufficient, although the language used does not contain every element of the offense charged. *State v. Geyer*, 44 W. Va. 649, 29 S. E. 1020.

6. Proper Charge to Jury.

The charge to the jury in a case of obtaining property under false pretenses may be in precisely the same form as in a case of larceny, and if the evidence in the course of a trial make out a case of false pretenses, the charge need not be changed to correspond. *Dull v. Com.*, 25 Gratt. 965.

E. DEFENSES.

Plea of "Autrefois Acquit" on Former Charge of Forgery Not Good.

—Where a person acquitted on a charge of forgery, and also falsely uttering as true a forged order, is afterwards indicted on the same facts for fraudulently obtaining goods, etc., he can not plead "autrefois acquit" of the former charge to the latter. *Com. v. Quann*, 2 Va. Cas. 89.

Obtaining Just Debt by False Pretenses.—A person is not guilty of the offense of false pretenses, who uses false pretenses to obtain payment of a debt justly due. *State v. Hurst*, 11 W. Va. 54.

F. EVIDENCE.

Admissibility of Evidence of Other Transactions to Show Intent.

—Where, as in prosecutions for obtaining goods under false pretenses, the fraudulent intent is a necessary ingredient of the offense, evidence of other transactions of similar character (such evidence not being too remote in time or place to throw light upon the intent of the accused in the main transaction), is admissible. But such evidence is only to be considered by the jury as explanatory of such intent and not as proof that the accused has committed other offenses not charged in the indictment. *Trogdon v. Com.*, 31 Gratt. 862.

And this though the statute has made the obtaining goods on false pretenses larceny. *Trogdon v. Com.*, 31 Gratt. 862.

And what are the limits as to the time and circumstances is for the court, in its discretion, to determine. *Trogdon v. Com.*, 31 Gratt. 862.

Thus, upon a prosecution for obtaining goods upon false pretenses, evidence that the accused, in the same city and at or about the same time purchased goods from other parties, is admissible to show the intent of the accused in making the other representations, but not as proof that the accused

had committed other offenses not charged in the indictment. And this, though the statute had made the obtaining goods on false pretenses larceny. *Trogdon v. Com.*, 31 Gratt. 862.

Representations to Third Parties.—

On the 15th of March, 1878, L., having received an order to send some goods to T. & Co., obtained from B. a copy of the representation made to him by T. on the 28th of February, 1878, which were the same representations made to M. He mailed a copy to T. & Co., asking if that statement represented a true condition of their affairs, and received, by due course of mail, a letter signed T. & Co., saying that it did, and that the business was still prospering. It was held, that the testimony of L., his letter to T. & Co. containing the statement, and the answer received by him, are admissible as evidence in this case to show the intent of the accused. *Trogdon v. Com.*, 31 Gratt. 862.

A Statement to One Member of a Firm a Statement to All.—A statement to one member of a firm is a statement to the firm and to every member of it, and must be admitted, since it is material evidence to show the grounds upon which the partners acted. *Trogdon v. Com.*, 31 Gratt. 862.

Thus, a statement is made by the accused of his partners, and the condition of the partnership, to one of the firm of which the goods were obtained, who encloses it in a letter to another member of his firm then in New York, and asks if he shall send the goods; and he receives a reply by telegraph to send them. The statement is admissible evidence. *Trogdon v. Com.*, 31 Gratt. 862.

Record in Bankruptcy.—The record in bankruptcy is competent to show the fact of bankruptcy, also to show the petition and schedules filed by accused, the statements therein contained and any other act done, or declaration made by the accused in the progress of the proceedings in bankruptcy, on

the ground that they are the deliberate declarations of record of the accused, not as a judgment. The identity of the petitioner in the record of bankruptcy with the accused may be established by circumstantial evidence. *Trogdon v. Com.*, 31 Gratt. 862.

But the schedules of third parties also forming part of the record in bankruptcy, are not admissible, being merely the admissions in writing of those persons which the accused had no opportunity of controverting. *Trogdon v. Com.*, 31 Gratt. 862.

Circumstantial Evidence.—A letter touching the financial condition of a firm, signed by the firm will be presumed to be written by the accused when he is the only member of the firm residing where the letter was written and he had the exclusive control of the business, and is admissible as evidence of false pretense on his part. *Trogdon v. Com.*, 31 Gratt. 862.

List of Property in Another State to Disprove Statement as to Value.—

A paper purporting to be the assessment of the property of A., one of the partners of T. & Co., and whose unincumbered real estate T. had represented as worth \$3,000, in R. county, North Carolina, is certified by the register of the county as a correct transcript of the taxable property of A., as copied from the list returned by the assessor. The certificate and assessment are without date, and do not state what year the statement refers to. Held, that in the absence of evidence that by the law of North Carolina the assessment is a record, and a copy of the record is evidence, the paper is not competent evidence against T. *Trogdon v. Com.*, 31 Gratt. 862.

First, because it was without date; 2d, because it was not proved by the statutes of the said state that such a copy was legal evidence; 3d, such paper, whether copy or original is nothing more than a statement by the party, on oath it may be, to some North Carolina officer as to the amount and value

of his property. It was not made in the presence of the accused; he had no interest or concern in the matter and he had no opportunity of cross-examining the person who made it. It is difficult to find even a plausible ground upon which such a paper can be used upon a criminal trial. *Trogdon v. Com.*, 31 Gratt. 862.

And the original paper, to which the certificate refers, referring to the property of A., and T. having no connection with or interest in it, would not be competent evidence against T. *Trogdon v. Com.*, 31 Gratt. 862.

Character of Accused.—In *Fay v. Com.*, 28 Gratt. 912, it was held, that the evidence was wholly insufficient to establish the fraudulent intent, when such conclusion was strengthened by the fact that the prisoner had resided in the city where the offense was alleged to have been committed for twenty years in good repute.

Essential Elements Must Be Proved.

—Although the statute makes false pretenses equivalent to larceny, yet one can not be found guilty under a simple count charging him with larceny any more than under one charging specifically the offense of obtaining money, etc., by false pretenses, if there is wanting in the proof any of those elements which constitute that offense. *Anable v. Com.*, 24 Gratt. 563; *Fay v. Com.*, 28 Gratt. 912; *Trogdon v. Com.*, 31 Gratt. 862.

Thus it is necessary to prove, under an indictment for larceny of money obtained by false pretenses, that the money was obtained by the false pretenses alleged. *Fay v. Com.*, 28 Gratt. 912.

Evidence Improperly Admitted Ground for Reversal.—If the accused may have been prejudiced by the evidence admitted, even though it be doubted whether, in fact, he was so or not, it is sufficient for reversing the judgment. *Trogdon v. Com.*, 31 Gratt. 862.

G. PUNISHMENT.

The punishment for obtaining money by false pretenses is the same as that for larceny. *State v. Hurst*, 11 W. Va. 54; *Dull v. Com.*, 25 Gratt. 965.

Exclusion from Franchise.—By § 62, Va. Code, 1904, persons convicted after the adoption of the constitution of 1902, of obtaining money or other property under false pretenses shall be excluded from registering and voting. See art. 2, § 23, of said constitution. See also, § 73, of said Code.

II. Cheats.

Definition.—Falsely procuring the goods of others by means of a false and counterfeit note, purporting to be the note of a bank, but which bank never existed, knowing said note to be false and counterfeit, is indictable as a cheat at common law. Such an offense does not come within the scope of the act of 1789, against those who "counterfeit letters or privy tokens to receive money or goods in other men's names." *Com. v. Speer*, 2 Va. Cas. 65.

The goods were here fraudulently obtained by means of a forged bank note; the paper on the face of it appeared to be one issued by a subsisting company, to be signed by a president, and countersigned by a cashier; it was calculated, in the course of trade, to deceive numbers; it was a false token by which the public was affected. It was, therefore, an indictable offense. *Com. v. Speer*, 2 Va. Cas. 65, note in 1853 edition.

The use of this false token constituted one of the ingredients of a cheat indictable at common law, but as it was not presented as coming from a third person, it was not embraced by the statute. *Com. v. Speer*, 2 Va. Cas. 65, note in 1853 edition.

"The distinction between such cheats as are, and such as are not indictable, is well drawn in the leading case of *Rex v. Wheatly*, 2 Burrow 1125. See

also, *Salkeld*, 379. *The Queen v. Jones*. Where the unfair dealing operates as an injury to an individual only, against which ordinary caution and prudence may guard, a civil action only lies; but if the fraud be effected by such means as are calculated to deceive numbers, it is indictable. Thus the use of false weights and measures, or other false tokens, or if there be a conspiracy, the offense is public. So it has been decided that the deceitfully obtaining a sum of money by means of a counterfeit indorsement is indictable as a cheat at common law, the same being a false token; so of a counterfeit order." *Com. v. Speer*, 2 Va. Cas. 65, note in 1853 edition.

Distinguished from Theft.—"It is very clear that a purchase of goods from the owner, by means of a deceit as to the genuineness of value of the consideration paid, is not a theft but a cheat." *Williams v. Given*, 6 Gratt. 269, 270.

Cheating by False Pretenses.—"A statute against those who cheat by means of false pretenses, similar to that of 30 Geo. II, ch. 24 (as amended by 52 Geo. III, ch. 64), seems to be much wanting in Virginia." Note in 1853 edition to *Com. v. Speer*, 2 Va.

Cas. 65. See now Va. Code, 1904, § 3722.

An unreported case from the county of Henrico, decided by the general court, is that of *James A. Porter*, who went to the house of an ignorant old woman, and, falsely pretending that he was a collector of public taxes, by such fraudulent pretenses obtained from her \$12. He was indicted for it, and the jury assessed his fine at \$500, but as it was not alleged in the indictment that the cheat was effected by any false token nor by means of a conspiracy between the defendant and others, the judgment was arrested. See note in 1853 edition to *Com. v. Speer*, 2 Va. Cas. 65.

Jurisdiction of State Court.—"No good reason can be suggested why a state court should be allowed to punish, under a law of the state, a cheat effected by means of a counterfeit coin, and not be allowed to punish, under a law of the state, a cheat effected by means of a forged national bank note." *Jett v. Com.*, 18 Gratt. 933, 968.

Scienter Necessary.—"The 'scienter' is a necessary averment in an indictment for a cheat at common law. *Com. v. Speer*, 2 Va. Cas. 65.

FALSE REPRESENTATION.—See the title FRAUD AND DECEIT.

In *State v. Berkeley*, 41 W. Va. 455, 23 S. E. 609, it is said: "A **false representation** is one made with knowledge of its falsity—made scienter, in law phrase. 'A false representation may be made scienter, in contemplation of law, in any of the following ways: (1) With actual knowledge of its falsity; (2) without knowledge either of its truth or falsity; or (3) under circumstances in which the person making it ought to have known, if he did not know, of its falsity.' 1 Bigelow, Frauds, 509."

False Swearing.

See the titles LIBEL AND SLANDER; PERJURY.

False Token.

See the title FALSE PRETENSES AND CHEATS.

Falsi Crimen.

As to the meaning of this term, see the title WITNESSES.

Falsifying Accounts.

See generally, the title ACCOUNTS AND ACCOUNTING, vol. 1, p. 87. See also, the titles EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; PARTNERSHIP; TRUSTS AND TRUSTEES.

Falsus in Uno, Falsus in Omnibus.

See the titles EVIDENCE, ante, p. 338; WITNESSES.

FAMILY.—See the titles HOMESTEAD EXEMPTIONS; WILLS.

The word **family** has two very distinct meanings: 1st, The collective body of persons, who live in one house and under one head or manager; and it may include in this sense parents, children, servants, or in some cases even boarders or lodgers; 2d, Those who descend from one common progenitor; and in this sense it can not include the parents and has no reference to the fact of residence in one house and under one head. *Stuart v. Stuart*, 18 W. Va. 675.

When used in its first sense, it rarely includes boarders and lodgers; sometimes includes servants; generally includes children; but is sometimes confined to the wife and infant children or those dependent on the head of the **family** by reason of their relations independent of contract. The word has this comprehensive, or more or less limited, sense, as will most effectually carry out the purpose of the document, in which it is used. *Stuart v. Stuart*, 18 W. Va. 675.

In a will, where the word **family** is used as a designation of beneficiaries, it includes the parents and is generally confined to children, unless the apparent meaning of the testator as shown by the context is different and more comprehensive or more restricted. *Stuart v. Stuart*, 18 W. Va. 675.

"The word **family** may mean children, wife and children, blood relations, or the members of the domestic circle, according to the connection in which the word is used." *Whelan v. Reilly*, 3 W. Va. 597, 610.

"It has been held, that the **family** prima facie means children, and that such construction ought to be adhered to, unless some reason be found in the context of the will for extending or altering it. *Gregory v. Smith*, 41 En. Chy. Rep. 708." *Whelan v. Reilly*, 3 W. Va. 597, 610.

The expression **family** in a will is held prima facie to mean children, and must be so construed unless some reason appears in the context of the will for extending or altering it. And where the language of the will provides that certain property shall be held in trust, and then proceeds "shall be applied to the support of John" (a son of the testator) "and his **family**, or such of them as the trustees may think proper, in such manner and at such times as the trustees may think proper (support in this clause being meant to include education as to the children)," it is apparent that the testator meant children in the use of the word **family**, and that the will must be construed to read "John and his children;" and the devise is therefore not void for uncertainty and indefiniteness in the devisees. *Whelan v. Reilly*, 3 W. Va. 597.

A prohibition to marry into the **family** of a person named is reasonable and valid; **family** means one of the children of such person. Parol evidence is admissible to show who was the person referred to in the will. *Senger v. Senger*, 81 Va. 687; *Phillips v. Ferguson*, 85 Va. 509, 8 S. E. 241.

"It is not a technical word, and, being of flexible meaning, it must be construed according to the context of the will. In one sense it means the whole household, including servants, and even boarders and lodgers. In another it

means all the relations who descend from a common ancestor. Its primary meaning, however, is 'children,' and so it must be construed in all cases, unless the context shows that it was used in a different sense. And authority in point is *Pigg v. Clarke*, 3 Ch. Div. 672, in which case the Master of the Rolls, in delivering judgment, said: 'Every word which has more than one meaning has a primary meaning; and if it has a primary meaning, you want a context to find another. What, then, is the primary meaning of **family**? It is "Children;" that is clear upon the authorities which have been cited; and, independently of them, I should have come to the same conclusion.' So, in *Hill v. Bowman*, 7 Leigh 650, a trust for the purpose of aiding any of the members of the testator's **family** was held sufficiently certain, and sustained accordingly. See also, 2 Jarm. Wills, 90, et seq." *Phillips v. Ferguson*, 85 Va. 509, 8 S. E. 241.

A testator, after devising lands to his executors to sell, devised and bequeathed as follows: "I give the money arising from the sales of the lands and tenements aforesaid and the collection of my outstanding debts, as well as all moneys which I may have on hand at the time of my death, in trust to my said executors that they shall so dispose of the same for the purpose of aiding any of the members of the **family**, or any other person or persons who may be in distress, and whom they may think I would myself have assisted in such cases, confiding the disposition of the said trust fund entirely to their discretion;" the heirs and distributees, alleging the devise and bequest to be void for uncertainty, file a bill for partition of realty and distribution of the personalty, and the circuit court decrees according to the prayer. In the court of appeals, decree reversed and bill dismissed, the words the members of my **family** being considered sufficiently certain. *Hill v. Bowman*, 7 Leigh 650.

Family Agreements.

See the title COMPROMISE, vol. 3, p. 46.

Family Bible.

See the title PEDIGREE.

Fares and Tickets.

See the title CARRIERS, vol. 2, p. 696.

Farmer.

See the title EXPERT AND OPINION EVIDENCE, ante, p. 774.

Father.

See the titles DESCENT AND DISTRIBUTION, vol. 4, p. 588; PARENT AND CHILD.

Federal Courts.

See the title REMOVAL OF CAUSES.

Fees.

See the titles ATTORNEY AND CLIENT, vol. 2, p. 162; CLERKS OF COURT, vol. 2, p. 839; COMMONWEALTH'S ATTORNEY, vol. 3, p. 33; DAMAGES, vol. 4, p. 195; DIVORCE, vol. 4, p. 754; PUBLIC OFFICERS; SHERIFFS AND CONSTABLES; WITNESSES.

As to commissioner's fee, see the title REFERENCE. As to fees of state officers, see the title STATE.

FEE SIMPLE.—See the titles DEEDS, vol. 4, p. 431; ESTATES, vol. 5, p. 160; REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS; WILLS.

In *Yeager v. Fairmont*, 43 W. Va. 259, 27 S. E. 234, quoting *Tied. Real Property*, § 36, it is said: "**Fee simple** is a freehold estate of inheritance, free from conditions and of indefinite duration. It is the highest estate known to the law, and is absolute, so far as it is possible for one to possess an absolute right of property in lands." See also, *Hope v. Norfolk, etc., R. Co.*, 79 Va. 283, 287.

An estate for life, coupled with the absolute and unlimited power of alienation of the fee, express or implied, comprehends everything, and constitutes a **fee simple** estate. *Davis v. Heppert*, 96 Va. 775, 32 S. E. 467; *Farish v. Wayman*, 91 Va. 430, 21 S. E. 810; *May v. Joynes*, 20 Gratt. 692.

An agreement grants to a railroad company "the full faith and free right of way of the width of 50 feet * * * in, upon and through the lands of the said Uhl * * * which right of way is hereby granted and conveyed for the construction, building and use of the road of said company." It also says: "And the said Uhl also hereby covenants and agrees to execute and acknowledge in due form of law, when required by said company, a deed conveying to said company in **fee simple** the land hereinbefore described." Such agreement conveys only a right of way, an easement in **fee simple**, not the land itself and the oil in it. The court said: "But in fact there is not the slightest conflict between the clauses in question, and this for the reason that reading the words **fee simple** with other parts of the paper, they mean a conveyance of a **fee simple** right, an easement in **fee simple**, an incorporeal fee." *Uhl v. Ohio River R. Co.*, 51 W. Va. 107, 115, 41 S. E. 340.

Fee Tail.

See the title ESTATES, ante, p. 160.

Feigned Issue.

As to the rule that a court will not decide moot questions or abstract propositions, see the title ACTIONS, vol. 1, p. 129. As to the direction of issues to a jury, see the title ISSUES TO THE JURY.

Feigned Names.

See the title CONTEMPT, vol. 3, p. 253.

